

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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In the Matter of:)	<u>Public Version</u>
_____)	
ASPEN TECHNOLOGY, INC.,)	Docket No. 9310
_____)	
_____)	

**NON-PARTY THE DOW CHEMICAL COMPANY’S MOTION FOR
IN CAMERA TREATMENT OF RESPONDENT ASPEN TECHNOLOGY, INC.’S
EXHIBITS AND MEMORANDUM IN SUPPORT THEREOF**

Pursuant to the Federal Trade Commission’s (“FTC”) Rules of Practice, 16 C.F.R. § 3.45(b), non-party The Dow Chemical Company (“Dow”) moves for an order granting *in camera* treatment of certain exhibits that Respondent Aspen Technology, Inc. (“Aspentech”) intends to offer into evidence during the administrative trial in the above captioned matter scheduled to begin on May 26, 2004. On April 13, 2004 counsel for Respondent notified Dow of its intention to offer nine (9) exhibits into evidence. As set forth below, Dow seeks to obtain *in camera* treatment for the following seven (7) exhibits.

ATTACHMENT	EXHIBIT NO.	BATES NO.
B	RX 1422	Dow-07-0001-0007
C	RX 1423	Dow-04-0022-0027
D	RX 1424	Dow-04-0050-0126
E	RX 1426	Dow-05-0119-0153
F	RX 1427	Dow-01-0001-0003
G	RX 1428	Dow-06-0023-0023
H	RX 1429	Dow-04-0191-0192

The exhibits at issue consist of restricted company e-mails, discussions relating to manufacturing technology, business strategy discussions, internal technology evaluations, and a variety of other sensitive business information. Disclosure of these exhibits would provide marginal public benefit when compared to the likely damage Dow would suffer in the marketplace. Accordingly, Dow respectfully moves for *in camera* treatment of its confidential documents identified above, found at Attachments B-H, and referenced in the Confidential Declaration in support of this Motion (Attachment A). *See generally* H.P. Hood & Sons, Inc. 58 F.T.C. 1184, 1188 (1961) (*in camera* treatment afforded where applicant demonstrates that public disclosure would result in an injury to the corporation).

Additionally, Dow seeks *in camera* treatment of the Confidential Declaration in support of this Motion (Attachment A) because of the sensitive nature of its contents.

I. DOW HAS TAKEN THE APPROPRIATE MEASURES TO MAINTAIN THE CONFIDENTIALITY OF THE EXHIBITS

Since the inception of Dow's involvement in this matter, it has taken the steps necessary to protect the confidential nature of its documents. Two of the exhibits at issue were designated "Restricted Confidential – Outside Counsel Only" pursuant to the protective order governing this matter when they were produced in response to the FTC's *Subpoena Duces Tecum*. Although Dow had the opportunity to designate certain documents as "Confidential Discovery Material," it chose the more restrictive designation because of the document's sensitive content and the likelihood that competitive harm would ensue should the materials be made public. Further, during the

deposition of a Dow employee, counsel for Dow requested that the entire transcript of the proceeding be designated “Restricted Confidential” to prevent the dissemination of sensitive information.¹

Under the Protective Order, only documents that would likely cause substantial commercial harm or embarrassment to Dow may be designated “Restricted Confidential – Outside Counsel Only.” Presently, Dow seeks for these documents only to continue the protection afforded by the Protective Order to last through the forthcoming administrative trial and for five (5) years thereafter.

The remaining five documents were not so designated because they had previously been seen by Aspentech. They have not, however, been publicly disclosed. In fact, the documents were only disseminated pursuant to a strict obligation not to disclose their contents. Therefore, *in camera* treatment is appropriate

II. DISCLOSURE OF RESPONDENT’S EXHIBITS COULD RESULT IN SERIOUS MARKETPLACE HARM TO DOW

Because Dow is not a party to this proceeding, its request for *in camera* treatment warrants “special solicitude.” *In the Matter of Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984) (as a policy matter, reasonable extensions of *in camera* treatment are permitted because it encourages third parties to cooperate in future adjudicative discovery requests). Moreover, it is unlikely that public understanding of this proceeding depends on access to the confidential documents submitted by Dow. *See id.*

¹ During the course of the Dow employee’s deposition, one of the exhibits at issue was discussed and admitted into the record.

The documents at issue fall into three categories. Four of the documents (Attachments C, E, F, and H) relate to confidential discussions with Aspentech and other software vendors concerning product improvements in the software simulation field. Two other documents (Attachments B and D) relate to internal studies concerning Dow's software technology. The remaining document (Attachment G) is an internal e-mail discussing Dow's position on the merger between Aspentech and Hyprotech.

As the Confidential Declaration (Attachment A) states in more detail, public disclosure of the contents of these documents would certainly compromise Dow's ability in future negotiations with Aspentech and other technology vendors. Furthermore, none of these documents contain information that has been previously disclosed to the public at large. Under the appropriate balancing of the interests of public disclosure with *in camera* protection, Attachments B-H should receive confidential treatment. *See, e.g., In re Bristol-Meyers*, 90 F.T.C. 455, 456 (1977) (listing the factors relevant in determining *in camera* treatment).²

III. PROTECTION FOR THE EXHIBITS SHOULD EXTEND FOR FIVE (5) YEARS

The extension of *in camera* treatment to Dow's internal discussions on the potential merger between Aspentech and Hyprotech is justified. Similarly, Dow's confidential business communications and internal technology evaluations warrants *in camera* protection. Accordingly, Dow respectfully requests that the exhibits found at

² Respondent initially informed Dow that it planned to use the entire deposition transcript of Jerry Gipson as evidence in the upcoming trial. It ultimately decided against doing so, as indicated in the correspondence found at Attachment I. Should Respondent change its mind, Dow would likely file a motion seeking *in camera* treatment of those parts of the transcript that contain confidential information.

Attachments B-H be afforded protection for a period of five (5) years. In addition, at the conclusion of the five-year *in camera* protection period, Dow respectfully requests an opportunity to file a subsequent Motion seeking further *in camera* treatment should the documents warrant continued protection.

CONCLUSION

The exhibits identified in this Motion and accompanying Declaration that Respondent seeks to admit into evidence during the administrative trial warrant *in camera* treatment based on the sensitive nature of their content. Accordingly, the Administrative Law Judge should extend *in camera* protection to those exhibits found at Attachments B-H.

Respectfully Submitted,

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Dated: April 23, 2004

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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In the Matter of:))
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ASPEN TECHNOLOGY, INC.,) Docket No. 9310
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**ORDER GRANTING THE DOW CHEMICAL COMPANY'S
MOTION FOR *IN CAMERA* TREATMENT OF
RESPONDENT ASPEN TECHNOLOGY, INC.'S EXHIBITS**

After consideration of non-party The Dow Chemical Company's ("Dow") Motion for *In Camera* Treatment of Respondent Aspen Technology, Inc.'s Exhibits, it is hereby ORDERED that Dow's motion is granted.

The following exhibits and corresponding Bates numbered pages shall receive *in camera* treatment for a period of five (5) years.

ATTACHMENT	EXHIBIT NO.	BATES NO.
B	RX 1422	Dow-07-0001-0007
C	RX 1423	Dow-04-0022-0027
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G	RX 1428	Dow-06-0023-0023
H	RX 1429	Dow-04-0191-0192

Date: _____

Administrative Law Judge

CERTIFICATE OF SERVICE

I, Christopher Tierney, certify that on April 23, 2004, I caused an original and two (2) copies of Non-Party The Dow Chemical Company's Motion For *In Camera* Treatment of Respondent Aspen Technology, Inc.'s Exhibits and Memorandum in Support Thereof to be filed by hand and one electronic copy of the Motion and Memorandum to be filed with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-172
Washington, D.C. 20580

I also certify that on April 23, 2004, I cause two (2) copies of the Motion and Memorandum with Attachments to be served by hand upon:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

I also certify that on April 23, 2004, I caused one copy of the Motion and Memorandum with Attachments to be served by U.S. mail upon

Phillip L. Broyles
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Counsel for Aspentech/Hyprotech

Christopher Tierney
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

COPY CERTIFICATION

I, Christopher Tierney, certify that the electronic version of Non-Party The Dow Chemical Company's Motion For *In Camera* Treatment of Respondent Aspen Technology, Inc.'s Exhibits and Memorandum in Support Thereof filed with the Secretary of the Federal Trade Commission is a true and accurate copy of the paper original and that a paper copy with an original signature was filed on the same day.

April 23, 2004

Christopher Tierney
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

**Attachments A-H are not included in the Public Version
of this document because of their sensitive contents**