

Federal Court



Cour fédérale

Date: 20200212

Docket: T-1642-16

Citation: 2020 FC 229

Ottawa, Ontario, February 12, 2020

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

FLUID ENERGY GROUP LTD.

**Plaintiff/
Defendant by Counterclaim**

and

**MUD MASTER DRILLING FLUID SERVICES
LTD., HEARTLAND ENERGY GROUP LTD.,
a corporation incorporated in Seychelles,
HEARTLAND ENERGY GROUP LTD.,
a corporation incorporated in Nevada, and
ALCHEM DRILLING FLUID SERVICE LTD.**

**Defendants/
Plaintiffs by Counterclaim**

ORDER AND REASONS

Introduction

[1] The Plaintiff [Fluid Energy] appeals the Prothonotary's October 24, 2019 decision dismissing its motion to remove the "Confidential Information – Counsels Eyes Only"

designations [CEO] from documents produced by the Defendants in this patent infringement action. This appeal engages the terms of a protective order agreed to by the parties.

[2] As is often the case in patent litigation, sensitive information was to be exchanged between the parties to the litigation, and they agreed to the terms that would govern disclosure. The original Order dated April 11, 2017, was issued on consent. It is typical in this Court in patent litigation that the parties agree to the terms of a protective order and then ask the Court to issue the Order, on the agreed terms, on consent.

[3] It is generally expected, and most certainly best practise, to file the consent motion with affidavit evidence that attests that there is information that will be disclosed in the pre-trial steps that must be protected as it is confidential, sensitive, or valuable. It is of note that in this matter, the motion leading to the granting of the initial protective order relied only on the written consent of the parties to the draft order and the Notice of Motion. No affidavit was apparently filed by either party. The Notice of Motion (which is not evidence) stated the grounds for the requested order as follows:

Each parties [*sic*] confidential and sensitive information is valuable to them. This information is not of any public interest and it should be protected to prevent competitors from gaining an unfair access to such information and gain illicit competitive advantages therefrom.

In the interests of justice, some confidential information should remain confidential and communication of such documents should be confined to this Court, the solicitors for the involved parties and any experts retained by the parties, or others as agreed between the parties.

Granting the Protective Order would not be contrary to the public interest as the financial and commercial information is only of

interest to the producing party and its competitors for the sale of synthetic acid compositions for the oil and gas industry.

[4] On this basis, the requested protective order issued. It was subsequently amended, again on consent, when additional defendants were added to the action. The amended protective order is dated March 13, 2019 [the Protective Order].

Protective Orders and Confidentiality Orders

[5] Recent jurisprudence of this Court has highlighted the uncertain state of the law with respect to protective orders, confidentiality orders, and hybrid orders: See *dTechs EPM Ltd v British Columbia Hydro & Power Authority*, 2019 FC 539 at paras 23, 40 [*dTechs*]; *Paid Search Engine Tools, LLC v Google Canada Corporation*, 2019 FC 559 at paras 21-25 [*Paid Search Engine*].

[6] In *dTechs* at paragraphs 23-29, Justice Lafrenière conducted a comprehensive analysis of the distinction between protective and confidentiality orders, and the Court's authority to issue them. In *Paid Search Engine* at paragraphs 17-45, Justice Phelan provided an equally thorough discussion of the distinction.

[7] Protective orders arise in the context of disclosure between the parties in the pre-trial phase of the action. Materials that are only exchanged between parties in the pre-trial steps are not made available to others unless a party provides it or files it with the Court. Even in the absence of a protective order, disclosure of documents to persons outside the litigation raises the

issue of compliance with the implied undertaking rule. Prothonotary Tabib in *Seedlings Life Science Ventures LLC v Pfizer Canada Inc*, 2018 FC 443 at paragraph 3, reversed 2018 FC 956, described the rule in this manner:

The implied undertaking rule is a now well accepted principle of common law, pursuant to which a party to whom documents or information are transmitted in the course of pre-trial discovery is taken to have given an undertaking to the Court that he or she will not disclose or use them for any purpose other than the litigation in which they are produced. Any collateral or ulterior use constitutes a contempt of court.

[8] Protective orders prevent disclosure of confidential materials exchanged in the pre-trial process to those outside the litigation. A variant on the usual protective order is one that further limits those in the litigation process itself who are entitled to review the documents to counsel or experts. Orders of this type are granted only in unusual circumstances: *Arkipelago Architecture Inc v Enghouse Systems Limited*, 2018 FCA 192 [*Arkipelago*]. The Federal Court of Appeal stated at paragraph 11 that “in the context of harm to a commercial business interest, a [Counsel’s and Expert’s Eyes Only] order is warranted where the disclosure of the confidential information at issue presents a ‘serious threat’ that is ‘real, substantial, and grounded in the evidence’.”

[9] On the other hand, confidentiality orders, as provided for in Rule 151, apply to prevent materials filed in Court from becoming accessible to the public. Such materials are sealed.

[10] Hybrid orders address both document control during the pre-trial process, and confidentially filing documents with the Court, most usually for the limited purpose of pre-trial motions.

[11] Considerations around issuing protective orders and confidentiality orders are slightly different and the two types of orders must be delineated. Regrettably, some of the earlier jurisprudence of the Court fails to acknowledge this distinction and care must be taken in applying those decisions. A clear focus on the type of order sought determines the appropriate legal test to apply.

[12] Fluid Energy relies on the test for a confidentiality order pursuant to Rule 151, found at paragraph 53 of *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*]:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[13] I acknowledge that some members of the Court have taken this approach when considering requests for protective orders: See for example, *Canadian National Railway Company v BNSF Railway Company*, 2019 FC 281; *Pliteq, Inc v Wilrep Ltd*, 2019 FC 158.

[14] While not an issue in this appeal, because we are dealing here with a protective order that has been issued by the Court rather than whether one that is sought should be issued, I agree with the analyses of Justice Phelan in *Paid Search Engine* and Justice Lafrenière in *dTechs*.

Protective orders assist in the orderly and expeditious conduct of litigation, and are distinct from confidentiality orders. The test for a Rule 151 confidentiality order as set out at paragraph 53 of *Sierra Club* is not at play when a protective order is requested, and it was not engaged when the Protective Order here was issued.

[15] The issuance of a protective order is governed by the test set out at paragraph 60 of *Sierra Club*:

Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a “confidential nature” in that it has been “accumulated with a reasonable expectation of it being kept confidential” as opposed to “facts which a litigant would like to keep confidential by having the courtroom doors closed” (para. 14).

[16] This is essentially the test set out by the Federal Court in *AB Hassle v Canada (Minister of National Health and Welfare)*, 1998 CanLII 8942 (FC) at paragraphs 29-30 with slight modification to include both subjective and objective elements. To obtain a protective order, the applicant must demonstrate that:

1. The information at issue has been treated at the relevant times as confidential;
2. The information is confidential in nature; and
3. On a balance of probabilities, the applicant’s proprietary, commercial, and scientific interests could reasonably be harmed by the disclosure of the information.

[17] As noted earlier, such orders are typically obtained by motion in writing under Rule 369 with a motion record containing an affidavit attesting to facts sufficient to establish each of these three elements.

The Subject Protective Order

[18] The Protective Order sets out three sorts of confidentiality designations: (1) Confidential Information, (2) Confidential Information – Counsel’s Eyes Only, and (3) Confidential Information - Counsels Eyes Only With Respect to Mud Master and Alchem. The first two designations are relevant to this appeal and they are defined in the Protective Order in the following terms:

“Confidential Information” shall mean any information, document, or thing that any Party reasonably and in good faith believes to contain confidential information used by it in, or pertaining to, its business and that is not generally known, and which that Party would not normally reveal to third parties or, if disclosed, would require such third party to maintain in confidence.

“Confidential Information – Counsel’s Eyes Only” shall mean such materials as the Party reasonably and in good faith believes to contain particularly sensitive information that the designating Party reasonably believes is of such nature and character that disclosure of such information would be harmful to the designating Party.

[19] The preamble to the Protective Order aptly states that it only applies to govern the manner in which the parties deal with information exchanged in the course of the litigation. Absent a separate, specific confidentiality order, no party is entitled to file information confidentially with the Court. However, the Protective Order specifically provides that in support of a motion for further or better answers to undertakings given on discovery, or to rule

on objections made on discoveries, the parties may file materials in sealed envelopes to be treated as confidential in accordance with Rule 152 of the *Federal Courts Rules*.

[20] The Protective Order is therefore a hybrid order as it contemplates filing confidential material with the Court in limited specific circumstances. That said, the only aspects of the Protective Order at issue here relate to the designation of materials as CEO, and the challenge to that designation relates only to the exchange of documentary information between the parties.

[21] The Protective Order states that any party may designate documents as Confidential or Confidential–CEO by marking the document accordingly. It also includes a mechanism whereby a party who believes a document has been improperly marked may challenge the designation by writing to the designating party. Upon challenge, the designating party must either remove the designation or respond that it has reviewed the challenged document and maintains the designation in good faith.

[22] Where the parties are unable to resolve designation disputes after good faith attempts, the challenging party may bring a motion to the Court to challenge the designation of the documents at issue. Paragraph 13 of the Protective Order specifically states that on such a challenge “[t]he Party asserting confidentiality shall have the burden of establishing the appropriateness of the designation, except that a Party claiming that information designated by the other as confidential is in the public domain shall have the burden of proving such public knowledge” [emphasis added].

The Motion Before the Prothonotary

[23] Pursuant to the Protective Order, the Defendants designated certain documents as CEO. Engaging the challenge mechanism in the Protective Order, Fluid Energy brought a motion seeking removal of the CEO designation from all such designated documents, and an order directing that those documents may be disclosed to certain of its officers. The Notice of Motion stipulated the relief sought, as follows:

An Order further to the Amended Protective Order dated March 13, 2019, removing the designation “Confidential Information – Counsel’s Eyes Only” (CEO) from the following documents produced by the Defendants, and listed in Schedule 1 of their Affidavits of Documents (AODs), and directing that those documents may be disclosed to Clay Purdy (Purdy), Fluid’s Chief Executive Officer and corporate representative in this litigation, and Dr. Markus Weissenberger (Weissenberger), Fluid’s Chief Technology Officer, for the purpose of and use in this litigation, including the pending examinations for discovery.

[24] The Prothonotary dismissed the motion and provided oral reasons for so doing. First, she held that while Fluid Energy framed its request as a motion to remove the CEO designation from certain documents, the relief sought effectively amounted to variation of the Amended Protective Order:

I find that the effect of the relief sought by the Plaintiff is a variation of the original protective order that the Plaintiff agreed to. The Plaintiff says that that is not the case; rather, they are simply challenging every single CEO designation made by the Defendants, as they are entitled to do under the terms of the protective order.

I disagree. However, I will nonetheless consider the motion based on that interpretation of the Notice of Motion as well.

[25] As a motion to vary the order, the Prothonotary looked to Rule 399(2)(a) of the *Federal Courts Rules* which provides: “On motion, the Court may set aside or vary an order by reason of a matter that arose or was discovered subsequent to the making of the order.”

[26] She found that Fluid Energy had not demonstrated a change in circumstances or a compelling reason not directly considered when the Order was initially granted. Accordingly, considered as a motion to amend the Protective Order, it was denied:

I am not satisfied that the protective order should be varied so as to permit Mr. Purdy and Dr. Weissenberger access to the disputed documents.

[27] She then considered, and dismissed the motion based on Fluid Energy’s view that it was a motion to remove the CEO designation from all such designated documents. In so doing, she stated that she was not satisfied that the designated documents were in the public domain.

[28] The Prothonotary rejected Fluid Energy’s assertion that the burden lay with the Defendants to show that the complete Oil Safe AR formulation was never disclosed to Fluid Energy. Rather, she found that the proper interpretation of the challenge mechanism in the Protective Order required Fluid Energy to establish that such information is in the public domain, including disclosure in the various patents or prior disclosure to Fluid Energy, to refute the Defendants’ evidence that the documents were treated as confidential.

Pursuant to paragraph 13 of the protective order, a party asserting confidentiality shall have the burden of establishing the designation but a party claiming that information designated by the other party as confidential is in the public domain shall have the burden of proving such public knowledge.

I am not satisfied, based on the evidence before me, that the Plaintiff has demonstrated that information regarding the precise formulation of the Oil Safe AR product is in the public domain or was previously disclosed to the Plaintiff.

...

I find that a proper interpretation in my protective order is that it's for the Plaintiff to establish the information is in the public domain, and that includes disclosure in the various patents or prior disclosure to the Plaintiff to refute the Defendant's evidence. If that were not the proper interpretation, there would never be a need to have the provision placing a burden on the Plaintiff, as the Defendant would always bear the burden of establishing no public disclosure as part of establishing that the documents meet the definition of the designated category.

This is in keeping with the principles enunciated in the case law. The case law establishes that the CEO designation is appropriate where the documents fall within the defined category set out in the protective order.

When challenged, the designating party needs to put forward evidence to the effect that the disputed documents *prima facie* fall within the designated category.

With respect to whether the subset of disputed documents that relate to the formulation of the All Safe AR [*sic*] product, I am satisfied the Defendants bear the burden of burden of *prima facie* establishing the propriety of the designation made, have demonstrated that the documents properly fall within the designated CEO category.

The Defendants' evidence may not be exactly what the Plaintiff sought to receive in that there was no affidavit from Mr. McDonald, but I'm satisfied with the information put forward by Mr. Rowley was sufficient to establish on a *prima facie* basis that the disputed documents fall within the defined category.

Accordingly, I decline to exercise my discretion to remove the confidential counsel's eyes only designation from the subset of disputed documents that contain information regarding the formulation of the Oil Safe AR product.

[29] In addition to these documents containing information regarding the formulation of Oil Safe AR, she also considered the balance of the disputed documents, which includes various financial, inventory, and supplier information. She found that the Defendants had met their *prima facie* burden regarding both. The Prothonotary concluded by awarding the Defendants heightened costs based on her concerns about Fluid Energy's characterization of the relief sought, and the inclusion of certain documents in the motion that were clearly irrelevant.

Issues on Appeal

[30] The parties submitted a wide variety of issues for the Court to consider on this appeal. In my view, the relevant issues are:

1. Did the Prothonotary err in treating the motion as a motion to vary the Protective Order under Rule 399?
2. Did the Prothonotary err in articulating the legal test for removing the CEO designation pursuant to the challenge mechanism in the Protective Order?
3. If the Prothonotary erred, should the CEO designation be removed from any of the disputed documents?

Applicable Standard to this Appeal

[31] When reviewing discretionary orders made by prothonotaries, the standard of review for questions of law is correctness. The standard of review for questions of fact or questions of mixed fact and law is palpable and overriding error: *Hospira Healthcare Corporation v Kennedy*

Institute of Rheumatology, 2016 FCA 215 at para 79; *Housen v Nikolaisen*, 2002 SCC 33 at para 36.

[32] The first two issues of whether the Prothonotary erred by treating the motion as a Rule 399 motion to vary, or erred by articulating the wrong test for upholding a CEO designation are extricable questions of law reviewable for correctness: *Arkipelago* at para 8.

Analysis

1. *Was this a motion to vary the Protective Order?*

[33] Upon review of the transcript of the hearing before the Prothonotary, it is clear that she viewed the relief requested as an amendment to the terms of the CEO designation, rather than a challenge to that designation being placed on a number of the disclosed documents by the Defendants. The following passage shows her concern:

And the concern that I have is what this really appears to be is a motion to vary the protective order that was granted by the Court on the consent of and at the request of all the parties, including the Plaintiff. I now have the Plaintiff before me saying for every single CEO document -- and I'll get to the public nature issue later, but for every single CEO document, change the term so that these two people can see it. [emphasis added]

In effect, subject to what you have to say, that would appear to me to be a request to vary the protective order. And if that's the case, that's potentially a very different test in terms of what's transpired since it was issued to now.

[34] I agree with the Prothonotary that if what was being asked were that documents designated as CEO Documents could, with that specific designation, be viewed by counsel and

the two additional persons the Plaintiff named, then this would be a request to amend the terms of the Protective Order. However, the relief sought, as recited in paragraph 23 above, was for an Order “removing the designation ‘Confidential Information – Counsel’s Eyes Only’ (CEO)” from the referenced documents. That is not a request to amend.

[35] Admittedly, the Plaintiff also coupled its prayer for relief removing the CEO designation with a request that the documents could then be produced to certain named individuals representing the Plaintiff for “use in this litigation, including the pending examinations for discovery.” This additional relief was unnecessary as if the CEO designation were removed, then the Plaintiff would be able to disclose these non-CEO documents to those persons.

[36] Accordingly, I agree with the Plaintiff that to the extent that the Prothonotary viewed this as a motion to amend, she erred.

[37] However, as noted in her decision, she stated that notwithstanding her view that an amendment was being sought, “I will nonetheless consider the motion based on that interpretation of the Notice of Motion as well.”

2. *Was the wrong legal test for removing the CEO designation applied?*

[38] The Defendants submit that the Prothonotary applied the correct test for removing a CEO designation. The Prothonotary stated that the case law establishes that CEO designation is appropriate when the designated documents fall within a defined category set out in the protective order. Once challenged, the designating party, in this case the Defendants, must put

forward evidence that the disputed documents *prima facie* fall within the designated category. She was satisfied that the Defendants had established on a *prima facie* basis that all disputed documents were properly designated as CEO, and therefore declined to exercise her discretion to remove the CEO designation from any of the documents.

[39] The Defendants submit that the test and principles for challenging a confidentiality designation pursuant to a previously issued protective order are set out by the Federal Court of Appeal in *AB Hassle v Canada (Minister of National Health and Welfare)*, [2000] 3 FC 360 (FCA) [*AB Hassle FCA*]. The Federal Court of Appeal held at paragraph 11 that “issuance of a protective order in circumstances such as the present creates a presumption that any information of the type described in the order which is subsequently filed will be kept confidential subject to the exceptions described in the order.”

[40] In such circumstances, the Court should only grant a motion challenging the classification of a document in the clearest of cases, where it is obvious that the document does not fall within terms of the order. The party asserting confidentiality need only put forward evidence that the document *prima facie* falls within the class of documents set out in the order, and that the document has been treated by the party as confidential. Once these criteria are established, the burden then shifts to the challenging party to demonstrate that the document falls outside what was contemplated by the order or is not of a kind that the judge could have had in mind when he or she issued the order.

[41] Curiously, this test as articulated by the Federal Court of Appeal differs from that set out in the protective order at issue in that case. The challenge mechanism specifically provided:

In the event of a challenge to the confidentiality of designated Confidential Information, the Party asserting confidentiality shall have the burden of proving on a balance of probabilities that the information is, in fact, confidential. [emphasis added]

[42] The Court of Appeal acknowledged this provision but doubted that the terms of a protective order could tie the hands of a motions judge on a question of law. Further, it held that there are sound policy reasons backing its approach placing the burden of proof on the party challenging the designation. At paragraph 10, the Federal Court of Appeal noted:

Once a protective order has issued, it would be counter-productive if parties, who have no other choice but to file sensitive evidence and do so with a relatively secure judicial guarantee of confidentiality, were to live with the constant fear of facing routine attacks by adverse parties. The seeking and obtaining of a protective order would be a futile exercise if, whenever a document is filed under such order, the party invoking the order were routinely forced to start from scratch, face a burden similar to or more onerous than the one it has already overcome and reargue the very arguments that were accepted or dismissed by the judge issuing the order. [emphasis added]

[43] As is clear from the emphasized passage, the Court of Appeal was considering a situation where the protective order that issued did not issue on consent but following a contested motion: See *Ab Hassle v Canada (Minister of National Health and Welfare)*, 1998 CanLII 7657 (FC). In such circumstances, it noted that placing the burden on the party seeking to maintain the designation amounts, in effect, to requiring that it relitigate the matter.

[44] Although *AB Hassle FCA* is still good law, and binding on this Court, it is distinguishable on its facts.

[45] First, as noted, it was obtained by way of a contested motion and based on evidence provided by affidavit, the affiants of which had been cross-examined.

[46] Second, the discussion of the test for challenging classified documents at paragraphs 9-14 of *AB Hassle FCA*, as relied on by the Defendants, took place in the context of documents that had already been filed with the Court. The reasons clearly state that the presumption that a document falls within the classified category applies where the document is “subsequently filed” pursuant to the protective order. The test to be applied to rebut the presumption “at this stage in the proceeding” (once documents have been filed with the Court) is that a motion challenging the confidential nature of a document will only be granted in the clearest of cases: See *AB Hassle FCA* at paragraph 11. The dispute between the parties was focused on removing the confidential classification from documents filed with the Court such that the public, including competitors in the pharmaceutical industry who may have benefitted from the protected information, would have access. That is a situation materially different from a pre-trial exchange of documents between the parties.

[47] Accordingly, the policy bases underlying the test enunciated in *AB Hassle FCA* are not at play here. There, the Court found the specific circumstances justified departing from the challenge mechanism described in the confidentiality order. In line with the recent decisions of this Court that have sought to delineate clearly between protective and confidentiality orders, and

the requirements for granting such orders, the Court here, on these facts, cannot be bound by a case that dealt with removing a confidential designation from documents filed with the Court.

[48] Removing the designation in that case would have made the filed information open to the public. Here, the parties are concerned about disclosure of information to each other, and therefore sought a protective order prior to exchanging documents. Included in the Protective Order is a right to challenge the designation of information under each of the three categories of confidentiality. In my view, ignoring the express terms of the challenge mechanism contained in the Protective Order runs counter to the notion that including a challenge mechanism in a proposed CEO protective order is a factor that favours granting the order: See, for example, *Bard Peripheral Vascular Inc v WL Gore & Associates, Inc*, 2017 FC 585 at para 15. Moreover, as the Court does not rubber stamp proposed orders, the terms of the challenge mechanism had to have been acceptable to the Court when the Protective Order issued.

[49] Finally, it is noted that consistent with Rule 3, protective orders are intended to assist parties in moving litigation along to achieve the most just, expeditious, and least expensive determination of every proceeding on its merits. As noted in *AB Hassle FCA* at paragraph 8, “[i]n an ideal world, counsel would agree to the terms of the [order] and then abide by it.” I observe that includes abiding by the terms agreed upon to challenge disputed designations.

[50] The test that the Prothonotary ought to have applied is that which the parties agreed to and is set out in paragraph 13 of the Protective Order. The Defendants must establish, on a balance of probabilities, not merely on a *prima facie* basis, that the information is confidential in

nature, has been treated at the relevant times as confidential, and that their proprietary, commercial, and scientific interests could reasonably be harmed by its disclosure. Absent such proof, the information is not shown to be confidential. Only if the confidentiality of the information is established does Fluid Energy then bear the burden of proving that the information is in the public domain if it advances that position.

[51] For these reasons, I find that the Prothonotary applied the wrong legal test for removing the CEO designation. As observed by Fluid Energy, where on appeal it has been found that the Prothonotary erred in law, the appeal judge may substitute the decision below with his own: *Seedlings Life Science Ventures LLC v Pfizer Canada Inc*, 2018 FC 956 at paragraph 20. This then brings us to the third issue: Should the CEO designation be removed.

3. *Should the CEO designation be removed?*

[52] The issue is whether, applying the correct test to challenge the CEO designations, they ought to be removed from some or all the impugned documents.

[53] The first step in that analysis is whether the Defendants, who are asserting that these documents are confidential, have established on the balance of probabilities that they are indeed confidential. In short, have they met the test set out at paragraph 60 of *Sierra Club*? Have they (1) demonstrated that the information in question has been treated at all relevant times as confidential, (2) that the information is confidential in nature, and (3) that on a balance of probabilities their proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information?

[54] There are two categories of documents designated as CEO, which are described by the Defendants as the following:

1. Oil Safe AR formulation information (formulation data; raw ingredients of the various components, build sheets); and
2. The balance of the CEO documents (financial agreements, ordering/sales/shipping documentation, suppliers, and quantities sold).

[55] The Defendants submitted the affidavit of Steve Rowley, President of the Heartland Energy Group Ltd. of Nevada, and Vice-President of the Heartland Energy Group Ltd. of the Seychelles, two of the Defendants in this action, and the party that formulates Oil Safe AR. Prior to this, he was the owner of a business called Heartland Solutions that distributed products from Environmental Manufacturing Solutions, LLC, which manufactured Oil Safe AR. A number of agreements were entered into; however, in my view, the most important is the agreement in October 2012, between Fluid Energy and the Defendant Heartland Energy Group Ltd. of the Seychelles to manufacture and distribute Oil Safe AR.

[56] Mr. Rowley affirms that the “Oil Safe AR formulation is a trade secret” and that its “practice has always been never to disclose the whole Oil Safe AR formulation, even to its customers, distributors and licensees.” It is referred to as “one of Heartland’s most important assets and is highly guarded by Heartland.” Any disclosure is subject to a confidentiality agreement.

[57] Fluid Energy submits in its memorandum that it was made aware of the formulation for Oil Safe AR during its contractual relationship with Heartland. However, that claim is not made out. Its own affiant, Clay Purdy, Chief Executive Officer of Fluid Energy, affirms that it has been privy only to some of the formulation information:

While it is true that Fluid was privy to much of the composition of OilSafe AR, to my knowledge, Heartland and MacDonald held back certain information by, for example, using generic trade names for some chemical components, or not fully disclosing the chemical concentrations and components. [emphasis added]

[58] Moreover, the agreement between the parties stipulates that Fluid Energy shall maintain any disclosed information in confidence.

[59] On the basis of the record before the Prothonotary, and specifically the statements noted above, I find that the Defendants have shown on the balance of probabilities that the Oil Safe AR formulation information has been treated at all relevant times as confidential, that it is confidential in nature, and that their proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information. I further find that the formulation information in its entirety has not previously been disclosed to Fluid Energy.

[60] Additionally, the evidence in the record supports that the other challenged documents, relating to financial information, sales, suppliers, etc., are also confidential.

[61] Accordingly, I find that a Confidential designation on all challenged documents is warranted.

[62] Is the CEO designation warranted? Has it been applied to confidential documents that contain particularly sensitive information the disclosure of which to Fluid Energy would be harmful to the Defendants?

[63] An analysis must begin with the observation that generally documents disclosed in the pre-trial process are available to the opposite party for inspection, review, and analysis. Limiting that role to counsel is exceptional and that should only be granted in unusual circumstances.

[64] The record reveals that the relationship between these parties is difficult and each mistrusts the other. It also reveals that they are now competitors in the same industry and market. Steve Rowley attests that it is his belief that if Fluid Energy is provided access to the CEO documents it may use the information to “make changes and improve its own products,” modify its business practices, and undercut the Defendant’s position in the market. This concern relates to both categories of CEO designated documents.

[65] Those beliefs may seem extreme, particularly considering the implied undertaking rule. However, I am satisfied, based on the history between these parties, and the conduct between them prior to this litigation, that it is a belief reasonably held by the Defendants. Specifically, I find that it meets the definition of a CEO designation agreed to by these parties, as the Defendants in good faith reasonably believe it to be of such nature and character that disclosure of such information would be harmful to them.

[66] Accordingly, while the appeal is allowed, in part, the motion by Fluid Energy to remove the CEO designations will be dismissed.

ORDER IN T-1642-16

THIS COURT ORDERS that:

1. The appeal is allowed and the Order of the Prothonotary is set aside;
2. The motion to remove the CEO designation placed on Documents produced by the Defendants is dismissed; and
3. The Defendants are entitled to a single set of costs.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1642-16

STYLE OF CAUSE: FLUID ENERGY GROUP LTD. v MUD MASTER
DRILLING FLUID SERVICES LTD. ET AL

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: DECEMBER 19, 2019

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DATED: FEBRUARY 12, 2020

APPEARANCES:

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