

CANADA / JUDGMENT

Powertech Labs Inc. v. Das

2023 BCSC 1187

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1187 Powertech Labs Inc. v. Das

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Powertech Labs Inc. v. Das,

2023 BCSC 1187

Date: 20230712

Docket: S230262

Registry: Vancouver

Between:

Powertech Labs Inc.

Plaintiff

And

Angela Das, Ronald Klopfer, Hyfluence Systems Corp., Karin Garandza, Marc Payot, John doe, Jane Doe, and other persons unknown who have conspired with the named Defendants

Defendants

Before: The Honourable Justice A. Ross

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

June 22-23, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 12, 2023

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Introduction

- [1] The plaintiff, Powertech Labs Inc. ("Powertech"), seeks both prohibitive and mandatory injunctions against three former employees, one former consultant, and the new business venture created by those individuals.
- [2] Powertech submits that each of the individual defendants, while either employed by, or under contract to, Powertech, breached their obligations (fiduciary, employment, or contractual) and conspired to commence a new business venture in a fashion that was designed to damage Powertech.
- [3] Powertech alleges that by taking the improper steps, the defendants hoped to prevent Powertech from being able to safely fulfil its current or future contractual obligations.
- [4] As discussed below, the plaintiff seeks injunctive relief:
- a) prohibiting the defendants from using confidential and proprietary information;
 - b) prohibiting the defendants from using a corporate phone number that was converted to the personal number of a defendant;
 - c) prohibiting the defendants from contracting with a software supplier or suppliers;
 - d) prohibiting the defendants from soliciting work from five customers;
 - e) and other relief in relation to the return of:
 - i. confidential information in any format; and
 - ii. two physical digital storage devices (a USB drive and a hard drive).
- [5] In response to the plaintiff's allegations, the defendants take the following positions:
- a) The plaintiff's allegations and submissions overstate the facts and the matters in dispute. The allegations of dishonesty, unethical conduct, and corporate theft are unsupported.
 - b) They concede that they took some steps that were not "perfect" in the circumstances.
 - c) However, to the extent they may have been in breach:
 - i. the plaintiff has not satisfied the tests for injunctive relief because:
 - (1) the evidentiary burden is not met;
 - (2) there is no evidence of irreparable harm; and
 - (3) the balance of convenience favours the defendants because the relief sought poses a threat to the existence of the defendants' new enterprise.

- d) The defendants further submit that the delay in bringing this application has caused prejudice.
 - e) Finally, the defendants submit that the plaintiff is improperly using the court's process, and this application, as part of a strategy to "squish" the defendants' business venture.
- [6] The defendants do not dispute that, upon resigning, the defendants Angela Das ("Das") and Ronald Klopfer (Klopfer") informed Powertech that they had commenced a new venture and hired away a number of employees. They also asserted that Powertech's ability to meet its contractual obligations had been damaged. The context of an email sent by Das and Klopfer is a matter of dispute. The plaintiff frames the email as an admission of mis-deeds and malintent. The defendants submit that the email was conciliatory. I address those positions below.
- [7] Despite the positions set out above, the defendants:
- a) consent to an order enjoining them from using any confidential information. However, there is a dispute as to what constitutes "confidential information";
 - b) in theory, consent to the return of the two physical objects sought by the plaintiff (a USB drive and a hard drive). However, the two individual defendants say that they are not in possession of those physical objects; and
 - c) in theory, consent to the return of any confidential or proprietary information. However, they deny they are in possession of any such information.
- [8] The major issue between the parties relates to the solicitation of certain customers and a supplier that had contracted with Powertech. The defendants submit that the plaintiff is not entitled to this injunctive relief.

Preliminary Comments

- [9] I note at the outset that there is an existing interim interlocutory injunction in place, granted by Milman J. on May 16, 2023. That interim injunction was granted on the basis that the plaintiff was ready to proceed with this application and Milman J. found that there was urgency. As of the date of the release of these reasons, the terms of Milman J.'s order had not been settled between the parties. There is significant disagreement over the scope and language of that order. However, whatever its terms, that order was to remain in place until July 14, 2023, or until further order of the court. These reasons constitute that further order.
- [10] I further note that this application followed a fairly familiar pattern in this type of claim. In this case two archetypes unfolded:
- a) In circumstances where former employees commence a competing business, the level of suspicion is usually very high. Former employers believe that the employees departed with a substantial amount of confidential information and are using the former employers' work product to unfairly springboard their new venture into a profitable position. Almost

inevitably, the responsive affidavit material seeks to placate the plaintiff. In turn, the plaintiff's usual response is to adjust, but not abandon, their positions. These adjustments often lead to amendments in pleadings alleging different mis-deeds. That scenario unfolded in this case. I see nothing unusual about those events or those amendments.

b) In the immediate aftermath and realization that former employees have departed to compete, former employers are often left with a gap in information. If a former employer wishes, or decides, to litigate, then evidence must be gathered. The former employers are caught in the countervailing needs created by:

- i. the urgency of its attempt to stop unfair competition, and
- ii. the necessity of establishing the evidentiary basis for injunctive relief.

[11] In this case, the plaintiff retained a forensic accountant to review the digital record including email and text messages. That process took from mid-December until mid-April. The notice of civil claim was filed on January 13, 2023, and amended May 16, 2023. This application was filed April 20 and amended June 9, 2023. Given the unfolding facts, I see nothing unusual in that scenario or those amendments. I do not find that the plaintiff delayed in pursuing its application. I infer nothing from the fact that allegations were amended over time.

The Parties

[12] Powertech is a private for-profit corporation. It is 100% owned by the province's electric utility, the British Columbia Hydro and Power Authority ("BC Hydro"). Powertech is not a Crown corporation.

[13] Powertech is in the business of providing testing, consulting, design, engineering, and software services to utilities and equipment manufacturers and the automotive industry. It is also involved in the clean energy field and provides hydrogen fuelling equipment, technology and services to customers around the world.

[14] This litigation involves one part of Powertech's business, its "Advanced Transportation Group" and specifically, the "hydrogen infrastructure group" ("HIG"). Powertech says that the HIG is a technical leader in research, development, and fabrication of compressed hydrogen fuelling infrastructure solutions. It says that it has pioneered the design of turnkey hydrogen fuelling stations and point-of-sale payment systems ("POS"). In doing so, it has developed confidential and proprietary information.

[15] Powertech further says that it has expended considerable time and resources over several years to develop, engineer, and manufacture its hydrogen fuelling technology, its manufacturing processes, its products, and its customer relationships. It developed market share and was poised to significantly grow with this expanding market.

- [16] The defendant Das was employed by Powertech as its "Director of the Advanced Transportation Group". As noted, that group included the HIG. Das was employed at Powertech for a period of 20 years. She resigned on December 9, 2022. Powertech alleges that Das was a fiduciary. I discuss that issue below.
- [17] The defendant Klopfer is a business consultant. He was retained by Powertech to act as a consultant regarding the evaluation and quantification of the future market opportunity for Powertech's hydrogen fuel systems business and to develop a plan to advance that opportunity.
- [18] The defendant Karen Garandza ("Garandza") was employed by Powertech as a senior engineer.
- [19] The defendant Mark Payot ("Payot") was employed by Powertech as an electrical technologist.
- [20] Both Ms. Garandza and Mr. Payot worked in the HIG.
- [21] It is not disputed that Das, Garandza, and Payot all resigned from the employment of Powertech on December 9, 2022. Further, it is not disputed that each of the defendants is now employed by, or otherwise connected to, the defendant Hyfluence Systems Corp. ("Hyfluence").

Causes of Action

- [22] The amended notice of civil claim pleads several causes of action. For the purpose of this application, plaintiff focused on the causes of action outlined below. The plaintiff submits that the evidence before the court on this application establishes both a serious question to be tried and a strong prima facie case for each of these causes of action:
- a) As against the defendant Das, the plaintiff alleges breaches of her fiduciary duty.
 - b) As against the defendants Das, Garandza, and Payot, the plaintiff alleges breach of employment agreements, employment duties, and duties of confidentiality.
 - c) As against the defendant Klopfer, the plaintiff alleges breach of a nondisclosure agreement and consulting agreement.
 - d) As against all the defendants, the plaintiff alleges that they acted in concert and with the common design to harm the plaintiff and, thus, were involved in a civil conspiracy when they engaged in wrongful conduct consisting of appropriation of corporate opportunity, and conversion and wrongful use of proprietary and confidential information, when they knew or ought to have known those acts would result in injury to Powertech. In the alternative, the plaintiff pleads that, if any of the above-noted acts were lawful, then the acts were designed and intended to cause damage to Powertech.

- e) The plaintiff also pleads other causes of action which are not relevant to this application. Those causes of action include knowing assistance and knowing receipt, intentional interference with economic relations, and inducing breach of contract.

The Application and the Terms Sought

[23] For ease of reference, I set out the paragraph of relief sought in the plaintiff's amended notice of application and the position of the defendants.

[24] Paragraph 1(a)(i) through (xxx) seeks to enjoin the use of confidential information. As noted, the defendants consent to the spirit of this paragraph, but dispute the wording. The full terms of the application are as follows:

1. The Defendants, and any other person acting on any of the Defendants' instructions or behalf, in any capacity, are hereby restrained and enjoined until the hearing of this matter, or until further order of this Court, from directly or indirectly:
 - (a) using or disclosing any documents or information confidential to Powertech, including documents or information relating to the organization, business, assets, trade secrets, copyright, intellectual property, and customers of Powertech (collectively, the "Confidential and Proprietary Information"). For greater certainty, Powertech's Confidential and Proprietary Information includes:
 - (i). Powertech's "POS Software System" and related code;
 - (ii). Powertech's "Programmable Logic Controller System and related code;
 - (iii). Powertech's "Hydrogen Plan";
 - (iv). the document titled "Hydrogen Overview- 2020 - updated for heavy duty";
 - (v). the document titled "PL-03229 UBC Operating Manual";
 - (vi). any slide or page contained in Hyfluence's "Pitch Deck" to the extent that they incorporate any images or content created by Powertech or any of Powertech's Confidential and Proprietary Information, including without limiting the generality of the foregoing, pages 3, 4 and 5 of the version of the "Pitch Deck" appended as Exhibit ."M" to Affidavit #1 of L. Sharpe, made April 19, 2023;
 - (vii). the document titled "Copy of Advanced Transportation Aug2022";
 - (viii). the document titled "Advanced Transportation March 2022";
 - (ix). the document titled "Budget F23 AT";
 - (x). the document titled "F23 plan AT";
 - (xi). the document titled "Hydrogen Infrastructure Overview2022";
 - (xii). the document titled "H2-1";

- (xiii). the document titled "H2-2";
- (xiv). the document-titled "He Leak Rate-8-3-95";
- (xv). the document titled "LLNL Perm Rationale";
- (xvi). the document titled "ISO (HOUf-11.08).pdf";
- (xvii). the document titled "Copy of Costing Sheet 23-12248 Reliance Hydrogen Dispensers-RI"; .
- (xviii). the document titled "Copy of Costing Sheet 23-12210 Forts BC 350 bar Heavy Duty";
- (xix). the document titled "Copy of Copy 20-8785 Iwatani bar Single Compressor"
- (xx). the document titled "Proposal 23-12047 Jon Cockerill 500 bar Tube Trailer Filling";
- (xxi). the document titled "Proposal 23-12248 Reliance H2 Station RI"
- (xxii). the document titled "Proposal 23-12128 Atura Power Hydrogen Gas Tube Trailer"
- (xxiii). the document titled "R.3 Equipment Sales Agreement (SGH2) _:_ 05Aug2022":
- (xxiv). the document titled,"21-10188 Equipment Sales Agreement Tsawwassen - Final"
- (xxv). the document entitled "22-11281 CBS redline TPL 2052 Equipment Sales":
- (xxvi). the document titled "4537638963 - 002.pdf"
- (xxvii). the document titled "EFA Contract Powertech CW610680"
- (xxviii). the document titled "Purge procedure":
- (xxix). all email correspondence containing the Confidential and Proprietary Information: and
- (xxx). all pictures or .jpg files containing the Confidential and Proprietary Information.

[25] The defendants' position on para. 1(a)(i)-(xxx) is that:

- a) they agree that they have common law obligations regarding confidential information;
- b) they do not agree with the plaintiff's characterization of what constitutes "confidential information";
- c) for the sake of expediency and without prejudice to their position that injunctive relief is not justified, they will agree to modified orders regarding information that is, in fact, confidential and proprietary.

[26] On the basis of my analysis below, I grant the injunctive relief sought by the plaintiff in para. 1(a)(i)-(xxx). In granting this injunctive relief, I note that the defendants Das and Klopfer have sworn affidavits indicating that they have instructed all Hyfluence employees and consultants to delete or return all of Powertech's confidential and proprietary information. As I discuss near the end of these reasons, the definition of "confidential information" will remain an issue for the trial judge.

Phone Number

- [27] In para. 1(b), the plaintiff seeks to enjoin Das from using a certain phone number for any purpose involving contact with Powertech customers.
- [28] The phone number was Das' work number while at Powertech. She switched the number to her personal use one month before resigning. Das denies that she committed any breach in relation to the phone number. She also disputes that Powertech has suffered any loss. She says she has taken significant steps to minimize any potential for damage, including promising to forward any misdirected calls to Powertech.
- [29] I discuss the nature of this claim for relief below. However, I decline to grant this relief because, in my opinion, the plaintiff cannot demonstrate irreparable harm and because the balance of convenience favours Das.

Suppliers

- [30] In para. 1(c) of the application, the plaintiff seeks to enjoin the defendants from working with the suppliers that assisted Powertech with the creation of the POS software (see para. 14 above). This is a significant issue for the defendants.
- [31] I dismiss the application for this paragraph of relief. As discussed below, I find that there is insufficient authority to restrain a defendant from working with a supplier. Any such order would, in my opinion, restrain the supplier. Further, I do not consider Hyfluence retaining a software company to create new software to be a matter that creates irreparable harm to the plaintiff.

Customers #1-#5

- [32] The plaintiff seeks to enjoin the defendants, until the hearing of this matter or until further order of this Court, from directly or indirectly, soliciting the business of five Powertech customers ("Customers") and their related affiliates. In the notice of application, the customers are numbered as Customer #1 through Customer #5. The parties agree on that naming convention and can identify each "Customer". The listing of the Customers is important because the defendants dispute that three of the entities are, in fact, customers of Powertech. This is a significant issue for the defendants. I discuss it in detail below.
- [33] As discussed below, I dismiss the application for this paragraph of relief. In short, by the time of the release of these reasons, approximately eight months have passed since the resignation of the defendants. I am satisfied that, if an injunction were to issue, then a reasonable period of "non-competition" would be between six and twelve months. Hence, to restrain the defendants until trial would not be in the interests of justice. To be clear:

- a) If this application had been brought earlier, I would have entertained an order in this regard (as Milman J. did). However, in my opinion, it is not warranted at this time, due to the passage of time.
- b) This portion of my decision relates to solicitation of customers and is based upon the evidence before me on this application. If the evidence at trial should establish that the defendants breached their duty of confidence or misused information to "springboard" into business, then the plaintiff's claim for damages may exceed this period.

Return of Confidential and Proprietary Information

- [34] The plaintiff seeks the return of all paper and electronic copies of all confidential or proprietary information.
- [35] The defendants concede that they are obligated to comply with this demand, but say that they are not in possession of any such information because, to the extent any such information existed, it has been deleted. Thus, the defendants consent to this order, in theory.

Return of Specific Physical Items

- [36] The plaintiff seeks return of a specific USB drive (the "USB Drive") and a specific hard drive (the "Hard Drive"). They allege that the defendants Garandza and Payot are in possession of these items.
- [37] Garandza and Payot deny that they are in possession of these devices. However, if the devices should show up, they will return them.

Costs

- [38] The plaintiff seeks the costs of this application. In response, the defendants seek special costs of this application.

Background Facts

- [39] I outline the background facts below, followed by the submissions of the parties. Where there are factual disputes, I have addressed those disputes in my recitation of the background facts.
- [40] I divide the evidence into four areas:
 - a) The Announcement of Hyfluence
 - b) The Contractual Relationships and Confidentiality Terms
 - c) The Nature of the Business Opportunity
 - d) The Impugned Conduct

The Announcement of Hyfluence

[41] I will deal with the allegations, events, and conduct of each of the parties below. However, I find it expository to place all of the defendants' conduct within the context of an email written on Sunday, December 11, 2022 (the "December 11, 2022 Email") following the coordinated resignation of seven Powertech employees on Friday, December 9, 2022. The email is from Klopfer and Das and addressed to the CEO of Powertech, Mr. Pierre Poulin ("Poulin"). The December 11, 2022 Email refers to Powertech as PTL. It says, in part:

Dear Pierre

We are writing to provide some context to the events of the past few days, which we were advised by legal counsel not to describe on Friday so as not to complicate Angela's [Das] resignation.

Angela and I both strongly think that a private, soul focused and well-capitalized company is the only viable route to growth and competitiveness as we strive to deliver clean hydrogen technology to British Columbia and beyond. We have now founded a company, closed private equity financing, and hired an initial team which includes seven recently resigned PTL employees. We are reaching out today because we also believe that there is a real opportunity for PTL and BC Hydro to partner with us to deliver a public success.

The group of top employees that will enable the new company to move forward with new hydrogen technology and product work are unfortunately also the group whose absence from PTL makes it extremely difficult for PTL to complete in-progress contracts or fulfil service commitments for systems in the field. Having PTL default on these contracts, particularly higher profile BC based projects with HTEC is in nobody's interest and we have no desire to see Powertech's reputation suffer. In addition, without the core experienced team we have concerns about the safety of the products that would be delivered by Powertech in the future.

We propose to discuss an arrangement to enable business continuity, whereby the new company and Powertech, working together, meet or exceed the expectations of your customers. As part of that we would also develop an economic arrangement that recognizes and compensates Powertech's role in enabling this new venture. This would allow Powertech to show success in hydrogen, without the risk.

[Emphasis added.]

[42] There is dispute over the nature of this email:

- a) The plaintiff submits that it constitutes relevant admissions in this litigation.
- b) The defendants submit that it demonstrates that they have been open and conciliatory with the plaintiff.

[43] I discuss this email further below. However, to presage my discussion below, in my opinion, it could be inferred that the underlined sentences in the email indicate:

- a) Hyfluence was incorporated, financed, and staffed by December 11, 2022.
 - b) The employees that joined Hyfluence were important, if not crucial, to Powertech's ability to complete its contractual obligations safely.
 - c) Hyfluence intended to work with Powertech's customers.
- [44] The December 11, 2022 Email constituted the end of the prior relationships and the beginning of the new company. To that extent, all events can be delineated as occurring before or after the email.

The Contractual Relationships and Confidentiality Terms

- [45] Each of the individual defendants is covered by a separate contractual arrangement although there is some overlap on confidentiality terms. I outline below the nature of the contractual relationship with each of Das, Garandza, and Payot. I then address the consulting contract with Klopfer.

The Code of Conduct

- [46] As noted above, Powertech is a fully owned subsidiary of BC Hydro. All of the employees of Powertech were covered by the BC Hydro Code of Conduct. That policy requires employees to protect confidential information. Further, all data and information is the property of Powertech, and any information not publicly available is considered confidential information. This includes information relating to business, employees, customers, facilities, operations, contractual relationships, technology, and day-to-day events.
- [47] Powertech employees also owe obligations upon departure. The Code of Conduct indicates that employees have continuing obligations to maintain the confidentiality of all non-public information and third-party confidential information. The Code of Conduct further requires the return of any property and information on the termination of employment. The Code of Conduct confirms that any work product produced within the scope of employment belongs exclusively to Powertech.

The Defendant Das

- [48] Das did not have a "non-complete" clause in her employment contract. However, Powertech alleges that Das was a fiduciary.
- [49] Das was employed by Powertech for almost 20 years. It is undisputed that Das was frequently promoted over her time at Powertech. Commencing in October 2019, she held the position of "Director of the Advanced Transportation Group". That group includes the HIG. Powertech says that she had a high degree of management, control, and authority. She reported directly to the CEO. She attended most Board of Directors meetings, but only when there were discussions of the HIG and her areas of work. She received confidential information including technical information and strategic marketing information. Powertech says that she was part of the "leadership team" consisting of senior directors and

management at Powertech.

- [50] Powertech says Das managed the team of engineers, programmers, and technicians, all of whom were involved in working on hydrogen fuelling systems. In addition, she was responsible for capital expansion of the business including:
- a) expanding the group's market share;
 - b) expanding the group's revenue;
 - c) maintaining and developing relationships with the group's customers and clients;
 - d) assessing customer accounts, product needs, and specific operations;
 - e) making proposals for the provision of hydrogen fuelling stations.
- [51] Powertech says that Das was instrumental in preparing the strategic plan regarding the growth of the hydrogen infrastructure group. It also notes that Das was a key liaison between Powertech and the five Customers and their contacts. These are the five Customers that this application seeks to restrain Das from soliciting.
- [52] I discuss the defendants' submission on Das' employment status below. In short, they say that she was "middle management" and she was paid on the regular BC Hydro pay scale.

The Defendant Garandza

- [53] Garandza was employed by Powertech commencing in 2017. She was a senior engineer. There is no allegation that she was a fiduciary, but the plaintiff alleges she was an important member of the HIG.
- [54] As part of her employment contract, Garandza agreed to a 12-month "non-compete" term following termination of her employment. The contract stated that the non-compete provision was necessary because Garandza had access to highly sensitive confidential information. In the employment contract, Garandza agreed that a breach of the non-compete agreement would result in irreparable harm to Powertech.
- [55] The defendants argue that Garandza's "non-compete" clause is presumptively invalid because it is too broad (covering the entirety of Powertech's business).
- [56] Garandza was specifically responsible for the development of a suite of software, the POS, which interfaced with the hydrogen delivery stations. She worked with a contractor (the "Supplier") that created the POS software.

The Defendant Payot

- [57] Payot was employed as an electrical technologist in the HIG.
- [58] Again, Powertech does not allege that he was a fiduciary but says that he was a key member of the HIG.

[59] Although labels are not particularly informative in this exercise, the plaintiff notes that Das described Payot and Garandza as "top" or "Tier 1 or Tier 2" employees.

The Defendant Klopfer

[60] As discussed in more detail below, Klopfer was retained as a consultant to work for Powertech. He was initially retained by Das (on behalf of Powertech) for that role. The nature of his work related to advice and consulting in connection with the evaluation of potential strategic alternatives and growth for the HIG's business.

[61] Klopfer signed a nondisclosure agreement (NDA) on April 5, 2022, in which he agreed to the following (among other terms):

- a) The term of the agreement was five years, unless terminated by either party on ten days' notice.
- b) To keep any confidential and proprietary information received in the strictest secrecy and confidence.
- c) To use all reasonable precautions to protect confidential and proprietary information and only use the information for the purposes contemplated under the NDA.
- d) Not to disclose the confidential and proprietary information received, except with the consent of Powertech.
- e) To return any confidential and proprietary information received immediately upon request.
- f) Any breach of the terms of the NDA would have a material adverse effect on, and result in irreparable damage to, Powertech. In the event of such a violation, Powertech would be entitled to seek an injunction and other equitable relief.

[62] Klopfer undertook a second parcel of work pursuant to a consulting agreement dated July 28, 2022. This work was covered by the existing NDA and a new agreement that contained a six-month "non-compete" clause. Pursuant to the consulting agreement, Klopfer was provided with access to certain confidential and proprietary information. I discuss the nature of that information below.

[63] In response to this application, in part, Klopfer says that he deleted all of Powertech's confidential and proprietary information on September 13, 2022. He says he took that step when it became clear that Powertech had no intention of partnering with Hyfluence.

The Nature of the Business Opportunity

- [64] In the period before December 2022, Powertech had expended considerable time, effort, and resources to develop certain confidential and proprietary information and to design, implement, and market the hydrogen fuelling technology and processes. That work had been undertaken by the HIG team within Powertech where each of the defendants, Das, Garandza, and Payot worked.
- [65] Powertech also took steps to pursue the corporate opportunity to grow the fuelling systems business. Both sides agree that the business is in its infancy. The development and growth of that opportunity was an important mandate for the Board of Directors of Powertech.
- [66] The defendants submit that, while working with Powertech, they promoted the idea that the HIG should be "spun off" into a new free-standing company. It is evident that the Board of Powertech was not keen on that idea. The Board wanted to grow the opportunity within Powertech.
- [67] For reference, I refer to Customers "#1" through "#5". I have not named those entities. The defendants deny that Customers #1 and #4 were, in fact, customers of Powertech. In the end, the distinctions between the five Customers are not important for my reasons. However, I do find it relevant that the Customers include multinational oil and gas companies and a Japanese auto-maker. These entities are interested in the opportunities presented by hydrogen powered vehicles. I infer from this information that the growth potential is "significant".
- [68] In approximately March 2022, Das, in pursuit of her employment obligations, commenced discussions with consultants regarding an exploration of strategic and market alternatives available to advance the HIG's business. Through that process, Das met the defendant Klopfer.
- [69] Das sent to Klopfer Powertech's standard NDA. Klopfer signed that NDA on April 5, 2022. Klopfer undertook the consulting work as requested.
- [70] Later in April, Das appeared before the Powertech Board of Directors to request investment into the HIG. According to Powertech, the Board was interested in the request but required a formal business strategy or plan. They requested further market and financial analysis to support the request.
- [71] In approximately June 2022, Das discussed with Powertech's Board the concept of the corporate spin-off of the HIG. Powertech's Board advised that the opportunity would be pursued internally.
- [72] In July 2022, Das recommended that Klopfer act as a consultant to provide a report to Powertech. In furtherance of this consultation, Das sent Klopfer a number of "slide decks" which detailed Powertech's business and strategic planning. In her email to Klopfer, Das indicated that the information was "confidential and protected by the NDA".

- [73] Klopfer's consulting agreement required him to evaluate and quantify the opportunity for Powertech's hydrogen fuel systems business and to develop a strategic plan to advance that opportunity. He was also tasked with forecasting Powertech's future scope of operations and estimating the capital investment required in order to scale up the business.
- [74] Klopfer undertook this work pursuant to a consulting agreement dated July 28, 2022 and the existing NDA. Pursuant to the consulting agreement, Klopfer was provided with access to Powertech's confidential and proprietary information including:
- a) hydrogen-related reports compiled by Powertech;
 - b) customer proposals, internal costing sheets, and information regarding hydrogen fuelling stations, dispensers, and tube trailer loading systems;
 - c) the mechanical layout, and the mechanical bill of materials regarding a hydrogen filling station created by Powertech.
- [75] Items b) and c) above were sent to Klopfer by Das.
- [76] Klopfer submitted his report on September 13, 2022. He then presented it to the Powertech Board on October 18, 2022. The Board tasked Das with taking further steps to develop a strategic plan that would implement Klopfer's recommendations.
- [77] Das undertook that work and presented the "Hydrogen Infrastructure Strategic Plan" to the Board on November 3, 2022. The Board approved the plan (but not the funding request) on the same day.
- [78] I note that despite the apparent approval by the Board, the position of the defendants was that they were frustrated by the Board's refusal to proceed with the plan that Klopfer recommended.
- [79] As discussed below, the events that are the basis of this action intervened before the final approval by the Board. For reference, Powertech's Board approved the request to fund the Hydrogen Infrastructure Strategic Plan on April 12, 2023.
- [80] As discussed below, Powertech alleges that during this same period (prior to December 9, 2022), Das and Klopfer were working against the interests of Powertech. The plaintiff alleges that this work constituted a breach of Das' employment and fiduciary obligations and Klopfer's contractual obligations. Powertech became aware of the result of those efforts (but not all of the evidence) upon receiving the December 11, 2022 Email from Klopfer and Das.
- [81] On Friday, December 9, 2022, seven employees of Powertech, including Das, Garandza, and Payot, resigned. They gave five weeks' notice. Upon receipt of the December 11, 2022 Email, Powertech terminated their employment, effective immediately.
- [82] The defendants allege that, at a meeting on December 13, 2022, Poulin indicated that Powertech would take all steps necessary to "squish" the competition. The meaning of his comment is a matter of dispute. The plaintiff submits that he was speaking of unfair

competition. The defendants say that he was setting out his plan to use all measures to crush Hyfluence. In my opinion, nothing turns on this statement. It is to be expected, following a departure like the defendants', that a CEO would "rally the troops" and express confidence that the prior employer would prevail in any competition against the new venture.

The Impugned Conduct

[83] Before discussing the defendants' conduct, I need to address the procedural steps taken.

[84] Powertech commenced this action on January 13, 2023.

[85] I set out above the contents of the December 11, 2022 Email. Upon receiving it, Poulin, on behalf of Powertech, retained a forensic accountant, Peter Sanford ("Sanford") of Deloitte to conduct a forensic investigation of the digital record of the communications between the players.

[86] Sanford completed his review in April 2023, and he swore an affidavit on April 20, 2023. The results of his review led to this application.

[87] Powertech sought to set down an urgent application. That led to the appearance before Milman J. on May 16, 2023, and the interim interlocutory injunction.

[88] The plaintiff alleges that Sanford's investigation discovered the evidence described below.

[89] On April 14, 2022 (nine days after his initial retainer), Klopfer had the following email exchange with a group that included Das and her husband:

a) Klopfer wrote:

While I bring my own entrepreneurial bias to this, it does seem to me that under the auspices of the Crown Corp. this fuelling systems business is unlikely to garner the resources nor expediency of execution needed to scale the growing market and build a leading product/systems manufacturing company. Discussions on some form of pure play venture need to continue, in my view. I would hate to see our economy and community miss the opportunity to capture this facet of a generational energy and economic transition.

b) On April 18, 2022, Das responded and thanked Klopfer.

c) On April 20, 2022, Klopfer requested, and Das provided, her personal (i.e., non-work) email.

[90] Also, on April 20, 2022, Das exchanged texts with her husband:

a) Das wrote, "Ron Klopfer just sent me a note asking for my personal email address Things could get interesting."

b) Das' Husband replied, "he he" and "Don't you want [our children] to have generational wealth?? Haha".

- [91] On August 16, 2022, as requested by Powertech, Das sent emails to four separate customer contacts in order to introduce them to Klopfer. She indicated that he was a consultant supporting the company's hydrogen infrastructure growth strategy. Each recipient was with one of Customers "#1" through "#5". She indicated that Powertech was asking Klopfer to interview its "key contacts" in the hydrogen industry. (The plaintiff points to this as evidence that Customers #1-#5 were, in fact, customers and important contacts.)
- [92] On or about September 20, 2022, Das traveled to Los Angeles on a business trip for Powertech. I infer from the text exchange with her husband that instead of, or in addition to, promoting Powertech, she promoted her potential new venture. I draw that inference from the following texts between Das and her husband:
- a) Earlier in the evening:
 - i. "Big opportunity" and "Stars have aligned"
 - b) Later that evening:
 - i. "Had dinner with [Representative of Customer #1] was really good"
 - ii. "So pretty amazing opportunity"
 - iii. "[Representative of Customer #1] told me confidentially that he is going to start his own thing - buy [Customer #1] assets and he is fully financed already"
 - iv. "Interested in our newco"
 - v. "Will finance it"
 - vi. "And we get all the stations"
- [93] On this point, the defendants submit that because this Representative of Customer #1 was pursuing a new business venture, he was not a client or customer of Powertech's. They also submit that, because it was dinner, Das was on her own time. Further, she did not pay for the dinner. Finally, the defendants note that these were simply discussions about a prospective investment that eventually went nowhere.
- [94] The plaintiff submits that the defence submissions miss the point of Das' obligation to her employer. If this Representative was planning to change the nature of Customer #1's business, Das had an obligation to bring that information, and that opportunity, to Powertech.
- [95] On September 26, 2022, there was an exchange of texts between Das and Klopfer. It is apparent from the texts that Das was meeting the same Representative of Customer #1 for drinks. Das and Klopfer discussed whether Klopfer should attend. Klopfer was concerned that if he attended, rumours may start. Klopfer sent the last text in chain, in which he wrote:

The more I think about it, the more I see an immediate merger with "[Representative of Customer #1]'s venture as untenable, however there are lots of other forms of partnership or investment we can discuss. Thoughts: 1) we can access the whole market as an independent co, whereas under [Representative of Customer #1] we only service his network, a smaller captive market, and we don't see the same economies of scale nor cost reduction potential 2) Hydro might be able to swallow the refuelling business going to a BC-based pure-play company (that PR story is workable) but having it pried out of their hands directly into foreign ownership might cause a real fight. 3) In terms of value/upside [Representative of Customer #1] likely can't compete with founder ownership in our venture, which I believe could be valued at 10-20x revenues.

[96] It is my understanding that "founder ownership" means the shares (or the percentage of shares) that Das and Klopfer would take upon incorporation of Hyfluence.

[97] On October 7, 2022, Das sent a text to Klopfer:

Hey Ron - [My husband] and I were just chatting about the Powertech situation. I'm really feeling like Pierre [Poulin] is trying to inoculate himself from me leaving. I think hiring the consultant will be to learn from me, get to know the team, etc. Basically his spy. He is trying to get into the [business development] side of things. I feel like we need to get the tier 1 and 2 people on our list to have the confidence the Powertech is really crippled. I'm wondering if we need to offer up better packages to the key people to ensure they will come. Otherwise I'm feeling like the risk of is getting pretty high. I don't think Pierre will let the team leave under him. Offering them another 10% to stay would be in his power.

[Emphasis added.]

[98] I return to this text below. For obvious reasons, it is a main focus of the plaintiff's submissions. I note, however, that in an affidavit, Das explained that she wrote this text in a moment when she was frustrated with Poulin because, among other things, on short notice, he had asked Das to attend a conference in the United States over the (Canadian) Thanksgiving weekend.

[99] I further pause to note the plaintiff's submission that some of Das' texts in this, and other, exchanges have been deleted from her phone. In response, the defendants note that if Das set out to delete incriminating texts, then she would surely have deleted this one.

[100] On October 11, 2022, Das and Klopfer exchanged texts. It is apparent that they were planning a presentation (or "pitch") to a potential client or investor. Das wrote:

Hi - just realized that my slides have Powwrtech (sic) branding - is that an issue?

I modified existing presentations I have for this meeting with [Customer #1]

Klopfer advised that the branding was not a concern.

- [101] The plaintiff submits that this is a clear example of the defendants using the plaintiff's work product and confidential information. In his affidavit, Klopfer admits that he used parts of the "pitch deck" to market to potential investors in the new venture. He minimizes the importance of any information included in it.
- [102] On October 30, 2022, Das sent a Powertech document named "Hydrogen Plan" to her personal email. The next day, her husband asked how she had shared that information with Klopfer, and raised the prospect that Powertech might be able to see that she had shared it. In the end, Powertech did trace that email. I infer from the fact that Das was concerned about Powertech being able to trace the movement of this document that Das was doing something that she did not want Powertech to know about.
- [103] In early November 2022, Das approached the Information Technology Division at Powertech and asked them to switch her work phone number to be her personal phone number. (As noted, Powertech seeks injunctive relief in relation to that phone number.)
- [104] On November 5, 2022, Das sent a group text (which she appears to have later deleted, but it was recovered from one of the recipients' phones). Das wrote:
- Hi everyone - wanted to give you an update on how things are progressing. Ron and I had an update call with [Customer #1] this morning. At the Board level they want to see out venture succeed. The head of [Customer #1 North America] also spoke with [Customer #4] who is also interested in us. They are looking for us to potentially be their long term equipment supplier.
- [105] Das had further text exchanges that appear to have been deleted from her phone:
- a) On November 21, 2022, with Customer #5.
 - b) On November 25, 2022, with [Representative of Customer #1] wherein she states that "it is looking like Hyfluence could be operational sooner rather than later." (This text was later recovered by the plaintiff.)
- [106] As noted above, the employees of Powertech resigned en masse on Friday, December 9, 2022. The defendants note that each employee provided five weeks of notice. They point to the retaliatory step taken by Powertech. Each of the resigning employees was immediately fired.
- [107] Two days later, on Sunday, Klopfer and Das sent the December 11, 2022 Email.
- [108] Following the departure, Powertech became aware of later steps taken by the defendants. In March and April, Customers # 1 and #5 sent emails regarding introductory meetings with representatives of Hyfluence. Presumably, due to "autofill" on the customers' email, the emails were mistakenly addressed to the Garandza's and Das' Powertech email addresses. Hence, Powertech learned of these meetings.

- [109] On November 18, 2022, Garandza sent an operating manual regarding alarms and settings to her personal email. The plaintiff points to this email as evidence of the defendants obtaining confidential information for use in the new business endeavour. Garandza notes that she regularly worked on projects on her home computer which had better specs for that type of work. Hence, she forwarded the information to herself by email. I address her evidence below.
- [110] As noted, Garandza worked on the POS proprietary software that operated Powertech's hydrogen dispensing stations. When she resigned from Powertech, Garandza was in possession of her work laptop computer. On December 15, 2022, Powertech advised her that a courier would be coming to her home to pick up the laptop within the hour. Sanford's forensic investigation of that computer indicated that a specific external USB Drive was plugged into the computer within the hour between notice being provided and the pick-up. Powertech says that the specific USB Drive has not been delivered by Garandza. Garandza says she did deliver it.
- [111] In addition, Powertech says that, during her employment (2017-2022), Garandza forwarded more than 10,000 work emails to her personal email address. Powertech further submits that Garandza's responsive affidavit only addresses approximately 700 of those emails. Further, the plaintiff says that there is no evidence that she "double deleted" the emails, leaving the prospect that she could fish them out of her "Deleted" folder.
- [112] I set out Garandza's response to these allegations below.
- [113] Sanford also says that when Powertech picked up Payot's laptop, the hard drive was missing. I address Payot's response below.

Nature of the Injunctions Sought

[114] Powertech seeks two forms of relief:

- a) Restraint on use (and return) of confidential information: Powertech seeks prohibitory injunctions preventing the use of Powertech's confidential and proprietary information and mandatory injunctions forcing the return of that material.
- b) Restraint on the use of the phone number that was converted to Das' personal number for business purposes.
- c) The (mandatory relief of) return:
 - i. of the Garandza USB Drive, and
 - ii. of the Payot missing Hard Drive.
- d) Restraint on solicitation of Powertech Customers: Powertech seeks a prohibitive injunction restraining the defendants from, directly or indirectly, soliciting Powertech Customers #1-#5.

- e) Restraint on working with the Supplier of the POS software: Powertech seeks a prohibitory injunction restraining the defendants from working with the supplier of Powertech's POS software, either directly or indirectly.

Defence Position

[115] I discuss the legal analysis below. However, in order to confine the issues, I find it convenient to set out the defence position here.

Confidential and Proprietary Information

[116] Regarding the "confidential information", as noted above, the defendants acknowledge that they have common law obligations regarding confidential and proprietary information belonging to Powertech. The defendants consent to an order enjoining them from using or disclosing any of Powertech's confidential or proprietary information. As noted above, they seek a term that this order is without prejudice to their position that injunctive relief is not justified.

[117] It is evident that there is a dispute between the two sides as to what constitutes "confidential and proprietary information". They were not able to settle that dispute during the hearing. I address my solution to that dispute below.

Das' Phone Number

[118] The defendants say that Das followed the ordinary protocol for switching a phone number from Powertech to personal.

[119] The defendants further say:

- a) There is no evidence of customers phoning Das on that number.
- b) To the contrary, Das says that since she resigned, there have been no calls from any potential customers on that line.
- c) The phone number itself is integrated in her life. Hence, the balance of convenience would favour:
 - i. allowing her to keep the number; and
 - ii. Powertech advising the five listed Customers of the new contact information.
 - iii. In the meantime, should any communication aimed at Powertech arrive upon her phone, she will forward it to Powertech.

[120] I address the issues of irreparable harm and balance of convenience below.

The USB Drive and Garandza Emails

- [121] The defendants' position is that these physical items do not exist and the emails have been double deleted.
- [122] With respect to any USB Drive connected to the laptop before returning it, Garandza says that she did so to ensure the software was up to date and to confirm that there was no personal information on the laptop. She further says that she sent that specific USB Drive back with the computer. (Powertech denies this.)
- [123] Hence, she denies that she is in possession of the USB Drive, and says there is no factual basis for a mandatory injunction.
- [124] With respect to the multiple emails sent to her personal email address, Garandza's affidavit explains that her regular practice was to forward information to her personal email. She did this because she worked on an older Lenovo laptop that had a unique set of software development tools for handling these tasks. For example, Powertech raised the fact that she forwarded a specific document relating to UBC in November 2022. Garandza says she worked on that manual and emailed the finished product back to her Powertech email. Finally, Garandza's affidavit states that she has "double deleted" all confidential information.
- [125] It follows that, in theory, the defendants will consent to these forms of relief. They agree that if these items exist, they should be returned. But, the defendants say they do not exist.
- [126] In answer to the plaintiff's allegation that she might improperly use the POS software, Garandza says that external consultants created the software specifically for Powertech's stations. The POS software is not compatible with any other hydrogen fueling system. Hence, it is of no value to Hyfluence. As noted, one of those consultants is the Supplier that the plaintiff seeks to enjoin the defendants from retaining.

Payot Hard Drive

- [127] Payot says that the company laptop that he returned was not missing a hard drive. He says:
- a) Prior to the events in this lawsuit, he was using his work laptop, and the hard drive began to fail.
 - b) The I.T. department could not quickly fix his hard drive, so they provided him with a decommissioned laptop.
 - c) He took the hard drive from the decommissioned laptop and installed it in his laptop.
 - d) He was on vacation during the period when the events occurred (December 9-15). The old laptop, missing its hard drive, was in his cubicle.
 - e) Powertech obtained the old laptop and believed that Payot had removed the hard drive. It is true that he had taken that step, but for the reasons set out above.
 - f) The I.T. department at Powertech should have records indicating all of this.

[128] Thus, again, in theory, the defendants would consent to this relief if Payot had the Hard Drive.

Suppliers

[129] The defendants submit that there is no case law that supports the concept of restraining the new company from contracting with the plaintiff's suppliers. I address the arguments in full below.

Deleted Texts

[130] As noted above, the plaintiff alleges that Das deleted texts. The defendants submit that she did not, and that these apparent deletions were a function of the application of Sanford's forensic software.

[131] In my opinion, that is an issue for document production and, ultimately, the trial judge in the action. I cannot determine the truth of either position.

The Hydrogen Plan and "Pitch Deck"

[132] As noted, the plaintiff points to the evidence that Das forwarded confidential information to Klopfer for use in meetings with potential investors.

[133] Das says that the Hydrogen Plan was a skeletal outline of the new business plan that did not contain any confidential information. She says that the information was "common knowledge in the industry". I outlined the nature of Klopfer's evidence above.

[134] Given the time that has passed since its creation, I consider this item to be a matter of document disclosure in the action, as opposed to an element of the injunction application.

Legal Principles

[135] The test for an injunction is not in dispute. It was set out in *RJR-McDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334:

- a) Is there a serious question to be tried?
- b) Has the applicant demonstrated that it will suffer irreparable harm if an interim injunction is not granted?
- c) Does the balance of convenience favour the granting of an injunction?

[136] In British Columbia, this test is often addressed as a two-part test. The difference being that "irreparable harm" and the remaining factors of the "balance of convenience" are often analysed together. As discussed below, I find that there is significant overlap between these two parts of the test.

[137] Powertech acknowledges that:

- a) prohibitive injunctions require the lower threshold of "serious question to be tried" on a preliminary assessment; and
- b) mandatory injunctions require higher threshold, described as a strong prima facie case, or "likely to succeed at trial".

[138] These are not rigid or formulaic boxes to be analysed. The fundamental question in each case is whether the granting of an injunction is just and equitable in the circumstances.

Powertech's Position

[139] Powertech submits that where intellectual property is involved, injunction is an oft-used remedy, especially where:

- a) the plaintiff has a legal right to the property; and
- b) there is a real threat or actual invasion on that legal right.

[140] On that basis, in these circumstances, Powertech submits that the proper remedy is for the court to order the return of confidential information.

[141] Powertech relies upon *EnWave Corporation v. Dehydration Research, LLC*, 2022 BCSC 637:

[43] The burden with respect to the first requirement, is there a serious question to be tried, is relatively low. The applicant must simply satisfy the court that its claim is not frivolous or vexatious. The court should not embark on a prolonged or extensive examination of the merits of the underlying case: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at paras. 39-40.

[45] The difference between a mandatory and a prohibitive interlocutory injunction is that a mandatory interlocutory injunction directs a defendant to undertake a positive course of action, such as taking steps to restore the status quo. By contrast, a prohibitive interlocutory injunction requires a defendant to refrain from doing something: *CBC* at paras. 15-16.

[142] Powertech also argues that, where there is an existing negative covenant (such as an NDA), injunctive relief is more readily granted: *Global Internet Management v. McLeod*, 2003 BCSC 652:

[82] As a general principle, the Courts have more readily granted injunctive relief where there has occurred a clear breach of a negative covenant such as those contained in the Confidentiality Agreements. The rationale is that the parties have agreed that a particular act not be done and the issuance of an injunction merely enforces that negative bargain between the parties. (R.J. Sharpe, *Injunctions and Specific Performance*, 2nd ed. looseleaf (Aurora, Ont.: Canadian Law Book Inc., 2002)).

[143] Powertech further submits that where more than one employee leaves the plaintiff, and where only one of those employees is a fiduciary, then the non-fiduciary employee is fixed with the duties of (and is vicariously liable for the actions of) the fiduciary. The plaintiff relies on the decision of Estey, C.J.H.C. (as he then was) in *Alberts et al. v. Mountjoy et al.*, 16 O.R. (2d) 682 at 692, 1977CanLII 1026 (S.C.):

As well, where a defendant of lower rank such as the defendant Butt might have claimed immunity from the duties attaching to a fiduciary, he lost that advantage in joining with Mountjoy in the new business venture which successfully diverted the business opportunity of his former employer and fixed him with the same fiduciary duty as Mountjoy.

[144] This passage from *Alberts* was followed by Burnyeat J. in the trial decision in *Clayburn Industries Ltd. v. Piper*, [1998] B.C.J. No. 2831 (S.C.).

[145] On the basis of *Alberts* and *Clayburn Industries Ltd.*, the plaintiff says that if I accept that allegation that Das was a fiduciary, then all defendants can be enjoined along with Das.

[146] Powertech further submits that a departing fiduciary is restricted from taking a corporate opportunity that ripened during her employment. This is particularly true when the defendant left with the goal of acquiring that opportunity for her own profit.

[147] The plaintiff submits that the evidence adduced establishes both a serious question to be tried, and a strong *prima facie* case.

[148] Not surprisingly, Powertech's submission proceeds on the basis that there is a strong *prima facie* case that Das was a fiduciary.

Defence Position

[149] Before addressing the elements of the test for an injunction, the defendants submit that this case will turn on what constitutes "fair" versus "unfair" competition. As noted above, the defendants consent to an order enjoining them from using confidential or proprietary information. Das and Klopfer say that they have informed all employees of Hyfluence to delete any information in their possession that came from Powertech. They submit that, on that basis, there is no need for injunctive relief. Any competition (at this stage) will be "fair".

[150] As noted above, the defendants (tacitly) acknowledge that certain improper steps were taken. They note that people seldom behave perfectly upon departing employment. However, in this case, Das was not under any "non-compete" terms. Hence, she was navigating the unclear common-law waters without the benefit of contractual terms as her compass.

[151] The underpinning of the defence position is: Even if the court assumes that there were breaches by the defendants, what would the legal effect of those breaches be? The defendants say that, regardless of prior breaches, they are entitled to compete (fairly) with Powertech. Further, any "non-compete" clause, if it existed, would be limited in duration.

On that basis, the defendants say that the court should only intervene to the extent that the defendants have consented to injunctive relief. With that position in mind, the defence submissions focused upon the second and third parts of the injunction test: "Irreparable Harm" and "Balance of Convenience".

- [152] I discuss the defence position on whether Das was a fiduciary below. The defendants say she was not. However, the defendants say that, even if I should find that she was a fiduciary, she is now entitled to compete with Powertech.
- [153] The defendants also note that the consulting contract with Klopfer precluded him from competing for a period of six months after termination. On any interpretation of that contract, that period has expired.
- [154] On the general application of the test in injunction cases, the defendants submit that when the injunction can have the effect of deciding the entire litigation (i.e., where it may put a defendant out of business), then the higher test (strong prima facie case) is applicable.

Analysis

[155] I now turn to the elements of the test for an injunctive relief and determine whether each allegation is established on either standard:

- a) serious issue to be tried (for prohibitive injunctions); or
- b) strong prima facie case (for mandatory injunctions).

[156] The parties agree that the "strong prima facie case" requires the chambers judge to be satisfied that there is a strong likelihood on the law and evidence that the applicant will ultimately be successful if the matter proceeds to trial.

[157] First, I address the allegation that Das was a fiduciary and breached her fiduciary duties.

Was Das a Fiduciary and Was She in Breach?

[158] The plaintiff alleges that the defendant Das was a fiduciary. It does not argue that Klopfer and the other defendants were fiduciaries.

[159] Powertech submits that Das was a fiduciary based upon her position, plus the level and nature of her work.

[160] Counsel for the defendants acknowledges that this allegation is not "frivolous and vexatious". Hence, it nears or meets the "serious question" standard. However, defence counsel argues that it does not meet the higher "strong prima facie case" standard. The defence submits:

- a) Das' position as one of "middle management";
- b) an organization chart that Poulin produced on December 5, 2022, placed a question mark beside Das' name;

- c) although she had access to the Board, she could not take any steps without Board approval. She had limited influence or scope;
- d) she had access to customer contacts and confidential information, but that access, on its own, is insufficient to establish a fiduciary obligation; and
- e) Powertech was not vulnerable to Das.

[161] On the basis of those submissions, the defence submits that Das' relationship with Powertech lacked the essential elements for finding of fiduciary obligations (see *England Securities Ltd. v. Ulmer*, 2023 BCCA 241 at paras. 47-52:

- 1) She did not have scope for the exercise of discretion or power.
- 2) She could not unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- 3) Powertech was not peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[162] In short, I do not accept the defence submissions on the existence of these elements. In my opinion there is a strong *prima facie* case that Das was a fiduciary. I make that determination on the basis of a combination of factors:

- a) She had knowledge of, and access to, the key contacts within Powertech's customer base.
- b) She had full access to Powertech's confidential 1) technical information, 2) strategic planning, and 3) pricing and marketing information.
- c) She reported directly to the CEO and the Board of Directors.
- d) As an example of the scope of her work, at the September 2022 meeting with the Representative of Customer #1 in Los Angeles, the Representative advised Das of a potential shift in the market and a significant change regarding Customer #1. Das clearly had the scope to exercise discretion on how to handle that information. She unilaterally exercised her discretion (improperly) to keep that information secret from her employer.
- e) Although she required Board approval to move ahead with projects, she was the person tasked with moving the strategic plans forward. That is not unusual in any organization of this size.
- f) The December 11, 2022 Email provides evidence that Powertech was, in fact, vulnerable to Das' departure. That email informs Powertech that, based upon her actions, Powertech would not be able to complete its current contractual obligations or safely continue in the hydrogen industry. In my opinion, that email is strong evidence of Powertech's vulnerability to Das.

[163] On the basis of these combined factors, I find that there is a strong prima facie case that Das was a fiduciary. Further, in my opinion, there is a strong prima facie case that Das breached her fiduciary obligations to Powertech as well as her duties of good faith and fidelity and duty of confidentiality. There is evidence, among other things, that she did the following:

- a) While employed by Powertech, she used at least some of Powertech's confidential information to market to prospective investors.
- b) In September 2022, when meeting with the Representative of Customer #1 in Los Angeles, on a trip funded by Powertech, she discussed the prospect of moving potential work away from Powertech and to her new venture.
- c) She took steps to hire away from Powertech a number of important employees. She orchestrated the simultaneous resignation of those employees. Two days later, she sent the December 11, 2022 Email.

[164] Das' motive for taking these steps will be an issue for the trial. However, her text message of October 7, 2022, suggested that the reason for that move was to "cripple" Powertech.

[165] As noted, in an affidavit, Das stated that she wrote the word "cripple" while "frustrated" with Poulin. In my opinion, if this matter proceeds to trial, Das' actions both before and after the date of her "cripple" comment could support a finding that her intent was, in fact, to hurt Powertech. There is evidence of a strategy designed to inhibit Powertech's ability to continue its work in the field of hydrogen delivery. In particular, the act of hiring away important employees and then telling Powertech (in the December 11, 2022 Email) that it could not complete existing contracts suggests that she acted on her intent to "cripple". I find that, within the entire context, her comment satisfies the "strong prima facie case" test when considering her motive.

[166] I mentioned above that the defendants submit that the December 11, 2022 Email was an attempt a reconciliation with Powertech. They say that it was not sent with mal-intent. I will leave that issue to the trial judge who hears the testimony. However, based on the evidence before me, that is not my interpretation of the email.

[167] Of course, the final determination of these questions will be for the trial judge. At this stage, I can only say that on the evidence before me, there is a strong prima facie case that Das was a fiduciary and breached her duties to Powertech.

[168] While I am on the subject of fiduciary obligations, I accept the submission from the plaintiff that, in circumstances where two parties, one fiduciary and one employee, set out on a new business venture in competition with the former employer, the non-fiduciary becomes laboured with the yoke of the obligations of the fiduciary. In other words, the injunctive relief would be toothless if only Das was enjoined and the other defendants were not.

Klopfers Breaches

[169] Although he was clearly not a fiduciary, I find that there is a strong prima facie case that Klopfer breached his contractual obligations to Powertech. I accept Powertech's submission that Klopfer's affidavit admits to the following conduct:

- a) He was retained by Powertech to prepare materials for a strategic plan.
- b) He took (at least some of) the strategic planning material that he prepared for Powertech and used it for Hyfluence's purposes.
- c) Included in this information was a Powertech "pitch" presentation and Powertech's customer list and 2023 forecasts.

[170] I note that Klopfer indicates that he expected that Powertech would partner with Hyfluence. He suggests that his use of Powertech's confidential information to market to investors was very limited. In my opinion, both his "expectation" and the limited nature of the confidential information that he used are both irrelevant to the issue of whether he was in breach of his contractual obligations. I find that there is a strong prima facie case that he was in breach of his contractual obligations.

[171] Powertech alleges that Klopfer, and others, took a corporate opportunity that belonged to Powertech. Powertech's cause of action against Klopfer might be broken down into the following undisputed facts:

- a) Prior to 2022, Klopfer had experience in the tech field, but no experience in the hydrogen delivery industry.
- b) He was introduced to Powertech in April 2022 to assist with market research and strategic planning in the hydrogen delivery industry.
- c) He was paid for his services, and he was bound by his consulting contract. He was prohibited from competing with Powertech in that field and from using the confidential information.
- d) By December 11, 2022, he was the CEO of Hyfluence, a company that received private equity funding and that had hired seven recently resigned Powertech employees. The new venture markets itself as designing and producing hydrogen fueling stations.

[172] On the evidence before me, there is a strong prima facie case that Klopfer used his work under the consulting agreement to achieve his new position within Hyfluence and thus the corporate opportunity attached to it.

[173] If those facts are established at trial, there is a strong prima facie case against Klopfer for breach of contract for the purpose of taking the corporate opportunity.

Breach of Employment and Common Law Duties by Garandza and Payot

- [174] Powertech seeks mandatory injunctive relief against Garandza and Payot. The plaintiff alleges that these two employees took physical storage devices and digital copies of confidential information.
- [175] As noted above, Garandza and Payot deny that they took, or are in possession of, any confidential information. They also deny possession of any storage devices containing confidential information.
- [176] Given that evidence from the two individuals defendants, I am unable to say that there is a strong prima facie case against them. I accept that the plaintiff has suspicions about their conduct and record keeping. In my opinion, those suspicions do not rise to the level of a strong prima facie case. Instead, this will be an area of discovery within the action and a matter to be established at trial.
- [177] Despite that assessment, as noted, the defendants agree that if the items exist, then they should be returned. They consent to the injunctive relief, in theory.

Breach of Duty of Confidence by All Defendants

- [178] Powertech seeks a prohibitive injunction against the use of confidential information. As noted the defendants consent to an injunction on the non-use of confidential information.
- [179] While that may seem to lead to an obvious conclusion, I note that there is a dispute between the parties on the terms of that injunction and the definition of confidential information.
- [180] The plaintiff, of course, can only apply to enjoin the future use of any confidential information. In other words, if the allegation is that Das breached her duty of confidence by using confidential information, then:
- a) to the extent those acts were performed in the past, there is a cause of action for damages;
 - b) to the extent that similar acts may happen in the future, the plaintiff can pursue injunctive relief.
- [181] On the allegation of breach of confidence, I am faced with a situation where the plaintiff has suspicions of ongoing misuse by the defendants. In response, the defendants have provided affidavits specifically addressing those concerns. Das and Klopfer say that they have instructed every Hyfluence employee to ensure that no confidential information is used at Hyfluence. In addition, the defendants consent to an injunction prohibiting any use of confidential information.
- [182] I find that the plaintiff has established that there is a serious question to be tried, but the defendants' consent to injunctive relief removes the need for me to consider the matter further. I return to discuss the nature of the confidential information below.

Civil Conspiracy

[183] The plaintiff alleges that the defendants engaged in a civil conspiracy.

[184] The elements of a civil conspiracy are established where:

- a) the predominant purpose of the defendant's conduct is to cause injury to the plaintiff (regardless of whether or not the means used by the defendants are lawful or unlawful); or
- b) the defendant's conduct is unlawful and directed toward the plaintiff, and the defendant should know in the circumstances that injury to the plaintiff is likely to happen (and does happen).

(Canada Cement LaFarge Ltd. v. BC Lightweight Aggregate, [1983] 1 S.C.R. 452 at 471.)

[185] The plaintiff also relies on Baring v. Grewal, 2022 BCCA 42 at para. 52, which describes the following elements:

[52] The judge properly identified the following elements of the tort of conspiracy:

1. An agreement between two or more persons;
2. Concerted action taken pursuant to the agreement;
3. The conspirators:
 - (a) intended to cause damage to the plaintiff, if the action is lawful, or
 - (b) knew or ought to have known that their action would injure the plaintiff, if the action is unlawful; and
4. Actual damage suffered by the plaintiff.

[186] Above, I found a strong prima facie case as against Das and Klopfer. There is a further strong prima facie case that:

- a) Das and Klopfer agreed to set up Hyfluence;
- b) they took concerted action in that regard; and
- c) they knew (i.e., hoped) that their actions would damage Powertech.

[187] Given that we are not at the trial stage, I received limited evidence of damage suffered. However, I infer that there is evidence of damage based upon the contents of the December 11, 2022 Email. Das and Klopfer knew that Powertech would be damaged.

[188] I find that there is strong prima facie case for civil conspiracy.

Irreparable Harm

- [189] The next stage of the test for injunctive relief requires the plaintiff to establish that it will suffer irreparable harm if the injunction is not granted. This portion of the test is often considered alongside the "Balance of Convenience" test, particularly when the defendant submits that it will suffer irreparable damage if the injunction is granted.
- [190] The plaintiff submits that the bar for establishing irreparable harm is relatively low: it is only required to show a meaningful risk of irreparable harm.
- [191] Powertech says that the facts of this case clearly establish that irreparable harm will be:
- a) Powertech invested heavily into the HIG on the basis that it is an industry in its infancy. Powertech had the expectation that it would establish itself at this early stage and then be ready to expand (or "scale") the production and the supply of its technology.
 - b) With the breaches of Das and Klopfer, there is a substantial risk of a continuing loss of clients, market share, and goodwill.
 - c) The misappropriation and use of Powertech's confidential information means that the information is no longer confidential.
- [192] Powertech further submits that the December 11, 2022 Email establishes the existence of irreparable harm. The defendants indicated in their email that, because of the steps the defendants took, Powertech will not be able to (safely) meet its contractual obligations. Hence, it will suffer reputational and contractual damage that cannot be repaired.
- [193] Powertech points to *Brian L. Leipert Financial Services Ltd. v Reiter*, 2019 SKQB 310, as an analogous decision. Powertech says there are several analogous factual references on the issue of irreparable harm:
- [4] The defendants, Shirley Reiter and Jason Moller, were long-term employees of Argus and LFG, respectively. On October 15, 2019, they both resigned their employment without notice. Immediately thereafter, they began working as partners in their own business, Elev8 Wealth Advisors Inc. [Elev8], as a competitor of Argus and LFG. It is alleged that they solicited clients of Argus and LFG to become clients of Elev8, and that this solicitation may even have occurred prior to their resignations.
- [56] The harm includes a substantial risk that the core of Argus' business will be converted to Elev8 by means of the continued use of confidential information to solicit clients of Argus and LFG. This confidential information is not just client lists. It is knowledge of clients' histories, their portfolios, and their needs and goals. This knowledge was gained by Ms. Reiter and Mr. Moller as a result of their employment with Argus and LFG. The risk of irreparable harm is increased by the fact that the majority of Argus' staff have joined Elev8. Loss of other employees of the former employer, as a result of recruitment by the defendants, could lead to a further loss of business and overall market share, which damages are difficult to isolate and quantify. Finally, Argus has lost its third-party

administrator, Johnstone's Benefits, to Elev8. Losing this key industry partner may have a significant detrimental effect on Argus' business, the damages from which will be very difficult to isolate.

- [194] Powertech says that there is a substantial risk of losing business, market share, and the growth opportunity because of the improper use of confidential information.
- [195] I noted above the defendants' position focusses primarily on the relief sought by the plaintiff, as opposed to the defendants' alleged breaches. The defendants say that the plaintiff will not suffer irreparable harm. The defendants rely on the reasoning in *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, where Groberman J.A. wrote for the court:
- [142] *Barton Insurance and Imperial Sheet Metal Ltd.* are both cases dealing with the ability of former employees to accept employment with companies that compete with their former employers, and to solicit business from clients of the former employer.
- [143] The general law in the area is summarized in *Imperial Sheet Metal Ltd.*, first with respect to non-fiduciary employees:
- [34] Once the employment relationship ends, the non-fiduciary employee is permitted to engage in fair competition with a former employer. Fair competition has traditionally meant that the employee may, without fear of legal consequences, establish a business that competes directly or indirectly with the business of the former employer. A correlative right is the right of the employee to work for a competitor of the former employer. As well, in both instances, the employee may bring to that business the knowledge and skill acquired while working for the former employer. The right to compete includes the right to solicit the customers of the former employer "whose names and addresses he has learned during the period of his service". Again, it must be emphasized that former employees cannot make use of printed information compiled by the former employer, including a customer list. The use of the employer's documentation or confidential information would amount to "unfair competition". Subject to that limitation, it has to be understood that employers cannot claim a monopoly over their clients or customers. This explains why employees are routinely required by their employers to execute confidentiality, non-competition or non-solicitation agreements. With respect to the latter two points see *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2007 BCCA 22.
- [144] The court then discusses the situation of fiduciary employees:
- [43] For purposes of deciding this appeal, I need only restate a few basic and well-recognized propositions under this heading. Not only does the fiduciary employee have a continuing duty to keep confidences, he or she has a continuing duty to act in the best interests of the former employer. Curiously, however, the law permits the fiduciary employee to compete with the former employer so long as he or she does not actively solicit the customers of the former employer for a reasonable period of time. Furthermore, this obligation is not

breached if it is the client or customer that seeks out the fiduciary.

[Citations omitted].

[145] This general law was applied in both Barton and Imperial Sheet Metal Ltd. In both cases, the former employer was denied relief against the employee.

[196] The defendants submit that there is no evidence of irreparable harm. Regardless of whether Das was a fiduciary or Klopfer was in breach, they submit that both would be allowed to compete (fairly) with Powertech at some point. At most, Das would be precluded from "actively" soliciting the customers for a reasonable period of time.

[197] On the issue of irreparable harm, the defendants submit that there was, in fact, limited business with the five Customers:

- a) Customer #1 purchased one "low-value ancillary" item, and no hydrogen fueling stations. As of December, 2022, there was no prospect of any future sale to Customer #1.
- b) Customer #2 had not ordered any hydrogen fueling equipment in the past five years.
- c) Customer #3 did purchase hydrogen fueling station equipment from Powertech. However, this sale was not confidential. The sales were advertised, and Powertech branding appears on the stations.
- d) Customer #4 has never purchased from Powertech.
- e) Customer #5 (like Customer #3) has purchased customized systems. This sale, and this relationship, were not confidential. They were publicized.

[198] I note that the plaintiff's evidence is that it had ongoing commercial relationships with each of the five Customers. Powertech says it had expended significant effort into developing its relationship with each of the five Customers:

- a) With respect to Customer #1: Powertech has active contracts of approximately US\$150,000. It has marketed to the Customer in an attempt to secure an order for ten fueling stations.
- b) Customer #2 has purchased equipment valued at \$250,000 in the past ten years. Further, in the months prior to her departure, Das prepared proposal for the supply of stations to Customer #2.
- c) Customer #3 purchased "significant" hydrogen fueling station equipment from Powertech. The contact information, business leads, and commercial opportunities were kept confidential.
- d) Customer #4: Powertech says that it put effort into developing a business relationship with this Customer. Das played a significant role. There is no evidence of any sales to this Customer.

- e) Customer #5 (like Customer #3) has purchased customized systems which constitutes "significant" business. The marketing information was confidential.

[199] In this respect, I note that businesses (for example, law firms) expend funds in an effort to attract new clients. They often respond to requests for proposals. They get to know some of the important contacts within the potential client. While those may constitute "commercial relationships", it does not mean that the prospect is a "Customer".

[200] I further note that the defendants' affidavits say that:

- a) neither Das nor Hyfluence has solicited any transactions with the Customers;
- b) Klopfer says that, as part of his consulting agreement, he met with a representative of four of the Customers. The meetings were less than 30 minutes which means that he could not develop any relationship.

[201] One might infer from the separate wording, and the division of submissions on this issue, that Klopfer has solicited work from the Customers. However, that is not an issue I need to decide.

[202] I note that Das and Klopfer acknowledge that they met with contacts within Customers #1, #3, and #4 before December 2022 regarding an investment in Hyfluence. However, they did not seek orders from those Customers. They acknowledge that, on September 20, 2022, Das discussed a vague general proposal that the Representative of Customer #1 would invest and Hyfluence which would then "get all the stations". However, nothing came of that concept.

[203] Finally, the defendants submit that the market for hydrogen fueling stations is burgeoning. The defence position is that there will be more demand in the market than either Powertech or Hyfluence could supply.

[204] I note that the bulk of the defendants' position was submitted under the heading "Balance of Convenience". In my opinion, it is also applicable to the issue of "Irreparable Harm."

[205] I am left with a significant conflict in the evidence:

- a) Powertech says that it had ongoing commercial relationships with Customers #1- #5.
- b) The defendants say that there were no pending sales to any of the Customers.

[206] Although I am left with that conflict on the evidence, I have scant evidence of the risk of harm that is actually faced by Powertech. I infer that this gap exists because the hydrogen industry is in its infancy. The question is whether Powertech will suffer an irreparable loss because it will (or may) miss out on the anticipated growth in that sector.

[207] For the reasons set out below, I resolve the "irreparable harm" issue under the heading "Balance of Convenience."

Balance of Convenience

[208] I address this part of the test in relation to the following forms of relief in the following order:

- a) The solicitation of Work from the Five Customers
- b) The Phone Number
- c) Soliciting Work from the Supplier

[209] I note that, due to the defendants' consent to these forms of relief, I have excluded from my discussion below the plaintiff's application for injunctive relief in relation to:

- a) the use or disclosure of confidential and proprietary information;
- b) the return of confidential and proprietary information in the possession;
- c) the return of the USB Drive and the Hard Drive (which the defendants say do not exist).

The solicitation of work from the Five Customers

[210] As noted, this paragraph of the notice of application constitutes the main dispute between the parties on this application. On the basis of the affidavit evidence:

- a) the plaintiff says that there is a significant risk that it will lose market share and a growth opportunity due to the breaches by the defendants. That loss cannot be compensated in damages;
- b) the defendants submit, based upon the evidence of Das, that a restriction on their ability to solicit business from the Customers poses a threat to the economic viability of Hyfluence.

[211] In addressing the balance of convenience, I accept both of the following propositions:

- a) Loss of market share can constitute irreparable damage: *Millennium Specialty Alloys Ltd. v. Sali*, 2023 BCSC 914 at para. 22.
- b) The prospect of an injunction preventing the defendants from continuing in business (or providing for their family) weighs heavily in favour of that party: *961945 Alberta Ltd (Servicemaster of Edmonton Disaster Restoration) v. Meyer*, 2018 ABQB 564 at para. 77.

[212] In this regard, I consider it important that Powertech is a well-funded subsidiary of BC Hydro. Approximately 10 percent of Powertech's business is focussed on the hydrogen field.

[213] Conversely, Hyfluence is a new company completely focussed on the supply of products to the hydrogen fueling industry. I do not have information on its financial structure. However, it is clearly significantly smaller than Powertech.

[214] In addressing the "balance of convenience", I return to the submissions of the plaintiff describing the reasons that the damage will be irreparable. Again, the plaintiff submits:

- a) Powertech invested heavily into the HIG on the basis that it is an industry in its infancy. Powertech had the expectation that it would establish itself at this early stage and then be ready to expand (or "scale") the production and supply of its technology.
- b) With the breaches of Das and Klopfer, there is a substantial risk of a continuing loss of clients, market share, and goodwill.
- c) Further, the misappropriation and use of Powertech's confidential information means that the information is no longer confidential.
- d) Klopfer agreed that injunction would be a fair and appropriate remedy.
- e) Hyfluence is a newborn entity. If Hyfluence fails, and Powertech is successful in this action, there is a good chance that it will obtain a dry judgment.

[215] I proceed on the following bases, which combine to inform my sense of whether this form of injunctive relief is just and equitable in the circumstances:

- a) A fiduciary is constrained from competing with their former employer (for a reasonable time) to allow the employer to solidify relationships with its customers upon the fiduciary's departure. Such competition, in the period immediately following departure, would be unfair. This reasoning accounts for the temporal element of the prohibition.
- b) Fiduciaries and employees are barred from using or disclosing confidential information.
- c) Das, Klopfer, and the other former employees continue to owe a duty of confidentiality to Powertech. The defendants have consented to an order enjoining them from the use or disclosure of any confidential information.
- d) There was no "non-compete" clause in Das' contract. However, if Das was restricted from competing with Powertech, the general law in this area would set a duration on that restriction in the range of 6-12 months.
- e) Das and Hyfluence have stated that they have not solicited any sales from Customers.
- f) Klopfer's "non-compete" was for a period of six months, which is now expired.
- g) If Powertech establishes that the defendants have acted improperly (by early solicitation of Customers or use of confidential information), Powertech will have a claim in damages.
- h) In respect of the ability of the defendants to pay damages:
 - i. Powertech's real concern is that Hyfluence will be a success. If that occurs, and Powertech achieves a significant damage award, then Hyfluence will be able to pay it.
 - ii. If Hyfluence does not succeed (really, if Hyfluence fails), then it is unlikely that the litigation will proceed to trial. However, Powertech will have had the opportunity to regain its position in the market.

[216] I am further mindful that an injunction should not be used as a means of limiting or gaining an improper advantage against the plaintiff's competition.

[217] In terms of the duration of any injunctive relief, I note the decision of the Court of Appeal in *TCT Logistics Inc. v. Nordeen*, 1999 BCCA 597:

[27] This case raises an issue that did not arise for consideration in *Barton Insurance Brokers Ltd. v. Irwin* (1999), , 40 C.C.E.L. (2d) 159. That issue concerns the duration of injunctive relief ordered concerning a person determined to be part of senior management or a key employee of an enterprise. As to that, I should think courts ought to be careful to limit the grant of equitable relief to that reasonably necessary to protect the interests threatened. In such circumstances, I believe that generally any injunctive relief should be time limited, perhaps with liberty to the moving party to seek to extend the duration of any such relief granted. Each case will, of course, fall to be decided on its particular circumstances but generally, save in exceptional circumstances, I doubt if it would be easy to persuade a court to initially grant an order extending this sort of equitable relief beyond approximately one year from the date of termination of employment and in many cases, a shorter period may be deemed adequate.

[Emphasis added.]

[218] On the basis of all the factors described above, I find that the balance of convenience on these facts favours Hyfluence. In particular:

- a) Powertech seeks to enjoin solicitation of five Customers.
- b) Powertech has now had eight months to refill the personnel in the HIG to be able to complete its existing obligations and re-establish relationships with the Customers. I was not directed to any evidence of the duration needed for Powertech to get back onto even field.
- c) Enjoining the defendants from solicitation until the trial could significantly exceed the volume of the relief to which Powertech is entitled.
- d) Further, enjoining Hyfluence from marketing to the Customers may seriously inhibit its economic viability.

[219] I noted above the existence of Milman J.'s interim interlocutory injunction. That order has a mix of terms preventing different types of contact with each Customer.

[220] However, given that approximately eight months have now passed since the departure of the defendants, I decline to enjoin them from soliciting work from Customers #1 - #5. In my opinion, parsing the difference between "8 months" and "12 months" of restriction on soliciting customers places too fine a point on the injunctive remedy. The goal is not to punish Hyfluence or to benefit Powertech. Instead, it is to ensure fair competition. In my opinion, a just and fair result would not be achieved by extending the prohibition on solicitation to 12 months, or until the trial date.

[221] On that basis, because of the passage of time before hearing this application, I dismiss the application for the relief sought in para. 2 of the amended notice of application. Having said that, I would have granted the injunction to the 8-month date.

[222] Again, as set out at the outset of these reasons, my decision relating to solicitation of customers is based upon the evidence before me on this application. If the plaintiff establishes at trial that the defendants breached their duty of confidence or misused information to "springboard" into business, then the plaintiff's claim for damages may exceed this period.

Restriction on Use of the Phone Number

[223] Again, in my opinion, the balance of convenience on this issue favours the defendant Das for the following reasons:

- a) Powertech is concerned about contact with a total of five Customers. It has had eight months to provide those Customers with the new or correct contact information of Das' replacements.
- b) Das indicates that she has not received any calls from the Customers on that number. (There is, however, evidence of her texting business contacts.)
- c) That phone number is fully integrated into her life, including being the emergency contact for her children's activities.
- d) Das agrees to forward any misdirected communications that are seeking Powertech.

[224] I do not perceive that the harm to either party would be "irreparable" if this relief is granted or not granted. In my opinion, the balance of convenience favours Das. Put simply, Powertech only has to contact five entities. Das would have to notify significantly more entities.

[225] I dismiss the plaintiff's application for the relief set out in para. 1(b).

Soliciting Work from the Supplier

[226] I turn now to the request that the defendants be enjoined from contracting with the suppliers of Powertech's POS software.

[227] I understand that the underpinning of this paragraph is:

- a) Powertech, through Garandza, retained a supplier (a software company) to create the POS software that would allow end-point users of hydrogen filling stations to pay for the product that they purchase.
- b) Powertech believes that if Hyfluence is allowed to use that same supplier, then Hyfluence will gain a competitive advantage on Powertech.

[228] In short, I do not accept that this is a proper area for injunctive relief.

[229] First, in my opinion, I would be enjoining the Supplier from pursuing profitable work when:

- a) the Supplier is not a party to this application; and
- b) if Powertech wanted to prohibit the Supplier from contracting with competitors, then Powertech should have included those terms in the Supplier's contracts.

[230] Second, I am not satisfied that there is adequate authority for such an injunction.

[231] Third, I cannot see how such a contract would cause irreparable harm to Powertech.

[232] On that basis, I dismiss this paragraph of relief in the application.

Defining "Confidential Information" of Powertech

[233] I set out above the full text of the relief sought by the plaintiff relating to confidential information. As noted, the defendants consent to an order prohibiting them from using or disclosing any "confidential information", but they do not agree with Powertech's construction or definition of that term. They note, for example, that the notice of application makes reference to:

- a) the organization of Powertech,
- b) the assets of Powertech, and
- c) the customers of Powertech.

[234] The defendants say that the existence of certain entities being "customers" of Powertech is not confidential. For example, Powertech's branding appears on one customer's hydrogen fueling station. Further, the assets of Powertech are disclosed on public financial statements.

[235] On the other hand, the defendants generally agree that all of the documents listed in para. 1(a)(i)-(xxx) are confidential documents.

[236] It is not possible for me to envision all of the permutations of information that may be cloaked (by Powertech) with some level of confidentiality.

[237] On the basis of my analysis above, I would restrict para. 1(a) of the order to the following wording:

- a) Using or disclosing any documents or information confidential to Powertech including documents or information relating to trade secrets, copyright and intellectual property. For greater clarity, Powertech's Confidential and Proprietary Information includes para. 1(a)(i)-(xxx) (those paragraphs would then follow).

Summary and Conclusion

[238] In summary, by consent:

- a) the defendants are enjoined from using or disclosing any documents or information confidential to Powertech including documents or information relating to trade secrets, copyright, and intellectual property. For greater clarity, Powertech's confidential and proprietary Information includes: the document described in para. 1(a) (i)-(xxx);
- b) the defendants will return all paper and electronic copies of confidential and proprietary information in their possession or control (if any exist) within seven days of this order; and
- c) the defendants Garandza and Payot (respectively) will return the USB Drive and the Hard Drive (if they exist) within seven days of this order.

[239] The plaintiff's application for the following relief is dismissed:

- a) The restraint against soliciting the business of Customers #1- #5 after the date of release of these reasons.
- b) The restraint against working with the Supplier of POS software.
- c) The restraint against the use of Das' personal phone number (subject to her agreement to redirect any messages meant for Powertech).

Costs

[240] The plaintiff seeks costs of this application.

[241] The defendants seek costs, assessed as special costs, due to the nature of the allegations made against the individual defendants.

[242] I note that the defendants consented to certain paragraphs of relief, but disputed the breadth of those paragraphs. Further, I have found that:

- a) the plaintiff has a strong prima facie case against the defendants in some parts of the action; but
- b) the balance of convenience lies with the defendants (from this date forward).

[243] On that basis, I am not inclined to find that either party was successful on this application. On that basis, I award costs in the cause. There is no basis for an award of special costs on this application.

"A. Ross J."

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