

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

| | | |
|-------------------------|---|-----------------|
| In the Matter of |) | |
| |) | |
| ASPEN TECHNOLOGY, INC., |) | Docket No. 9310 |
| |) | |
| Respondent. |) | |
| |) | |

JOINT MOTION TO ENTER PROTECTIVE ORDER AND SCHEDULING ORDER

Complaint counsel and Respondent’s counsel hereby jointly move the Court to enter the attached proposed Protective Order Governing Discovery Material and proposed Scheduling Order. Counsel for the parties have conferred and have reached agreement on the terms of these Orders. The proposed Orders are attached to this motion for purposes of the Court’s review.

We concur in the belief that the terms of the proposed Protective Order fairly and reasonably restrict the use of confidential material received during discovery, as well as protect their confidential nature, without impeding the discovery process itself. We also believe that the proposed Order strikes a reasonable balance between the need for confidentiality and the interest of public disclosure in a Commission proceeding.

We concur in the belief that the terms of the Scheduling Order will allow complaint counsel and Respondent’s counsel to meet the proposed trial date with sufficient time to conduct fact and expert discovery and fully brief the case.

Respectfully submitted,

Peter Richman
Lesli C. Esposito
Mary N. Lehner

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C

Date: September 15, 2003

Mark W. Nelson
George S. Cary
Jeremy J. Calsyn
Tanya N. Dunne

Counsel for Respondent

Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801

CERTIFICATE OF SERVICE

I, Evelyn J. Boynton, hereby certify that I caused a copy of the attached Joint Motion to

Enter Protective Order and Scheduling Order to be hand-delivered this day to:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Mark W. Nelson, Esq.
George S. Cary, Esq.
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801

Evelyn J. Boynton
Merger Analyst
Federal Trade Commission

Dated: _____

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PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the Parties and Third Parties against the improper use and disclosure of confidential information submitted or produced in connection with this Matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Discovery Material (“Protective Order”) shall govern the handling of all Discovery Material during the adjudicative proceedings in the above-captioned matter.

DEFINITIONS

For the purposes of this Protective Order, the following definitions shall apply:

1. “AspenTech” means Aspen Technology, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Ten Canal Park, Cambridge, Massachusetts 02141.
2. “Commission” or “FTC” means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this Matter.
3. “Confidential Discovery Material” means all Discovery Material that is confidential or proprietary information produced in discovery that is not generally known and

which the Producing Party would not normally reveal to Third Parties or would normally require Third Parties to maintain in confidence. These are materials which are referred to and protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f); Section 4.10(a)(2) of the FTC Rules of Practice, 16 C.F.R. § 4.10(a)(2); Section 26(c)(7) of the Federal Rules of Civil Procedure, 28 U.S.C. § 26(c)(7); and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which would likely cause substantial commercial harm or personal embarrassment to the Producing Party. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product roadmaps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material. Discovery Material will not be considered confidential if it is in the public domain.

4. “Disclosing Party” means a Party to this proceeding that is disclosing or contemplating disclosing Discovery Material pursuant to this Protective Order.

5. “Discovery Material” includes without limitation deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu of process, and any other documents or information produced or given to one Party by another Party or by a Third Party in

connection with discovery in this Matter. Information taken from Discovery Material that reveals its substance shall also be considered Discovery Material.

6. “Document” means the original or an identical copy, and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored, or reproduced. “Document” includes, but is not limited to, any writing, letter, envelope, telegram, e-mail, meeting minute, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, drawing, chart, photograph, tape, phono record, compact disc, video tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, organizer, desk pad, telephone message slip, note of interview or communication, and any other data compilation from which information can be obtained.

7. “Expert/Consultant” means testifying or consulting experts, and their assistants, who are retained to assist complaint counsel or respondent’s counsel in preparation for the hearing or to give testimony at the hearing.

8. “Matter” means the matter captioned *In the Matter of Aspen Technology, Inc.*, Docket Number 9310, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.

9. “Outside Counsel” means Cleary, Gottlieb, Steen & Hamilton; its associated attorneys; persons employed by the law firm (including legal assistants, clerical staff, and information management personnel); vendors retained by the law firm to provide copying, graphic, and other similar litigation support services; and temporary personnel retained by the law firm to perform legal or clerical duties or to provide logistical litigation support with regard

to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer, or employee of Respondent. The term Outside Counsel does not include persons retained as an Expert/Consultant for purposes of this Matter.

10. “Party” means each of the FTC and AspenTech.

11. “Person” means any natural person, business entity, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust.

12. “Process Engineering Simulation Software Industry” includes those entities in the business of developing, producing, licensing, or selling steady-state and dynamic process simulation software (including refinery-wide simulation and optimization software), reactor model optimization software, batch process simulation software, or data management software.

13. “Producing Party” means a Party or Third Party that produced or intends to produce Restricted Confidential or Confidential Discovery Material to any of the Parties. With respect to Restricted Confidential or Confidential Discovery Material of a Third Party that is in the possession, custody, or control of the FTC, or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided the Restricted Confidential or Confidential Discovery Material to the FTC. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of, the FTC.

14. “Respondent” means AspenTech.

15. “Restricted Confidential Discovery Material” is Confidential Discovery Material stamped “Restricted Confidential Discovery Material,” that contains non-public, current information or future projections that is highly sensitive (marketing plans, pricing plans,

financial information, trade secrets, or documents of a like nature), the disclosure of which would likely cause substantial commercial harm or personal embarrassment to the Producing Party.

16. “Third Party” means any natural person, partnership, corporation, association, or other legal entity not named as a Party to this Matter, and their employees, directors, officers, attorneys, and agents.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose. Notwithstanding the foregoing, nothing contained in this Protective Order shall prevent the Commission from using any material produced as part of the investigation in this matter, including any Discovery Material, for any authorized law enforcement purpose, provided that the Commission may only use or disclose Discovery Material as provided by: (1) its Rules of Practice and any cases construing them; (2) Sections 6(f) and 21 of the Federal Trade Commission Act and any cases construing them; and (3) any other legal obligation imposed upon the Commission.

2. The Parties, in conducting discovery from Third Parties, shall attach a copy of this Protective Order to any discovery request and include a cover letter that will apprise Third Parties of their rights.

3. Restricted Confidential or Confidential Discovery Material may be designated as such by: (a) the Producing Party placing on or affixing to the first page of a document containing the Restricted Confidential or Confidential Discovery Material, in a manner that will not interfere with its legibility, the notation “CONFIDENTIAL - FTC Docket No. 9310” or

“RESTRICTED CONFIDENTIAL, OUTSIDE COUNSEL ONLY - FTC Docket No. 9310”; or

(b) any Party instructing the court reporter, with notice to all Parties, within ten (10) business days of the publication of the transcript, to designate as “Restricted Confidential” or “Confidential” each page of the deposition transcript containing the Restricted Confidential or Confidential Discovery Material. Such designations constitute a good-faith representation by counsel for the Party or Third Party making the designation that the document or transcript constitutes or contains “Restricted Confidential Discovery Material” or “Confidential Discovery Material.” All deposition transcripts shall be treated as Restricted Confidential Discovery Material until the expiration of ten (10) business days after the publication of the transcript.

4. A Producing Party will use reasonable care to avoid designating any Discovery Material as “Confidential” or “Restricted Confidential” that is not entitled to such designation or that is generally available to the public.

5. All documents obtained by compulsory process or voluntarily in lieu of process from any Party or Third Party, regardless of whether designated or marked confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews, or depositions that were obtained before this Protective Order was adopted, shall be treated as Restricted Confidential Discovery Material for a period of twenty days from the time notice of the intent to produce is given to the Producing Party. At the expiration of that time, this material shall be treated as Confidential Discovery Material unless otherwise designated by the Producing Party as either Restricted Confidential Discovery Material or non-confidential.

6. Restricted Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone other than:

- a. complaint counsel and the Commission, as permitted by the FTC Rules of Practice;
- b. Outside Counsel;
- c. Experts/Consultants;
- d. the Administrative Law Judge presiding over this Matter and other court personnel;
- e. court reporters involved in transcribing proceedings relevant to this Matter;
- f. judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this Matter;
- g. any author or recipient of the Discovery Material (as indicated, for example, on the face of the document, record, or material); any individual who was in the direct chain of supervision of any author or recipient at the time the Discovery Material was created or received; any employee or agent of the entity that created or received the Discovery Material at the time the Discovery Material was created or received; or anyone representing an author or recipient of the Discovery Material in this Matter; and
- h. any other person(s) authorized in writing by the Producing Party.

7. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone other than the persons listed in paragraph 6 and to in-house counsel for respondent provided that in-house counsel executes a declaration in the form attached as Exhibit A, and provided that Stephen Doyle, AspenTech Chief Strategy Officer and General Counsel, shall not be permitted to fill such an in-house designation. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to Stephen Doyle. The designated in-house counsel for respondent is Sumit Chakravorty of AspenTech.

8. Restricted Confidential or Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant unless the

Expert/Consultant agrees in writing:

- a. to maintain the confidentiality of the Restricted Confidential or Confidential Discovery Material;
- b. to return the Restricted Confidential or Confidential Discovery Material to complaint counsel or respondent's outside counsel, as appropriate, upon the conclusion of the expert/consultant's assignment or retention, or upon the conclusion of this Matter;
- c. not to disclose the Restricted Confidential or Confidential Discovery Material to anyone, except as permitted by this Protective Order; and
- d. to use the Restricted Confidential or Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

9. Restricted Confidential or Confidential Discovery Material shall not be disclosed to any person described as an Expert/Consultant under this Protective Order until such person has executed and transmitted to Respondent's counsel or complaint counsel, as appropriate, a declaration, in the form attached as Exhibit A. Respondent's counsel and complaint counsel shall maintain a file of all such declarations for the duration of the Matter. Restricted Confidential or Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter, and all such copies or reproductions shall be subject to the terms of this Protective Order.

10. If any Party desires to disclose Restricted Confidential or Confidential Discovery Material to any Expert/Consultant who is not an FTC employee, and who, beyond that person's

employment as an expert in this Matter, is an officer, director, or employee of any company the primary business of which is in the Process Engineering Simulation Software Industry, or who regularly consults regarding competitive decision making with any company the primary business of which is in the Process Engineering Simulation Software Industry, or who may otherwise have a financial or pecuniary interest, beyond that of a passive, minority investment, in any company the primary business of which is in the Process Engineering Simulation Software Industry, the Disclosing Party shall notify the Producing Party of its desire to disclose such material. The notice shall identify the specific Expert/Consultant to whom the Restricted Confidential or Confidential Discovery Material is to be disclosed. The identification shall include, but not necessarily be limited to, the full name, professional address and/or affiliation, current curriculum vitae of the proposed expert/consultant, and identify all other present and prior employers and/or firms in the Process Engineering Simulation Software Industry for, or on behalf of, that the identified Expert/Consultant has been employed or done consulting work in the preceding four (4) years. To prevent the disclosure of Restricted Confidential or Confidential Discovery Material to such an Expert/Consultant, the Producing Party must, within five (5) business days of receiving notice, file a motion with the Administrative Law Judge that includes a written statement of the reasons for the objection to disclosure. If the Producing Party files such a motion, then the Disclosing Party shall not disclose the Restricted Confidential or Confidential Discovery Material to the identified Expert/Consultant, absent a written agreement with the Producing Party or order of the Administrative Law Judge permitting the disclosure. If the Producing Party does not file such a motion within five (5) business days of receiving notice, then the Disclosing Party may disclose the Restricted Confidential or Confidential Discovery Material to the identified Expert/Consultant without providing further notice.

11. If any Party desires to disclose a Producing Party's Restricted Confidential or Confidential Discovery Material to any Person other than those referred to in paragraphs 6 and 7 of this Protective Order, the Disclosing Party shall inform the Producing Party of its desire to disclose such material. The notice shall identify those materials sought to be disclosed with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to easily locate the materials), and the specific Person (by name and business affiliation) to whom the material is to be disclosed. The Producing Party may object to the disclosure of the Restricted Confidential or Confidential Discovery Material within five (5) business days of receiving notice of an intent to disclose the Restricted Confidential or Confidential Discovery Material to the Person by providing the Disclosing Party with a written statement of the reasons for the objection. If the Producing Party objects within five (5) business days of receiving notice, the Disclosing Party shall not disclose the Restricted Confidential or Confidential Discovery Material to the Person, absent a written agreement with the Producing Party or order of the Administrative Law Judge permitting the disclosure. If the Producing Party does not object to the disclosure of the Restricted Confidential or Confidential Discovery Material to the Person within five (5) business days of receiving notice, the Disclosing Party may disclose the Restricted Confidential or Confidential Discovery Material to the identified Person.

12. If any Party seeks to challenge a Producing Party's designation of material as Restricted Confidential or Confidential Discovery Material, the challenging Party shall notify the Producing Party and all other Parties of the challenge. Such notice shall identify with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party

may preserve its designation within five (5) business days of receiving notice of the confidentiality challenge by providing to the challenging Party and all other Parties to this Matter a written statement of the reasons for the designation. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Restricted Confidential or Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Administrative Law Judge providing otherwise.

13. If any confidentiality issue arises and the Parties involved have failed to resolve the conflict via good-faith negotiations, a Party seeking to disclose Restricted Confidential or Confidential Discovery Material or challenging a confidentiality designation may make written application to the Administrative Law Judge for relief. The application shall be served on the Producing Party and the other Party to this Matter, and shall be accompanied by a certification that good-faith negotiations have failed to resolve the outstanding issues. The Producing Party and other Party shall have five (5) business days after receiving service to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Restricted Confidential or Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Administrative Law Judge of the propriety of a requested disclosure or change in designation.

14. The Parties shall not be obligated to challenge the propriety of any designation or treatment of information as Restricted Confidential or Confidential Discovery Material and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not otherwise entitled to access under the terms of this Protective Order. If Restricted Confidential or Confidential Discovery Material is produced without the legend attached, the material shall be

treated as Restricted Confidential or Confidential from the time the Producing Party advises complaint counsel and Respondent's counsel in writing that the material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall either return promptly or otherwise destroy the unmarked documents.

15. Counsel for the FTC, Respondent, or any Producing Party shall have the right to exclude from oral depositions any person not authorized to receive Restricted Confidential or Confidential Discovery Material, during periods of examination or testimony relating to Restricted Confidential or Confidential Discovery Material.

16. The production or disclosure of any Discovery Material, made after entry of this Protective Order, that a Producing Party claims was inadvertent and should not have been produced or disclosed because of a privilege will not be deemed a waiver of any privilege that the Producing Party would have been entitled to had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of a claimed inadvertent production or disclosure, the following procedures shall be followed:

- a. The Producing Party may request the return of the Discovery Material within five (5) business days of discovering that it was inadvertently produced or disclosed, or inadvertently produced or disclosed without redacting the privileged content. A request for the return of any Discovery Material shall identify the specific Discovery Material and the basis for asserting that the specific Discovery Material, or portions thereof, is subject to a claim of privilege and the date of discovery that there had been an inadvertent production or disclosure.
- b. If a Producing Party requests the return of any such Discovery Material from another Party, pursuant to this paragraph, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control – including all copies in the possession of experts, consultants, or others to whom the Discovery Material was provided – unless the Party asked to return the Discovery Material in good faith reasonably believes that the Discovery Material is not privileged. Such good-faith relief shall be based

on either: (1) a facial review of the Discovery Material; or (2) the inadequacy of any explanations provided by the Producing Party, and shall not be based on an argument that production or disclosure of the Discovery Material waived any privilege. In the event that only portions of the Discovery Material contain privileged subject Matter, the Producing Party shall substitute a redacted version of the Discovery Material at the time of making the request for the return of the requested Discovery Material.

- c. Should the Party contesting the request to return the Discovery Material under this paragraph decline to return the Discovery Material, the Producing Party seeking the return of the Discovery Material may move for an order compelling the return of the Discovery Material. In any such motion, the Producing Party shall have the burden of showing that the Discovery Material is privileged, that the privilege was not waived, or that the production or disclosure was inadvertent.

17. If either Party receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Restricted Confidential or Confidential Discovery Material, the recipient of the discovery request shall promptly notify the Producing Party of receipt of the request. The notice shall be in writing and be received by the Producing Party at least ten (10) business days before production in the other proceeding, and shall include a copy of this Protective Order and a cover letter apprising the Producing Party of its rights. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Protective Order to challenge or appeal an order requiring production of Restricted Confidential or Confidential Discovery Material, to subject itself to any penalties for non-compliance with such an order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the Producing Party's efforts to challenge the discovery request calling for the production by the recipient of the Producing Party's Restricted

Confidential or Confidential Discovery Material. In addition, nothing herein shall limit the applicability of section 4.11(e) of the FTC Rules of Practice, 16 C.F.R. § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

18. In the event that any Restricted Confidential or Confidential Discovery Material is contained in any pleading, motion, exhibit, brief, or other paper filed or to be filed with the Secretary of the Commission, the Party filing the papers shall inform the Secretary, and the papers shall be filed under seal. Restricted Confidential or Confidential Discovery Material contained in papers (including Restricted Confidential or Confidential Discovery Material from the Parties and Third Parties) shall remain under seal until further order of the Administrative Law Judge; provided, however, that the papers may be furnished to persons or entities who may receive Restricted Confidential or Confidential Discovery Material pursuant to this Protective Order. After filing any paper containing Restricted Confidential or Confidential Discovery Material, the filing Party must file on the public record a duplicate copy of the paper with the Restricted Confidential or Confidential Discovery Material deleted, within five (5) business days of the original filing. Further, if the protection for any such material ceases, any Party may file on the public record a copy that also contains the formerly protected material.

19. If counsel for a Party plans to introduce into evidence at trial any document or transcript containing Restricted Confidential or Confidential Discovery Material produced by the other Party or by a Third Party, they shall provide forty-eight (48) hours advance notice before such introduction to the Producing Party, or as much notice before the introduction as practicable under the circumstances, for purposes of allowing that Party to seek an order that the document or transcript be granted *in camera* treatment pursuant to section 3.45 of the FTC Rules of Practice, 16 C.F.R. § 3.45. Except where an order seeking *in camera* treatment is granted, all

documents and transcripts shall be part of the public record. If *in camera* treatment is granted, a copy of the document or transcript with the Restricted Confidential or Confidential Discovery Material deleted must be placed on the public record.

20. At the time that any Expert/Consultant or other person retained to assist counsel in the preparation of this Matter concludes participation in this Matter, that person shall return to counsel all copies of documents or portions thereof designated Restricted Confidential or Confidential Discovery Material that are in the possession of that person, together with all notes, memoranda, or other papers containing Restricted Confidential or Confidential Discovery Material. At the conclusion of this Matter, and upon request of the Producing Party, the Respondent shall return or destroy all documents obtained in this Matter that contain or refer to Restricted Confidential or Confidential Discovery Material, other than trial transcripts and trial exhibits offered into evidence (and, if destroyed, shall provide the Producing Party with an affidavit of destruction). The FTC shall retain, return, or destroy documents in accordance with the provisions of section 4.12 of the FTC Rules of Practice, 16 C.F.R. § 4.12.

21. The provisions of this Protective Order, insofar as they restrict the communication and use of Restricted Confidential or Confidential Discovery Material, shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter.

22. This Protective Order shall not apply to the disclosure by a Producing Party or its counsel of the Producing Party's Restricted Confidential or Confidential Discovery Material to the Producing Party's employees, agents, former employees, board members, directors, and officers.

23. Nothing in this Protective Order shall be construed to limit, restrict, or otherwise affect the ability of the Parties to seek to modify this Protective Order by application to the Administrative Law Judge for good cause shown.

24. Entry of this Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provision of this Protective Order.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Dated: _____

EXHIBIT A

TO THE PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

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

| | | |
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| _____ |) | |
| In the Matter of |) | |
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| ASPEN TECHNOLOGY, INC., |) | Docket No. 9310 |
| |) | |
| Respondent. |) | |
| _____ |) | |

DECLARATION CONCERNING THE PROTECTIVE ORDER

I, _____, hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the “Protective Order Governing Discovery Material” (“Protective Order”) issued by Chief Administrative Law Judge Stephen J. McGuire on _____, in connection with the above-captioned Matter. I understand the restrictions on my access to and use of any Restricted Confidential or Confidential Discovery Material (as these terms are used in the Protective Order) in this Matter and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Restricted Confidential or Confidential Discovery Material include:

- a. that I will use Restricted Confidential or Confidential Discovery Material only for the purposes of this Matter;
- b. that I will not disclose such Restricted Confidential or Confidential Discovery Material to anyone, except as provided by the Protective Order;
- c. that I will use, store, and maintain the Restricted Confidential or Confidential Discovery Material in such a way as to ensure its continued protected status; and

d. that upon the conclusion of my involvement in this proceeding, I will promptly return all Restricted Confidential or Confidential Discovery Material, and all notes, memoranda, or other papers containing Restricted Confidential or Confidential Discovery Material, to complaint counsel or Respondent's outside counsel, as appropriate.

4. I am aware that, pursuant to section 3.42(h) of the FTC Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.

Full Name [Typed or Printed]

Date: _____

Signature

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SCHEDULING ORDER

- October 31, 2003 - Complaint Counsel provides preliminary witness list (not including experts) with description of proposed testimony.
- November 7, 2003 - Respondent's Counsel provides preliminary witness list (not including experts) with description of proposed testimony.
- January 6, 2004 - Complaint Counsel provides revised witness list, including preliminary rebuttal witnesses, with description of proposed testimony.
- January 9, 2004 - Respondent's Counsel provides revised witness list, including preliminary sur-rebuttal witnesses, with description of proposed testimony.
- January 15, 2004 - Exchange expert witness disclosures.
- January 15, 2004 - Deadline for issuing document requests, requests for admission, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
- February 17, 2004 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- February 20, 2004 - Complaint Counsel provides expert witness reports.
- February 27, 2004 - Complaint Counsel provides final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.

- Complaint Counsel serves on Administrative Law Judge final witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the expected testimony of each witness.
- March 1, 2004
- Respondent's Counsel provides final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.
 - Respondent's Counsel serves on Administrative Law Judge final witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the expected testimony of each witness.
- March 2, 2004
- Parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
- March 5, 2004
- Respondent's Counsel provides expert witness reports.
- March 12, 2004
- Identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in the opposing party's expert reports. If material outside the scope of fair rebuttal is presented, the opposing party will have the right to seek appropriate relief (such as striking rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports).
- March 12, 2004
- Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- March 12, 2004
- Deadline for filing motions *in limine* and motions to strike.
- March 19, 2004
- Deadline for filing motions for summary decision.
- March 23, 2004
- Deadline for filing responses to motions *in limine*, motions to strike and motions for *in camera* treatment of proposed trial exhibits.
- March 24, 2004
- Complaint Counsel files pretrial brief, not to exceed 50 pages, and proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations

and deposition citations. Conclusions of law shall be supported by legal authority.

- March 26, 2004 - Deadline for depositions of experts (including rebuttal experts).
- March 26, 2004 - Exchange and serve courtesy copy on Administrative Law Judge objections to final proposed witness lists and exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.
- March 31, 2004 - Exchange proposed stipulations of law, facts, and authenticity.
- April 9, 2004 - Respondent's Counsel files pretrial brief, not to exceed 50 pages, and proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
- April 9, 2004 - Deadline for filing responses to motions for summary decision.
- April 9, 2004 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.
- April 12, 2004 - Final prehearing conference to be held at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.
- April 14, 2004 - Deadline for Complaint Counsel to file reply pretrial brief, not to exceed 15 pages, and any reply findings of fact and conclusions of law.
- April 14, 2004 - Commencement of Hearing, to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

ADDITIONAL PROVISIONS

1. Pursuant to the FTC Rules of Practice § 3.21(c)(2), extensions or modifications of the deadlines set forth in this scheduling order will be made by the Administrative Law Judge only upon a showing of good cause.

2. There is no limit to the number of sets of interrogatories the parties may issue, as long as the total number, including all subparts, does not exceed twenty-five. Additional interrogatories will be permitted only for good cause upon application to and approval by the Administrative Law Judge. Responses or objections to interrogatories and requests for admission shall be due within twenty days of service of the discovery request. Objections to requests for production shall be due within ten days, and the documents and materials shall be produced within thirty days, of service of the discovery request. Any motion to compel responses to discovery requests shall be filed within five days of impasse. For requests for production served prior to this order's issuance, objections to requests for production shall be due within ten days of the date of this order, and the documents and materials shall be produced within thirty days of the date of this order.

3. The parties shall serve all pleadings, motions, discovery requests, responses to discovery requests, objections to discovery requests, and briefs on each other in both hard copy and electronically through e-mail (formatted in WordPerfect or Word). Responses or objections to each discovery request shall be preceded by the specific discovery request to which the response or objection pertains.

4. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *duces tecum*, the party issuing the subpoena shall provide copies of the subpoenaed documents and materials to the other party within five business days of receiving them. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other party before the deposition date is scheduled. Additionally, the deposition of any person may be recorded by videotape, provided that the party seeking the deposition notifies the deponent and the other party of its intention to record the deposition by videotape at least five days in advance of the deposition.

5. Service of all papers filed with the FTC's Office of the Secretary shall be made on the other party, and two courtesy copies shall be given to the Administrative Law Judge by hand or electronic mail by 5:00 p.m. (EST) on the designated date. Unless requested, the parties shall not serve courtesy copies on the Administrative Law Judge of any papers (such as discovery requests and responses) that are not required to be filed with the Office of Secretary.

6. Service on the parties shall be by electronic mail (formatted in WordPerfect or Word) and shall be followed promptly by delivery of an original by hand or by U.S. mail, first class postage prepaid, to the following addresses:

- (a) For complaint counsel:

Peter Richman
Phillip L. Broyles
Federal Trade Commission
601 New Jersey Ave., N.W.
Room NJ-7172A
Washington, D.C. 20580

prichman@ftc.gov
pbroyles@ftc.gov
eboynton@ftc.gov
lesposito@ftc.gov
mlehner@ftc.gov

- (b) For respondent Aspen Technology, Inc.:

Mark W. Nelson
George S. Cary
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801

mnelson@cgsh.com
gcary@cgsh.com
jcalsyn@cgsh.com
tdunne@cgsh.com

7. All pleadings, motions, and briefs that cite to unpublished opinions not available on LEXIS or WestLaw shall include such cases as exhibits.

8. The period in which to file responses to motions for summary decision is extended to twenty days after service of the motion for summary decision.

9. Memoranda in support of, or in opposition to, any non-dispositive motion, shall not exceed ten pages.

10. The preliminary and revised witness lists shall represent the parties' good faith designation of all potential witnesses the parties reasonably expect may be called at the hearing. A party shall notify the other party promptly of changes in preliminary and revised witness lists to facilitate completion of discovery within the dates of the scheduling order. After the submission of the final witness lists, additional witnesses may be added only: (a) by order of the Administrative Law Judge, upon a showing of good cause; (b) by agreement of the parties, with notice to the

Administrative Law Judge; or (c) if needed to authenticate, or provide the evidentiary foundation for, documents in dispute, with notice to the other party and the Administrative Law Judge. Opposing counsel shall have a reasonable amount of time to subpoena documents for and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing.

11. The final exhibit lists shall represent the parties' good faith designations of all exhibits the parties reasonably expect may be used in the adjudicative proceedings, other than demonstrative and summary exhibits. Additional exhibits may be added after the submission of the final lists only: (a) by order of the Administrative Law Judge, upon a showing of good cause; (b) by agreement of the parties, with notice to the Administrative Law Judge; or (c) where necessary for purposes of impeachment, with reasonable notice to the other party.

12. At the time an expert is first listed as a witness by a party, the listing party shall provide the other party with: (a) materials fully describing or identifying the background and qualifications of the expert; (b) a list of publications and all prior cases in which the expert has testified or has been deposed; and (c) transcripts of such testimony in the possession, custody, or control of the expert or listing party.

13. The parties shall provide for each testifying expert witness a written report containing the information required by the FTC Rules of Practice § 3.31(b)(3). Drafts of expert reports and notes taken by expert witnesses need not be produced.

14. Motions for *in camera* treatment of evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sep. 19, 2000) and must be supported by a declaration or affidavit by a person qualified to explain the nature of the evidence.

15. The procedure for marking of exhibits used in the adjudicative proceedings shall be as follows: (a) complaint counsel's exhibits shall bear the designation CX and respondents' exhibits shall bear the designation RX; and (b) both sides shall number the first page of each exhibit with a single series of consecutive numbers. So, for example, complaint counsel's first exhibit shall be marked CX-1. When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, all exhibit numbers must be accounted for, even if a particular number is not actually used at the hearing.

16. At the final prehearing conference, the parties will be required to introduce all exhibits they intend to use in the adjudicative proceedings. The parties further will be required to give the originals of exhibits to the court reporter, which the court reporter will keep.

17. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the hearing must comply with 16 C.F.R. § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel.

18. The parties shall provide one another, and the Administrative Law Judge, no later than seventy-two hours in advance, a schedule that identifies by day the party's best estimate of the witnesses to be called to testify during the upcoming week of the hearing. The parties further shall provide one another with copies of any demonstrative exhibits seventy-two hours before they are used with a witness.

19. In accordance with the FTC Rules of Practice § 4.7, there shall be no *ex parte* communications between any party and the Administrative Law Judge or his attorney advisor, unless such communications have been expressly consented to by the parties.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Dated: _____