

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

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 COMPLAINT COUNSEL’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 Complaint Counsel intends to offer into evidence during the administrative trial in the above captioned matter scheduled to begin on May 26, 2004. On March 25, 2004 the FTC notified Dow of its intention to offer ten (10) exhibits into evidence (Attachment B). As set forth below, Dow seeks to obtain *in camera* treatment for the following nine (9) exhibits.

<b>ATTACHMENT</b>	<b>EXHIBIT NO.</b>	<b>BATES NO.</b>
C	CX 1410	Dow-04-0007-0010
D	CX 1411	Dow-04-0050-0126
E	CX 1412	Dow-04-0128-0129
F	CX 1413	Dow-04-0140-0145
G	CX 1414	Dow-04-0200-0202
H	CX 1415	Dow-04-0229-0233
I	CX 1416	Dow-05-0114-0118
J	CX 1418	Dow-05-0181-0312
K	CX 1419	Dow-08-0003-0003

The exhibits at issue consist of restricted company e-mails, discussions relating to licensing negotiations, internal financial information, 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 communications and internal business discussions identified above, found at Attachments C-K, 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. Most 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.<sup>1</sup>

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.<sup>2</sup>

## **II. DISCLOSURE OF THE COMPLAINT COUNSEL’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.*

In general, the documents at issue fall into two categories. Two of the documents relate to the internal discussions Dow had concerning the merger of Aspen Technology,

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<sup>1</sup> During the course of the Dow employee’s deposition, five of the exhibits at issue were discussed and admitted into the record.

<sup>2</sup> The only documents not designated “Restricted Confidential – Outside Counsel Only” are CX 1416 (Bates Nos. Dow-05-0114-0118) and CX 1418 (Bates Nos. Dow-05-0181-0312) found at Attachments I and J, respectively. These documents were not so designated because they had previously been seen by Aspentech. They have not, however, been publicly disseminated. Therefore, *in camera* treatment is appropriate.

Inc. (“Aspentech”) with Hyprotech. The remaining documents all relate to the evaluation and licensing of simulation software.

Attachment’s H and K are internal e-mails discussing Dow’s position on the merger between Aspentech and Hyprotech. Attachment C is an e-mail and accompanying spreadsheet detailing Dow’s proposed licensing language as well as its confidential financial information. Attachment D is a technology evaluation study done by Dow’s research and development group, which contains Dow’s proprietary information. Attachment E is an e-mail detailing the issues and risks as they relate to Dow’s 2002 simulation product negotiations with Aspentech. Similarly, Attachments F and G are internal e-mails and related documents discussing the proposed language in Dow’s license agreements with Aspentech for simulation software. Both Attachments also detail Dow’s internal business strategies. Lastly, Attachments I and J are internal documents circulated among members of the Aspen Engineering Suite Advisory Committee (“AESAC”) discussing product improvements.

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 C-K 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).

**III. PROTECTION FOR 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 discussing potential licensing negotiations and its internal technology evaluations warrants *in camera* protection. Accordingly, Dow respectfully requests that the exhibits found at Attachments C-K 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 Complaint Counsel 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 C-K.

Respectfully Submitted,

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Dated: April 23, 2004

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**UNITED STATES OF AMERICA  
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**ORDER GRANTING THE DOW CHEMICAL COMPANY’S  
MOTION FOR *IN CAMERA* TREATMENT OF  
COMPLAINT COUNSEL’S EXHIBITS**

After consideration of non-party The Dow Chemical Company’s (“Dow”) Motion for *In Camera* Treatment of Complaint Counsel’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.

<b>EXHIBIT NO.</b>	<b>BATES NO.</b>
CX 1410	Dow-04-0007-0010
CX 1411	Dow-04-0050-0126
CX 1412	Dow-04-0128-0129
CX 1413	Dow-04-0140-0145
CX 1414	Dow-04-0200-0202
CX 1415	Dow-04-0229-0233
CX 1416	Dow-05-0114-0118
CX 1418	Dow-05-0181-0312
CX 1419	Dow-08-0003-0003

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 Complaint Counsel'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  
Assistant Director  
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Room NJ – 7119  
600 Pennsylvania Avenue, NW  
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Counsel for Aspentech/Hyprotech

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Christopher Tierney  
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1111 Pennsylvania Avenue, NW  
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**COPY CERTIFICATION**

I, Christopher Tierney, certify that the electronic version of Non-Party The Dow Chemical Company's Motion For *In Camera* Treatment of Complaint Counsel'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

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**Attachments A and C-K not included in the Public Version  
because of the confidential nature of their contents**