

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

_____)
In the Matter of)

ASPEN TECHNOLOGY, INC.,)

Respondent.)
_____)

PUBLIC VERSION

Docket No. 9310

**NON-PARTY BP AMERICA, INC.'S UNOPPOSED MOTION
FOR *IN CAMERA* TREATMENT OF BUSINESS
DOCUMENTS DESIGNATED AS HEARING EXHIBITS**

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(g), and the Court's Order on Non-Parties' Motions for *In Camera* Treatment of Documents Listed on Parties' Exhibit Lists issued in this matter on May 6, 2004 (the "Order"), non-party BP America, Inc. ("BP") respectfully submits this revised motion for *in camera* treatment. Attached to this motion is a Supplemental Affidavit of Michael J. Knight which provides additional details on the documents for which BP is seeking *in camera* treatment.

Pursuant to the Court's Order, BP has narrowed the scope of its request for *in camera* treatment. BP has identified eight documents for which it requests *in camera* treatment for only those portions of the document that contain competitively sensitive information, but has no objection to the remaining portions of those documents becoming part of the public record in this proceeding. Redacted versions of Exhibits E, F, G, H, J, L, P and S are attached to the Supplemental Affidavit of Michael J. Knight, and the material for which BP now requests *in camera* treatment has been bracketed. Unredacted copies of Exhibits E, F, G, H, J, L, P and S were submitted with the Affidavit of

Michael J. Knight filed on April 23, 2004. BP hereby withdraws its request for *in camera* treatment for three documents, Exhibits B, C and I to the Affidavit of Michael J. Knight. BP hereby resubmits its request for *in camera* treatment for the following documents: Exhibits A, D, K, M, N, O, Q, R, T, U, V, W and X. The Supplemental Affidavit of Michael J. Knight submitted with this motion contains additional information about BP's reasons for requesting *in camera* treatment for those documents.¹

If any of the documents or information for which BP is seeking *in camera* treatment were to become a part of the public record in this proceeding, BP's ability to compete in the production of its products, or to negotiate on price or other terms with third party vendors of technology products, including AspenTech, would be seriously harmed. All of the documents or information for which BP is seeking *in camera* treatment are confidential business documents of BP that have never been released outside the company, other than in response to the subpoenas duces tecum issued by the parties. For these reasons, BP respectfully requests that this court afford its confidential business documents *in camera* treatment for a period of five years. In support of this motion, BP relies on the Affidavit of Michael J. Knight, which was filed with the court on April 23, 2004, and the Supplemental Affidavit of Michael J. Knight, attached hereto. Mr. Knight is an employee of BP Oil International with knowledge of the harm BP will incur if its documents or information become public.

¹ Complaint Counsel notified BP that it intended to place 25 of BP's documents on its exhibit list for the hearing in this matter. BP now requests *in camera* treatment for 8 of those documents. For 8 other documents Complaint Counsel intends to offer into evidence, BP requests *in camera* treatment for only parts of those documents. Counsel for Aspen Tech notified BP that it would use 8 of BP's documents as hearing exhibits, and BP now seeks *in camera* treatment for 5 of those documents.

Complaint counsel and counsel for AspenTech have stated that they do not intend to oppose this motion.

BACKGROUND

BP is a third party witness in this proceeding. [REDACTED]

BP'S CONFIDENTIAL DOCUMENTS DESERVE IN CAMERA TREATMENT UNDER THE FEDERAL TRADE COMMISSION'S RULES OF PRACTICE

The information for which BP is seeking *in camera* treatment is highly competitively sensitive. If BP's documents or information were to become available to BP's competitors, [REDACTED]. BP would suffer serious and immediate harm to its ability to compete if this information became known to its rivals. [REDACTED]. BP has taken every possible step to insure the secrecy of its confidential documents. For these reasons, BP's documents should be afforded *in camera* treatment.

A. Disclosure of the Information Contained in BP's Documents Could Result In Serious Competitive Injury to BP

In camera treatment is warranted if public disclosure will likely result in a clearly defined, serious injury to BP. *In re Dura Lube Corp.*, 1999 F.T.C. Lexis 255, *6. A corporation can demonstrate the risk of a clearly defined, serious injury by showing that "the information in the documents is 'sufficiently secret' and 'sufficiently material' to its business that disclosure would result in serious competitive injury." *In re Rambus*, 2003 WL 21008650 (F.T.C. April 23, 2003); *see also In re Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Among the factors the court will consider in evaluating whether the information in BP's documents is "sufficiently secret" and "sufficiently material" to warrant *in camera* treatment are the extent to which the information is known outside of BP's business, the extent of the measures taken by BP to guard the secrecy of the information, and the value of the

information to BP's competitors. *See In re Bristol-Myers Co.*, 90 F.T.C. at 456-57. The potential loss of a business advantage has been recognized as a serious injury meriting *in camera* treatment of business documents. *In re Hoechst Marion Roussel*, 2000 FTC Lexis 138, *7 (2000).

The documents discuss several issues of competitive significance to BP.

[REDACTED] The loss of a business advantage has been recognized as a clearly defined, serious injury that warrants *in camera* treatment. *In re Hoechst Marion Roussel*, 2000 F.T.C. Lexis 138, *7.

BP would also suffer serious competitive harm if its competitors were to learn the information contained in its documents. [REDACTED] BP's competitors ordinarily would have no way of knowing this information. If BP's rivals learned this information, BP would be seriously and immediately harmed in its ability to compete in the production of its products.

[REDACTED]

The attached Supplemental Affidavit of Michael J. Knight explains in detail the potential harm to BP if the information contained in each of the documents were to become public.

B. The Public Interest in Disclosure of BP's Documents is Outweighed By The Likelihood of Serious Competitive Harm To BP

BP deserves "special solicitude" as a non-party to this proceeding requesting *in camera* treatment for its confidential business information. *See Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984). None of BP's confidential documents would enhance the public's understanding of the issues in this case if they were made part of the public record. The information contained in BP's documents is also not likely to be

necessary to explain the rationale for the court's decision in this matter. Public release of the documents would inflict serious competitive harm on BP. The balance of interests favors *in camera* treatment of BP's confidential documents. *See In re General Foods*, 95 F.T.C. at 355.

C. BP Has Shielded The Confidentiality Of Its Documents

BP has taken all possible steps to protect the confidentiality of its documents. All of the documents for which BP seeks *in camera* treatment were produced to the parties only under compulsory process and pursuant to the Protective Order Governing Discovery Material issued by the court in this matter on September 16, 2003. All of the documents were designated either "Confidential" or "Restricted Confidential – Outside Counsel Only" under the terms of the Protective Order. Other than in response to the subpoenas duces tecum issued by the parties in this matter, none of BP's documents has been disseminated outside of BP. As described more fully in the Affidavit and the Supplemental Affidavit, many of the documents were circulated to only a small number of recipients within BP because of the sensitivity of the information contained in the documents and the risk of competitive harm to BP if the contents of the document became known to BP's competitors or suppliers. BP has taken all possible steps to shield the confidentiality of its documents.

D. BP's Documents Should Be Afforded *In Camera* Treatment For Five Years

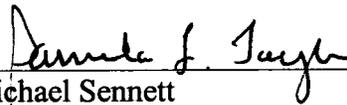
BP respectfully requests that its documents be afforded *in camera* treatment for five years from the date an order issues. [REDACTED]

CONCLUSION

BP's documents qualify for *in camera* treatment under the standards set forth in the Commission's Rules of Practice and prior FTC cases. Accordingly, this Court should extend *in camera* protection for a period of five years.

DATED: May 12, 2004

Respectfully submitted,



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[PROPOSED] ORDER

Upon consideration of Non-Party BP America, Inc.'s Unopposed Motion for *In Camera* Treatment of Business Documents Designated As Trial Exhibits, **IT IS HEREBY ORDERED** that the following documents are to be provided *in camera* treatment for a period of five years from the date of this order:

EXHIBIT	PRODUCTION BATES NUMBERS
A	CX1037-001 – CX1037-003
D	CX1041-001 – CX1041-002
K	CX1050-001 – CX1050-003
M	CX1052-001 – CX1052-005
N	CX1054-001 – CX1054-007
O	CX1055-001 – CX1055-002
Q	CX1058-001 – CX1058-005
R	CX1059-001 – CX1059-002
S	CX-1060-12, CS-1060-13, CS-1060-18
T	RX1372-001
U	RX1373-001 – RX1373-002
V	RX1374-001
W	RX1375-001 – RX1375-003
X	RX1376-001 – RX1376-003

IT IS FURTHER ORDERED that *in camera* treatment be provided to portions of the following documents for a period of five years from the date of this order.

EXHIBIT	PRODUCTION BATES NUMBERS
E	CX1043-002, CX1043-005, CX1043-006
F	CX1044-001, CX1042-002
G	CX1045-002
H	CX1046-002, CX1046-003
J	CX1048-002
L	CX1051-001, CX1051-002
P	CX1056-001, CX1056-002
S	CX1060-003, CX1060-004, CX1060-006, CX1060-010

Stephen J. McGuire
Chief Administrative Law Judge

Dated: _____

CERTIFICATE OF SERVICE

I certify that on May 13, 2004, I caused an original, two copies and one electronic copy of the public version of Non-Party BP America's Unopposed Motion For *In Camera* Treatment Of Business Documents Designated As Hearing Exhibits, as well as a verification that the electronic copy is a true and correct copy of the paper original, to be filed by hand delivery and electronic mail with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-159
Washington, DC 20580
secretary@ftc.gov

I also certify that on May 13, 2004, I caused two copies of the foregoing motion to be filed by hand delivery with:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue N.W.
Washington, DC 20580

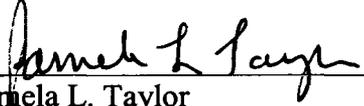
I also certify that on May 13, 2004, I caused one copy of the foregoing motion to be served by hand delivery upon each person listed below:

Phillip L. Broyles
Assistant Director
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20001

Peter Richman
(through service on)
Vadim Brusser
Federal Trade Commission
Room NJ-7172-A
601 New Jersey Avenue, N.W.
Washington, DC 20001

I also certify that on May 13, 2004, I caused one copy of the foregoing motion to be served by first class mail upon:

Mark W. Nelson
Cleary, Gottlieb, Steen & Hamilton
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Washington, DC 20006


Pamela L. Taylor
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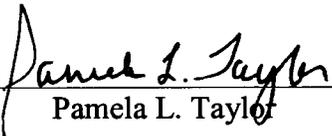
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VERIFICATION

I, Pamela L. Taylor, verify that the electronic copy of the nonpublic version of Non-Party BP America, Inc.'s Unopposed Motion For In Camera Treatment Of Business Documents Designated As Hearing Exhibits filed today with the Secretary's Office of the Federal Trade Commission on CD-rom is a true and correct copy of the paper original that I filed today with the Secretary's Office of the Federal Trade Commission.

I verify under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2004


Pamela L. Taylor