

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Powertech Labs Inc. v. Das*,
2026 BCSC 862

Date: 20260515
Docket: S230262
Registry: Vancouver

Between:

Powertech Labs Inc.

Plaintiff

And

**Angela Das, Ronald Klopfer, Hyfluence Systems Corp.,
John Doe, Jane Doe, and other persons unknown
who have conspired with the named Defendants**

Defendants

Before: The Honourable Madam Justice Sukstorf

Reasons for Judgment

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Place and Date of Hearing:

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Background

[1] The two applications before me arise in the course of document discovery in a commercial dispute between two competing businesses in the hydrogen fueling industry. The defendants include former employees of the plaintiff, as well as the company they subsequently established to carry on a competing business. The underlying litigation involves allegations that, while still employed by the plaintiff, the individual defendants participated in a coordinated effort to establish a competing enterprise, misappropriated confidential information, diverted corporate opportunities, and solicited or induced other employees to leave the plaintiff's business. The defendants deny those allegations and maintain that their business was developed independently and through lawful competition.

[2] At this stage, the issue before the Court concerns the production of certain categories of documents which both parties agree are relevant and subject to disclosure.

[3] The defendants submit that the documents sought by the plaintiff contain highly sensitive commercial and technical information, including product designs, pricing strategies, and source code, which are integral to their business operations as a competitor of the plaintiff. They seek an order substantially restricting disclosure to the plaintiff's business personnel, including its key decision-maker.

[4] The plaintiff argues that such restrictions are unnecessary. It submits that the implied undertaking rule provides sufficient protection and that limiting access to counsel only would unfairly impair its ability to instruct counsel and advance its case.

[5] The issue before the Court is how disclosure should occur, including whether the documents sought should be produced and, if so, on what terms.

Facts

[6] The plaintiff, Powertech Labs Inc. ("Powertech"), is a subsidiary of BC Hydro and has operated in the hydrogen fueling systems industry for several years. The defendants include Hyfluence Systems Corp. ("Hyfluence"), a relatively small

company formed in 2022 by former Powertech personnel, and individual defendants who were previously employed by or associated with Powertech.

[7] The underlying action concerns allegations by Powertech that, upon leaving its employ, and in some instances prior to doing so, the individual defendants took with them proprietary engineering knowledge, confidential information, and strategic business materials developed during their employment, and used or incorporated that information in the development of Hyfluence's hydrogen fueling systems. Powertech further alleges that the defendants acted in concert to divert business opportunities, recruit key personnel, and, using the confidential information taken from Powertech, position their newly established company to compete directly with it.

[8] The defendants deny those allegations. They maintain that their business and technology were independently developed, that any knowledge relied upon reflects general industry expertise rather than proprietary information, and that they acted lawfully in pursuing a competing business. The extent to which Hyfluence's systems reflect or incorporate Powertech's confidential information, and whether any duties owed to Powertech were breached, are central issues in the litigation. Although those issues and their merits are not before the Court at this time, they inform the analysis of these applications by providing context for the nature of the information in dispute. I therefore turn to the issue of the appropriate scope.

Scope of the Disclosure Dispute

[9] The two applications before the court engage the scope and conditions of document disclosure under Rule 7-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which governs a party's obligation to disclose existing documents.

[10] As background, the parties initially proceeded in the ordinary course of first-tier disclosure under Rule 7-1(1), with the defendants delivering a list of documents identifying materials in their possession or control that could be used to prove or disprove a material fact.

[11] Powertech later took the position that the defendants' production was incomplete. In its amended Notice of Application dated April 17, 2025, Powertech included an "Outstanding Documents" schedule seeking production of additional materials identified by specific item numbers. The requests were advanced as second-tier production under Rule 7-1(11), on the basis that the documents could assist in proving or disproving material facts or lead to a relevant line of inquiry.

[12] In response to the expanding production requests, including the filing of the Schedule of Outstanding Documents, the defendants sought broader protections. Earlier requests for enhanced protection had been more limited in scope and focused on narrower categories of documents, including marketing materials, Request for Proposal ("RFP") responses, and business plans. As the scope of the requested production expanded, so too did the protection sought by the defendants.

[13] Although the parties were aligned on the propriety of production, the dispute centred on the way disclosure should occur. The defendants initially proposed production pursuant to a confidentiality agreement, but ultimately sought more restrictive protections, including "counsel's eyes only" ("CEO") designations for certain categories of documents.

[14] The parties were unable to reach an agreement on a confidentiality regime, which led to the two applications before the court.

[15] Although the applications are framed differently — one seeking further production and the other seeking to restrict the terms of disclosure — they raise a common issue concerning the scope of production and the conditions under which the disputed documents should be disclosed.

[16] For the purposes of analysis, I have grouped the disputed documents into the following functional categories:

- a) Category 1 – Marketing and Proposal Materials (Items 17, 38): marketing materials, presentations, pitch decks, and proposals prepared for potential customers or investors;

- b) Category 2 – Requests for Proposals and Pricing Materials (Items 19, 20): RFP and RFQ responses, together with related pricing structures, timelines, commercial terms, and customer agreements;
- c) Category 3 – Business Plans and Strategic Documents (Item 23): internal business plans, strategic planning materials, and market strategy documents;
- d) Category 4 – Product Design and Engineering Materials (Items 27, 39–41): technical design and engineering materials relating to hydrogen refuelling systems;
- e) Category 5 – Source Code and Control Systems (Items 26 and 46): source code, programmable logic controller systems, and control system designs; and
- f) Category 6 – Communications and Correspondence (Items 21–22, 24–25, 42–44): communications, agreements, reports, and operational records relating to customers, suppliers, and industry participants.

Legal Framework

[17] The production of documents in civil litigation is governed by the principle of full and open disclosure. Parties are generally entitled to disclosure of relevant documents in order to understand the case they must meet and to properly instruct counsel.

[18] That entitlement is subject to the implied undertaking rule, which restricts the use of documents obtained on discovery to the purposes of the litigation in which they are produced. The rule reflects the statutory compulsion on parties to participate fully in pre-trial discovery and serves to protect the privacy interests of litigants. Where relevant information is not privileged, it must be disclosed, even if it may be adverse to the producing party. The undertaking, which is given to the court, applies to all information disclosed in the discovery process, whether innocuous or

confidential, including information that reveals wrongdoing: *Juman v. Doucette*, 2008 SCC 8.

[19] The implied undertaking will ordinarily suffice to protect the confidentiality of information produced on discovery. However, the Court retains the discretion to grant exemptions from, or to vary, the undertaking where it is satisfied that exceptional circumstances, including exceptional prejudice, are established. In such cases, the Court may impose an express protective order containing confidentiality protections: *Araya v. Newsun Resources Ltd.*, 2015 BCSC 1209 at para. 20 (iv); Rule 7-1(1).

[20] Where the information at issue is such that its disclosure would allow a competitor to improve its competitive position, courts have recognized that the implied undertaking rule may provide insufficient protection. This is because the rule does not prevent a competitor from using the information for internal purposes, so long as it is not used to commence a new proceeding: *Araya* at para. 20 (xii), citing *Zellers Inc. v. Venta Investments Ltd.*, [1998] O.J. No. 2118 (Gen. Div.) at para. 16.

[21] Where the court is satisfied that the information is confidential, commercially sensitive, and that disclosure could provide a competitor with an unfair advantage, the party seeking protection will ordinarily establish a prima facie basis for relief, subject to the broader balancing and necessity considerations governing such orders: *Araya* at para. 20(vi), citing *BASF Canada Inc. v. Max Auto Supply* (1986) Inc., [1999] O.J. No. 515 at para. 17.

[22] At the same time, the court must weigh the legitimate interest in protecting confidential commercial information against the need for disclosure. Where disclosure of trade secrets or commercially sensitive information would cause real and substantial harm disproportionate to the documents' probative value, the court may restrict or condition disclosure accordingly: *Araya* at para. 20(vii), citing *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* (1992), 70 B.C.L.R. (2d) 180 (S.C.).

[23] Such orders may take different forms depending on the nature of the information and the purpose of the restriction sought. In all cases, the governing principle is to strike the minimum level of protection necessary while leaning in favour of openness and disclosure: *Araya* at para. 20(viii), citing *BASF* at para. 16; *Devron-Hercules Inc. v. Gill* (1988), 27 B.C.L.R. (2d) 394 (C.A.).

[24] In *Paid Search Engine Tools, LLC v. Google Canada Corporation*, 2019 FC 559 at paras. 42–45, the Court distinguished protective orders from confidentiality orders. A protective order governs the exchange, handling, and use of documents during pre-trial disclosure. It is distinct from a confidentiality order concerning materials filed with the Court. In this case, the order sought is, in substance, a protective order containing confidentiality protections.

[25] The test for obtaining a protective order is well-established. As set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*] at para. 60, and summarized in *Paid Search Engine Tools* at para. 43 and *Del Ridge Homes Inc. v. Ledgemark Homes Inc.*, 2022 FC 566 at para. 42, the party seeking protection must establish, on a balance of probabilities:

- a) that the information at issue has been treated as confidential at all relevant times;
- b) that the information is, in fact, confidential in nature; and
- c) that there is a reasonable probability that disclosure would cause harm to proprietary, commercial, or scientific interests.

[26] Even where legitimate concerns regarding the disclosure or use of sensitive information are established, a protective order will be issued only where necessary to prevent a serious risk to an important interest that cannot be adequately addressed through reasonably available alternatives. Any order must be no broader than necessary and limited to the minimum protection required in the circumstances: *Sierra Club* at para. 57.

[27] A CEO designation is a more restrictive form of a protective order and will be granted only in unusual circumstances: *Lundbeck Canada Inc. v. Canada (Health)*, 2007 FC 412 at paras. 14–16.

[28] There is no exhaustive definition of what constitutes “unusual circumstances.” The determination is necessarily contextual and must be made on the particular facts of each case. The burden rests on the party seeking the restriction to establish, through evidence, that such protection is necessary, and the burden has been described as a heavy one: *Angelcare Development Inc. v. Munchkin, Inc.*, 2018 FC 447 at para. 22.

[29] The authorities further recognize that the assessment is fact-specific, particularly where restrictions are sought against in-house counsel. The inquiry focuses on the actual risk posed by disclosure, including the extent to which the individual in question is involved in the receiving party’s day-to-day business operations, strategic decision-making, or competitive activities: *Angelcare Development Inc.* at paras. 21–24.

[30] Those contextual considerations do not displace the governing test for a protective order. A CEO order will be granted only where the party seeking it establishes that disclosure would pose a serious risk of substantial harm grounded in the evidence, and that such risk cannot be adequately addressed through less intrusive measures: *Sierra Club* at paras. 53–54; *Del Ridge Homes Inc.* at para. 43.

[31] In applying that standard, the Court must balance the need to protect confidential information against the receiving party’s ability to understand the case, instruct counsel, and fairly advance its position. The Court must consider the nature and sensitivity of the information, the relationship between the parties (including whether they are competitors), the evidentiary foundation for the alleged harm, and the impact of any restriction on the fairness of the proceeding: *Arkipelago Architecture Inc. v. Enghouse Systems Limited*, 2018 FC 37 at para. 19.

Positions of the Parties

Defendants

[32] The defendants submit that the requested Outstanding Documents contain highly sensitive commercial and technical information central to Hyfluence's competitive position, including technical innovation, pricing strategies, source code, engineering materials, and strategic business documents developed following their departure from Powertech.

[33] They further submit that the hydrogen fueling industry is a small, specialized market in which they and Powertech are direct competitors. In their submission, disclosure to Powertech personnel would create a risk of competitive harm, including the risk that Powertech could replicate, adapt, or improve its own systems, undercut pricing, or otherwise gain a competitive advantage.

[34] On that basis, the defendants seek enhanced protections, including a CEO regime for certain categories of documents.

Powertech

[35] Powertech opposes the imposition of a CEO regime. It submits that the implied undertaking rule provides sufficient protection against misuse of confidential information and that additional restrictions are unnecessary.

[36] Powertech argues that limiting access to counsel only would impair its ability to instruct counsel, assess the evidence, and advance its claims, particularly given that the central issue in the litigation is whether Hyfluence's systems were developed using Powertech's confidential information.

[37] Powertech further submits that the defendants have not provided sufficient evidence of a real and substantial risk of harm arising from disclosure, and that many of the concerns advanced are speculative. It also points to inconsistencies in the defendants' approach to confidentiality, including the external sharing of certain materials and the lack of clear evidence that all categories have been consistently protected.

Issues

[38] The issues on this application are:

- a) On Powertech’s application, are the categories of documents sought by Powertech relevant and therefore producible under Rule 7-1?
- b) On the defendants’ application, have they established a real and substantial risk of harm sufficient to justify restrictions on disclosure?
- c) If so, what form of protection is appropriate on the defendants’ application?

Analysis of Issues

[39] Powertech seeks production of the disputed documents, while the defendants seek to restrict the scope of disclosure by invoking a CEO designation. Although the defendants seek broadly uniform restrictions, the evidentiary foundation for confidentiality and harm varies significantly across the disputed categories. The strongest assertions concern highly technical materials such as source code and engineering designs, whereas more generalized concerns are advanced regarding marketing, RFP, and operational documents.

[40] Given the breadth of the defendants’ request, the disputed documents must be assessed on a category-by-category basis. While the categories provide a useful organizational framework, the question before the Court is whether, in respect of each category, the defendants have established a basis for departing from the ordinary rules of disclosure.

Issue 1: On the plaintiff’s application, are the categories of documents sought relevant and therefore producible under Rule 7-1?

[41] The documents at issue — particularly those relating to product design, technical development, pricing structures, business strategy, and customer communications — go directly to the allegations advanced in the underlying

litigation, including misuse of confidential information and diversion of business opportunities.

[42] The breadth of the claims — including misuse of confidential information, diversion of opportunities, and development of competing systems — makes the disputed categories directly relevant to both liability and the parties' competing factual narratives.

[43] In my view, all the documents sought are capable of proving or disproving material facts in issue and may reasonably lead to a train of inquiry relevant to those issues. They are therefore producible.

Issue 2: On the defendants' application, have they established a real and substantial risk of harm sufficient to justify restrictions on disclosure?

[44] The central issue is whether the defendants have established a sufficient evidentiary basis for restricting disclosure of the disputed documents. That inquiry requires consideration of both the specific categories of documents at issue and the broader competitive risks said to arise from disclosure.

Nature of the Information

[45] The disputed documents vary significantly in nature, sensitivity, and commercial significance. While the categories provide a useful organizational framework, the parties differ in their characterization of the significance and confidentiality of the materials within them.

[46] Powertech submits that the disputed documents are necessary to advance its claims and that the implied undertaking rule provides sufficient protection against misuse. The defendants contend that the documents contain highly sensitive commercial and technical information and that disclosure to Powertech personnel would create a risk of competitive harm that can only be adequately addressed through a CEO order.

[47] While the defendants have provided some evidence of measures taken to protect confidentiality, including limited internal access, technical controls, and, in some cases, confidentiality agreements, that evidence is not uniform across all document categories. Certain materials—particularly technical designs and control systems—are described as subject to strict internal protections, whereas others, including marketing materials and RFP responses, are shared externally with varying degrees of control. The evidentiary record does not establish that these materials have been consistently treated as confidential, nor does it clearly define the scope or application of any confidentiality agreements or vetting practices. This inconsistency limits the weight that can be placed on generalized assertions of confidentiality.

[48] Consequently, whether enhanced protections are justified must be determined on a category-by-category basis, having regard to the nature of the information and the evidentiary foundation for the alleged risk of harm.

Marketing and Proposal Materials (Items 17, 38)

[49] Category 1 consists of marketing materials, pitch decks, presentations, and proposals prepared for potential customers or investors. These materials are outward-facing, although some were shared subject to confidentiality or vetting arrangements.

[50] Powertech says these materials may demonstrate efforts to secure financing, solicit customers, and position Hyfluence in the market using Powertech's confidential information, branding, or strategic direction.

[51] In these circumstances, the external-facing nature of the materials, together with the manner in which they have been shared, are relevant considerations in assessing the degree of confidentiality that attaches to this category.

Requests for Proposals and Pricing Materials (Items 19, 20)

[52] The second category includes RFP and RFQ materials, along with related pricing structures, project timelines, contractual terms, and customer agreements, as

reflected in Items 19 and 20 of the Outstanding Documents schedule. These materials reflect Hyfluence's bid preparation, pricing, and commercial dealings with customers.

[53] Powertech submits that these materials are directly relevant to its allegations that the defendants diverted business opportunities and used confidential information to compete for contracts that Powertech might otherwise have pursued. It says they may reveal how Hyfluence positioned itself in the market and whether its pricing, proposals, or commercial strategies reflect or incorporate information developed during the defendants' employment with Powertech.

[54] The defendants say the documents reflect Hyfluence's pricing methodologies, service models, and strategic positioning in a specialized and competitive market, and that disclosure could provide Powertech with insight into how Hyfluence structures its bids and negotiates contracts.

Business Plans and Strategic Documents (Item 23)

[55] The third category consists of Hyfluence's internal business plans and strategic planning materials, including documents outlining its market strategy, expansion plans, and long-term business objectives.

[56] Powertech says these materials may bear directly on Hyfluence's business development following the defendants' departure, including whether its strategic direction, market positioning, or commercial approach reflects or incorporates confidential information or proprietary concepts developed during the defendants' employment. They may also provide insight into whether the defendants were developing or advancing a competing enterprise while still employed by Powertech.

[57] The defendants say the documents reflect Hyfluence's internal strategy, future planning, and competitive positioning, and that disclosure would provide Powertech with insight into its business direction and long-term objectives.

[58] The evidence indicates that these materials include multiple iterations over time. Their temporal context may bear directly on the issues in dispute, including the timing of Hyfluence's formation and the evolution of its business strategy.

[59] While such documents may contain commercially sensitive and forward-looking information, they lie at the heart of the issues in dispute.

Product Design and Engineering Materials (Items 27, 39–41)

[60] The fourth category includes product design and engineering materials relating to hydrogen refuelling systems, as set out in the documents identified in Items 27 and 39–41 of the Outstanding Documents schedule. These materials reflect Hyfluence's technical design and engineering approach to its products.

[61] Powertech says these materials are necessary to determine whether Hyfluence's systems were developed using Powertech's confidential information, including whether the defendants incorporated or derived technical concepts, designs, or approaches developed during their employment.

[62] The defendants say the documents reflect proprietary engineering work, technical innovation, and system design developed following their departure from Powertech, and that disclosure to a direct competitor could allow Powertech to replicate, adapt, or improve upon those designs. They further submit that such disclosure could result in significant and potentially irreparable competitive harm.

[63] Unlike marketing or commercial documents, these materials are not outward-facing. They relate to the internal design and technical architecture of Hyfluence's systems and therefore engage a higher degree of confidentiality.

[64] At the same time, these materials go directly to the core allegations in the underlying action.

Source Code and Control Systems (Items 26 and 46)

[65] The fifth category consists of source code and control system materials, as reflected in the documents identified in Items 26 and 46 of the Outstanding

Documents schedule. These materials reflect the underlying software, control logic, and technical architecture of Hyfluence's systems.

[66] Powertech says these materials are necessary to determine whether Hyfluence's systems incorporate or derive from Powertech's confidential information, including proprietary software and control systems developed during the defendants' employment.

[67] The defendants say the source code and control systems reflect the core of Hyfluence's technical innovation and engineering work, and that disclosure to a direct competitor would enable Powertech to replicate, adapt, or improve its own systems using that information, resulting in a loss of competitive advantage and significant, potentially irreparable harm.

[68] The defendants further submit that, unlike other categories of documents, these materials are not externally shared and are closely guarded within their organization. They emphasize that exposure to such information may influence technical decision-making, whether consciously or unconsciously, and that the information, once disclosed, cannot be "unseen."

[69] This category represents the most technically sensitive materials in issue.

Communications and Correspondence (Items 21-22, 24-25, 42-44)

[70] The sixth category comprises broad commercial and operational records, including correspondence, agreements, memoranda, research, market analyses, and related documentation concerning Hyfluence's hydrogen refuelling system ("HRS") activities, as reflected in Items 21–22, 24–25, and 42–44 of the Outstanding Documents schedule. These materials reflect Hyfluence's day-to-day business operations, customer relationships, and commercial activities.

[71] This category includes emails and other communications with customers, prospective customers, suppliers, and industry participants, as well as agreements, reports, and project-related records. It also encompasses marketing, development,

and customer-facing documentation, including records relating to Hyfluence's role in HRS projects as contractor, subcontractor, or consultant.

[72] Powertech submits that these materials bear directly on its allegations. It says that such documents may provide insight into the defendants' dealings with customers and industry participants, including the timing and nature of those interactions.

[73] The defendants submit that these documents may contain commercially sensitive information relating to customer relationships, project terms, and business operations. However, they do not apply the same level of technical sensitivity to this category as they do to design or source code materials.

[74] Unlike the technical categories, these materials are largely operational and, in many instances, outward-facing.

Alleged risk of harm

[75] The defendants submit that disclosure to a direct competitor in a small, specialized market would expose Hyfluence's pricing strategies, technical approaches, and business operations in a manner likely to cause competitive harm. They emphasize that some materials are proprietary, selectively shared, and difficult to "unsee" once disclosed.

[76] However, as will be discussed below, the evidentiary foundation for those concerns varies significantly across the disputed categories. The strongest evidence concerns technical and engineering materials, whereas the basis for confidentiality and competitive harm is considerably less well developed for broader operational and commercial records.

Role of the competitive relationship

[77] The defendants place significant reliance on the parties' direct competition in a relatively small and specialized market as justifying heightened confidentiality protections. That competitive relationship is an important contextual consideration

because it informs both the sensitivity of the information and the potential consequences of disclosure.

[78] At the same time, competition alone does not establish a sufficient basis for enhanced restrictions. The Court must balance the legitimate interest in protecting confidential commercial information against the need for disclosure in the litigation. Where disclosure of commercially sensitive information would create a real and substantial risk of harm disproportionate to the documents' probative value, the Court may restrict or condition disclosure accordingly. However, the risk of harm must be grounded in evidence, not merely in the existence of a competitive relationship or in generalized concerns about potential misuse.

[79] The defendants also rely on prior interactions and alleged conduct by Powertech personnel as giving rise to concerns about the potential misuse of confidential information. While those concerns are noted, the evidentiary record does not establish any actual misuse of confidential information by Powertech in the course of this litigation, nor does it provide a sufficiently concrete basis to conclude that the existing protections would likely be disregarded.

Assessment of Categories

[80] As set out above, the implied undertaking rule remains the primary mechanism for protecting confidential information disclosed in litigation. Absent a demonstrated need for additional safeguards, the implied undertaking rule will ordinarily suffice.

[81] I now turn to the specific categories of documents at issue. The question is whether the defendants have established, for each category, a basis for protection beyond the implied undertaking.

Marketing Material and Proposal Materials

[82] With respect to Category 1, the defendants submit that these materials contain commercially sensitive information, including aspects of Hyfluence's business model, technical approach, and market positioning. They say these

materials are not widely disseminated, are provided selectively to vetted recipients, and may include proprietary content reflecting Hyfluence's engineering and commercial strategy. However, the evidentiary record does not establish that such materials are consistently treated as confidential, nor have the defendants explained why certain marketing materials—including those previously disclosed—would result in harm while others would not.

[83] I accept that the materials may be commercially sensitive, but that alone does not justify enhanced protection. These materials may be relevant to the question of whether the defendants were promoting or advancing a competing enterprise while still employed by Powertech.

[84] I am not satisfied that the defendants have established a sufficient basis for restricting disclosure of these materials to the plaintiff itself, rather than concerns about their use outside the litigation. No further restriction is warranted.

Requests for Proposals and Pricing Materials

[85] With respect to Category 2 documents, Hyfluence submits that the RFP and RFQ materials are among the most commercially sensitive documents at issue. It says these materials reveal pricing structures, cost assumptions, service models, project timelines, and contractual terms that are not publicly accessible and are closely guarded within its business. In particular, Hyfluence submits that disclosure to Powertech, as a direct competitor, would provide insight into how Hyfluence structures its bids and positions itself commercially, thereby creating a risk that Powertech would undercut Hyfluence in current or future opportunities.

[86] Powertech acknowledges that these materials may be commercially sensitive but submits that they may reveal how Hyfluence approached specific opportunities, including whether its pricing, proposals, or commercial strategies reflect or incorporate information developed by Powertech during the defendants' employment.

[87] In my view, a distinction must be drawn between completed or historical bids and those that are current or prospective.

[88] To the extent that the materials relate to completed or historical bids, any risk of competitive harm is diminished, while their significance to the issues in dispute is highly probative. Although such materials may reflect past pricing and commercial strategies, there is no evidence that those strategies remain in active use or that their disclosure would create a present competitive disadvantage. In these circumstances, with respect to historical bids, I am not satisfied that the defendants have established a sufficient basis for protection beyond the implied undertaking rule.

[89] The analysis is different with respect to current or prospective bids. I accept that RFPs, RFQs, and related responses are typically treated as highly confidential commercial documents and may reveal pricing strategies and commercial approaches that go to the heart of ongoing competition. Disclosure to a direct competitor may therefore give rise to a real and substantial risk of competitive harm. This concern is supported by the defendants' evidence that a significant portion of their bids remain active and that disclosure could affect ongoing negotiations.

[90] Even so, I am not satisfied that current or prospective bid materials should be withheld from the plaintiff altogether. Rather, they warrant additional targeted protections within a tiered protective regime.

Business Plans and Strategic Documents

[91] Category 3 consists of business plans that include multiple iterations over time. These materials may bear on whether the defendants were developing or advancing a competing business while still employed by Powertech, an issue central to the plaintiff's claims. Their sensitivity varies depending on both content and timing.

[92] The business plans generated in 2022 and 2023 are particularly significant. They were created in close temporal proximity to Hyfluence's establishment and the alleged misappropriation of Powertech's confidential information. To the extent the

plaintiff alleges that its ideas, intellectual property, or strategic direction were incorporated into Hyfluence's operations, these materials may directly reveal whether that occurred. To restrict access to these materials would impair the plaintiff's ability to test its central allegation that its confidential information was incorporated into the defendants' business.

[93] While such materials may contain commercially sensitive information, the defendants have not established that the implied undertaking is insufficient to protect against misuse.

[94] Later iterations of the business plans may include more forward-looking or evolving strategies and may therefore engage a higher degree of commercial sensitivity. However, the evidence does not establish that these materials are of such a character that they should be withheld from the plaintiff altogether.

[95] In these circumstances, I am not satisfied that a CEO restriction is warranted for this category. However, to the extent that certain materials reflect ongoing or forward-looking strategic direction, they are appropriately addressed through a tiered confidentiality regime that limits dissemination while preserving the plaintiff's ability to understand and fairly advance its case.

Product Design and Engineering Materials

[96] Category 4 is more sensitive. These materials reflect the defendants' technical approaches and innovation. In a specialized and emerging industry, disclosure of such information may create a genuine risk of competitive harm.

[97] However, the central issue in the litigation is whether the defendants' systems incorporate or derive from Powertech's own engineering systems and confidential information. Restricting access to these materials too narrowly would impair the plaintiff's ability to assess and respond to that issue.

[98] While the sensitivity of these materials is an important consideration, balancing the plaintiff's entitlement to disclosure against the potential harm to the

defendant company leads me to conclude that the documents must be produced, subject to appropriate protections to mitigate the associated risk.

Source Code and Control Systems

[99] I accept that source code and control systems are among the most sensitive materials in issue and may reveal detailed technical approaches and innovation.

[100] At the same time, these materials are central to the plaintiff's allegation that its confidential systems and technical information were appropriated. Excluding the plaintiff from any technically informed review would risk undermining the fairness of the proceeding.

[101] In my view, the appropriate response is not exclusion, but controlled access through counsel, independent experts, and a designated technical reviewer who are not involved in competitive decision-making.

Communications and Correspondence

[102] Hyfluence submits that these documents are sensitive because they may provide a competitor with insight into its business practices and strategy. However, the evidentiary record does not establish a concrete or particularized risk of harm. The concerns advanced are framed at a level of generality and, in substance, are speculative. There is limited evidence that these materials have been consistently treated as confidential, nor that their disclosure would expose information of such a nature that it could not be adequately protected by the implied undertaking.

[103] In these circumstances, I am not satisfied that Category 6 attracts a level of confidentiality beyond that ordinarily protected by the implied undertaking rule. To accept the defendants' position would be to extend enhanced protection to a broad range of commercial documentation in any case involving competitors, a result not supported by the authorities.

Issue 3: If so, what form of protection is appropriate on the defendants' application?

[104] Even where some risk of harm is established, the Court must consider whether less intrusive measures are sufficient to address that risk.

Adequacy of less restrictive measures

[105] In this case, the existing protections include:

- a) the implied undertaking rule, which restricts use of documents to this litigation;
- b) the availability of a protective order governing the use and dissemination of documents; and
- c) the ability to impose targeted restrictions on particularly sensitive materials.

[106] There is no persuasive evidence that these mechanisms would be inadequate.

[107] In particular, there is no indication that the plaintiff has breached, or is likely to breach, its obligations under the implied undertaking. Nor is there evidence that disclosure of the documents—properly controlled—would result in irreparable harm.

[108] The defendants also raise concerns about the identity of the individuals who may review the documents, including Mr. Poulain. While those concerns are noted, they do not establish a sufficient evidentiary basis to exclude the plaintiff from access altogether. Any residual risk associated with a reviewer's identity can be appropriately addressed by the safeguards in place, including the requirement that no designated representative be involved in competitive decision-making.

CEO restriction

[109] The defendants seek a CEO restriction on most categories of documents. Such orders are exceptional because they interfere with a party's ability to know and respond to the case against them.

[110] For the reasons set out above, I am not satisfied that the defendants have established a sufficient evidentiary basis for excluding the plaintiff from access to any category of documents altogether. While some materials—particularly technical designs and source code—engage legitimate confidentiality concerns, those concerns can be adequately addressed through targeted protections short of a CEO regime.

[111] This is particularly so given that the central allegations in the litigation concern whether Hyfluence's systems incorporate or derive from Powertech's confidential engineering and technical information. A regime that prevents technically informed review on behalf of the plaintiff would materially impair its ability to assess and respond to those allegations.

[112] At the same time, some degree of additional protection is warranted to guard against the disclosure of sensitive technical and commercial information to Powertech's operational personnel. The remaining issue, therefore, is the nature and scope of the more tailored protections that should govern production.

Appropriate Form of Protection

[113] In practical terms, the categories fall into three levels of protection. Categories 1 and 6 are adequately protected by the implied undertaking rule and ordinary disclosure obligations. The same is true of materials within Category 2 relating to completed, historical, or no longer active RFPs, RFQs, bids, or procurement processes, as well as earlier or historical business planning materials within Category 3. Some of those historical materials are centrally relevant to the issues in dispute and the formation of Hyfluence, which further supports disclosure under the ordinary rules. Materials within Category 2 relating to current or ongoing RFPs,

RFQs, bids, or procurement processes, together with forward-looking strategic and business planning materials within Category 3, warrant moderate confidentiality protections within a Tier 1 regime limiting dissemination to counsel, experts, and designated representatives necessary to instruct counsel. Categories 4 and 5, consisting of highly technical materials such as engineering designs and source code, warrant enhanced protections within a Tier 2 regime restricting access to counsel, independent experts, and a designated technical reviewer approved pursuant to this order and not involved in competitive decision-making.

[114] While the restrictions imposed on Tier 2 materials are significant, they do not amount to a true CEO regime. The plaintiff is not excluded entirely from meaningful review of the technical evidence. Rather, the order permits limited access through a designated technical reviewer and independent experts, subject to safeguards designed to prevent competitive misuse while preserving the plaintiff's ability to understand and advance its case. Given the technical nature of the allegations, such a technically informed review is necessary to permit meaningful instruction of counsel and proper assessment of the evidence.

[115] Although the evidentiary record does not justify a blanket CEO restriction, it does support a tiered protective structure that reflects the varying sensitivity of the documents at issue.

[116] In my view, this calibrated approach strikes an appropriate balance between the defendants' confidentiality interests and the plaintiff's right to understand and fairly advance its case while reducing the risk of conscious or unconscious competitive misuse.

Conclusion

[117] In summary:

- a) The documents sought are relevant and producible under Rule 7-1;

- b) While the documents include confidential and commercially sensitive information, the defendants have not established a basis for a blanket CEO restriction;
- c) The competitive relationship between the parties, without more, does not warrant such an extraordinary measure; and
- d) The varying nature and sensitivity of the documents support a tailored approach to disclosure that balances the defendants' confidentiality interests with the plaintiff's right to fairly advance its case.

[118] Accordingly, while the defendants' request for a CEO designation is dismissed, a tiered protective order is appropriate, having regard to the nature and varying sensitivity of the documents at issue.

Disposition and Orders

[119] The plaintiff's application for further production is granted, including the production of the categories of documents identified in these reasons, subject to the confidentiality regime set out below. The defendants' application for a CEO designation is dismissed.

[120] The documents at issue shall be produced, subject to a protective order set out below.

[121] The protections imposed by this order apply equally to both parties.

[122] For clarity, the categories of documents identified in these reasons fall into three groups for the purpose of disclosure:

- a) documents subject to ordinary disclosure under the implied undertaking rule, including Categories 1 and 6, historical bid materials within Category 2, and earlier or historical business planning materials within Category 3;
- b) Tier 1 — documents requiring moderate confidentiality protections, including materials within Category 2 relating to current or ongoing RFPs,

RFQs, bids, or procurement processes, and forward-looking strategic and business planning materials within Category 3 (Tier 1 documents); and

- c) Tier 2 — highly technical materials requiring enhanced protection, including Categories 4 and 5 (Tier 2 Documents).

[123] The protective order shall include the following:

Use of Documents

1. All documents produced pursuant to this order shall be used solely for the purposes of this proceeding and for no other purpose.

Normal Disclosure under Implied Undertaking

2. Documents falling within Categories 1 and 6 shall be disclosed in accordance with the ordinary rules of disclosure and are subject only to the implied undertaking rule. Materials within Category 2 relating to completed, historical, or no longer active RFPs, RFQs, bids, or procurement processes, and earlier or historical business planning materials within Category 3, likewise fall within ordinary disclosure and are subject only to the implied undertaking rule.

Tier 1 – Confidential Information

3. Documents of a commercial or strategic nature requiring moderate protection, including forward-looking strategic and business planning materials within Category 3 and materials within Category 2 relating to current or ongoing RFPs, RFQs, bids, or procurement processes, shall be disclosed only to:
 - i. counsel of record and their staff;
 - ii. experts retained for the purposes of this proceeding; and
 - iii. no more than two designated representatives of the plaintiff, strictly necessary to instruct counsel, provided that such representatives are not directly involved in competitive decision-making relating to the subject matter of the documents.

Tier 2 – Highly Confidential Technical Information

4. Documents of a highly technical nature, including source code, engineering designs, system architecture, and related materials (the “Tier 2 Documents”), shall be disclosed only to:
 - i. counsel of record and their staff;
 - ii. independent experts retained for the purposes of this proceeding who are not involved in the plaintiff’s competitive operations; and
 - iii. no more than one designated technical reviewer, approved in accordance with this order, who:
 - a. is strictly necessary to permit the plaintiff to understand and instruct counsel regarding the technical issues in dispute;
 - b. is not involved in the plaintiff’s competitive decision-making, engineering, design, procurement, pricing, or strategic operations relating to the subject matter of the documents; and
 - c. executes the undertaking required by this order prior to receiving access.

Designation of Technical Reviewer

5. The designated technical reviewer:
 - i. shall be identified by the plaintiff in the first instance;
 - ii. shall be subject to approval by the defendants, such approval not to be unreasonably withheld; and
 - iii. failing agreement, may be appointed by the Court on application.

Undertaking of Technical Reviewer

6. Prior to receiving access to any Tier 2 Documents, the designated technical reviewer shall execute a written undertaking to the Court.
7. That undertaking shall, at a minimum, include provisions that:
 - i. the information will be used solely for the purposes of this proceeding;
 - ii. the information will not be disclosed except as permitted by this order;
 - iii. the information will not be used, directly or indirectly, for any commercial, competitive, engineering, design, procurement, pricing, or strategic purpose;
 - iv. the reviewer will not participate in competitive decision-making relating to the subject matter of the information for the duration of the proceeding and for a period of 12 months following the final disposition of this proceeding; and
 - v. all materials will be returned or destroyed at the conclusion of the proceeding.
8. The parties shall attempt to agree on the form of undertaking. Failing agreement, either party may apply to the Court for directions. In the absence of agreement, the undertaking attached as Schedule “A” to these reasons shall apply.

Confidentiality Obligations

9. Any person receiving documents pursuant to this order shall maintain their confidentiality and shall not use or disclose them except in accordance with this order and the implied undertaking rule.

Security of Documents

10. The parties shall take reasonable steps to ensure that documents produced under this order are stored securely and are not accessible to persons not authorized under this order.

Return or Destruction

11. Upon the final disposition of this proceeding, including any appeals, all documents produced pursuant to this order, and any copies or materials derived from them, shall be returned or destroyed, subject to counsel's professional obligations.

Liberty to Apply

12. The parties shall have liberty to apply for:
- vi. further directions respecting the implementation of this order;
 - vii. the classification of any document, including whether it properly falls within Tier 1 or Tier 2; or
 - viii. the identity or scope of access of any designated technical reviewer.

Settlement of Terms

13. If the parties are unable to agree on the precise form of a protective order consistent with these reasons, they may apply to the Court for directions.

Costs

[124] The result of these applications is mixed. In the absence of agreement, costs may be spoken to.

"S. Sukstorf J."

SCHEDULE A**UNDERTAKING OF DESIGNATED TECHNICAL REVIEWER**

I, _____ [name], of _____ [address and occupation], DO SOLEMNLY UNDERTAKE AND AGREE AS FOLLOWS:

1. Purpose of Access

I acknowledge that I have been designated as a technical reviewer for the purposes of this litigation and will receive access to documents designated as “Highly Confidential Technical Information” solely for the purpose of assisting counsel in this proceeding.

2. Use Restricted to Litigation

I will use the Highly Confidential Technical Information only for the purposes of this proceeding and for no other purpose whatsoever.

3. No Disclosure

I will not disclose, communicate, summarize, describe, or otherwise make available any Highly Confidential Technical Information, in whole or in part, to any person except:

- counsel of record in this proceeding; and
- any independent experts retained for the purposes of this proceeding who are not involved in the plaintiff’s competitive operations, where authorized by counsel and subject to equivalent confidentiality obligations.

4. No Commercial or Competitive Use

I will not use the Highly Confidential Technical Information, directly or indirectly, for any commercial, competitive, business, design, engineering, procurement, pricing, or strategic purpose.

5. Non-Participation in Competitive Decision-Making

I confirm that:

- I am not currently involved in, and will not become involved in, any competitive decision-making for the plaintiff relating to the subject matter of the documents, including product design, engineering, pricing, procurement, or business strategy; and
- for the duration of this litigation and for a period of 12 months following its final disposition, I will not participate in such activities to the extent they relate to the subject matter of the Highly Confidential Technical Information.

6. No Copying or Retention Beyond What Is Necessary

I will not copy, reproduce, extract, or retain any Highly Confidential Technical Information except as strictly necessary for the purposes of this proceeding and as directed by counsel.

7. Security of Information

I will take all reasonable steps to ensure that the Highly Confidential Technical Information is stored securely and is not accessible to any unauthorized person.

8. Return or Destruction

Upon the final disposition of this proceeding, including any appeals, I will return or destroy all Highly Confidential Technical Information and any copies, notes, or materials derived from it, as directed by counsel, and will confirm in writing that I have done so.

9. Acknowledgment of Court Order

I acknowledge that the Highly Confidential Technical Information is subject to a court order and that any breach of this undertaking may constitute contempt of court.

10. Submission to Jurisdiction

I attorn to the jurisdiction of this Court for the purposes of enforcing this undertaking.

DATED at _____, this ____ day of _____, 20

(Signature)