CITATION: Behold Control Equipment Inc. v. Race Mechanical Systems Inc., 2024 ONSC 6098
COURT FILE NO.: CV-19-00633450-0000
DATE: 20241104

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

BEHOLD CONTROL EQUIPMENT INC.

Plaintiff

AND:

RACE MECHANICAL SYSTEMS INC. and 2700009 ONTARIO INC. (C.O.B. as AQUIRE FACILITIES MANAGEMENT SERVICES)

Defendants

AND BETWEEN:

RACE MECHANICAL SYSTEMS INC. and 2700009 ONTARIO INC. (C.O.B. as AQUIRE FACILITIES MANAGEMENT SERVICES)

Plaintiffs by Counterclaim

AND:

BEHOLD CONTROL EQUIPMENT INC. and TREVOR STRAUSS

Defendants by Counterclaim

BEFORE: A.A. Sanfilippo J.

COUNSEL: *Maureen Littlejohn and Rui Gao*, for the Plaintiff/Defendants by Counterclaim
Manjit Singh, for the Defendants/ Plaintiffs by Counterclaim

HEARD
(In person): October 18, 2024

ENDORSEMENT

[1] The Plaintiff, Behold Control Equipment Inc. (“Behold”), brought this action against the Defendants, RACE Mechanical Systems Inc. (“RACE”) and 2700009 Ontario Inc., carrying on business as Aquire Facilities Management Services (“Aquire”), pleading misappropriation and misuse of Behold’s confidential information and claiming damages based on breach of contract, breach of duty of good faith, breach of confidence and intentional interference with economic relations. RACE and Aquire (collectively, the

"Defendants") deny that they are liable to Behold and brought a counterclaim against Behold and Trevor Strauss, the founder and chief executive officer of Behold (collectively, the "Behold Parties").

[2] The trial in this Proceeding is scheduled to begin on November 14, 2024, and to continue for 12 days. The Behold Parties brought this motion prior to trial to seek an order to seal 26 documents comprising two categories, technical specifications and pricing/profitability analysis, proposed to be tendered into evidence at the pending trial (the "Confidentiality Motion"). The Defendants and the non-party, Starbucks Corporation ("Starbucks") did not oppose the Confidentiality Motion. Furthermore, no member of the media appeared on this Motion although properly notified by the moving parties' filing of a "Notice of Request for Publication Ban" (the "Notice of Request") compliant with Part VI.G, sections 151-152 of the *Consolidated Provincial Practice Direction*, last amended February 1, 2024 (the "*Provincial Practice Direction*").

[3] For the reasons that follow, I decline to grant the sealing order sought by the Behold Parties on the Motion Record, without prejudice to the Behold Parties renewing this Confidentiality Motion at trial.

A. Background

[4] This action and counterclaim (collectively, this "Proceeding") were accepted into the Civil Case Management Pilot Project, upon the parties' application, by determination that this Proceeding satisfied the criteria set out in the *Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model*, effective February 1, 2019 (the "One Judge Pilot Project"). This Proceeding has continued under the One Judge Pilot Project even though the One Judge Pilot Project has been discontinued.[1]

[5] In accordance with the One Judge Pilot Project, I conducted all case management conferences and motions in this Proceeding, and I will preside over the trial. At the first case management conference, the parties jointly requested a confidentiality order that set out a detailed protocol for the classification of certain categories of documentary productions as "Confidential" or "Highly Confidential" that would collectively be designated as "Protected Information" and proposed to be sealed.[2] I declined the parties' joint request to issue a sealing order, without substantive determination, because a sealing order can

[1] On October 19, 2023, Chief Justice Morawetz directed that, "[e]ffective immediately, no new cases will be admitted to the Provincial Civil Case Management Pilot – One Judge Model," but that the cases in the One Judge Pilot Project would continue under the terms of the Pilot unless the court ordered otherwise. The *Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model* is no longer in effect.

[2] *Behold Control Equipment Inc. v. Race Mechanical Systems Inc.,* 2020 ONSC 3289.

only be considered on Motion following the process set out in the *Provincial Practice Direction*.

[6] The parties did not bring a Motion for a sealing order at that time, but rather brought a Motion, on consent, for an order limiting the disclosure by the parties of confidential documents produced in this action in documentary and oral discovery: termed as a "protective order". For the reasons set out in the second case management endorsement, I granted a protective order regarding the documents and evidence gathered by the parties further to the exercise of their pre-trial discovery and oral examination rights without any restriction on public access to any documents and evidence filed in the public court record (the "2020 Protective Order").[3] Paragraph 25 of the 2020 Protective Order provides as follows:

> 25. For greater certainty, nothing in this Order constitutes an order sealing any Protected Information, including Documents and Transcripts, filed in Court in the Action or restricting their publication. Nothing in this Order shall affect or derogate from the public nature of any Protected Information, including Documents and Transcripts, filed in Court in the Action, or the Court's ability to deal with any such evidence, including in accordance with its ordinary processes, its inherent jurisdiction and/or the *Rules of Civil Procedure*.

[7] On October 21, 2021, the Behold Parties brought a Motion in writing for an order for the production of documents from a non-party, Starbucks, and the protection of those documents as "Disclosed Material" under the 2020 Protective Order. I granted this Order on the consent of the Behold Parties and of the non-party, Starbucks, unopposed by the Defendants (the "2021 Production and Protection Order").[4]

[8] In anticipation of the trial pending to begin in this Proceeding on November 14, 2024, the Behold Parties requested the scheduling of a motion to seal certain of the documents that the Behold Parties expect to tender at trial. I scheduled this Motion to proceed on September 9, 2024,[5] and, at the request of the Defendants, rescheduled the Motion to be heard on October 4, 2024.[6] On October 4, 2024, the Confidentiality Motion

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[3] *Behold Control Equipment Inc. v. Race Mechanical Systems Inc.et al*, 2020 ONSC 4643, at paras. 12-22.
[4] 2021 Production and Protection Order, para. 2(b): "The Starbucks Documents shall be deemed to be Disclosed Material, as defined in the [2020] Protective Order … and shall be subject to the confidentiality provisions and restrictions set out in the [2020] Protective Order."
[5] Sixteenth Case Management Endorsement issued February 16, 2024, at para. 4.
[6] Eighteenth Case Management Endorsement issued August 14, 2024, at paras. 3-4; Case Management Endorsement issued August 26, 2024.

was adjourned to proceed on October 18, 2024, to provide the Behold Parties with an opportunity to provide proper notice to the media by the filing of a Notice of Request compliant with the *Provincial Practice Direction*.[7] The Behold Parties have now done so.

B. This Motion

[9] The Behold Parties sought the following relief:

(a) An order protecting the confidentiality of the following categories of information contained in the documents listed in Schedule "A", by sealing such information and ensuring that it does not form part of the public record of this proceeding:

(i) technical specifications of the facilities management system created by Behold (referred to as the "Behold System"); and

(ii) pricing and profitability information and analysis.

(b) An order protecting the confidentiality of information falling into the same categories as the information referred to in paragraph (a) above which is contained in any other documents identified by Behold in advance of or during trial.

[10] In Schedule "A", the Behold Parties provided a list of 26 documents, comprised of 22 documents that are alleged to contain Technical Specifications and four documents that are alleged to contain Pricing and Profitability Analysis (collectively, the "Scheduled Documents").

C. The Evidence

[11] In support of their Confidentiality Motion, the Applicants filed the affidavit of Mr. Strauss, sworn September 23, 2024. Mr. Strauss deposed that in 2012, he began to develop a facilities management system to provide an innovative way for companies to monitor and control their heating, ventilation, air conditioning and refrigeration equipment ("HVACR Equipment") remotely through the Internet, using an intuitive user interface, called the "Dashboard". Mr. Strauss refers to this as the "Behold System".

[12] Mr. Strauss deposed that the Behold System was developed following a multi-year iterative design process, is comprised of both hardware and software, and is designed to be installed on physical HVACR Equipment at a customer's premises to provide real-time

[7] Endorsement issued October 4, 2024.

remote monitoring feedback on each piece of HVACR Equipment, including through displaying the feedback on the Dashboard, and some remote control over part of the equipment being monitored. Mr. Strauss swore that the Behold System consists of a variety of different sensors that are connected to printed circuit boards at one end and HVACR Equipment at the other.

[13] Mr. Strauss deposed that a significant amount of confidential and proprietary information was generated as part of the design process of the Behold System, including assembly and configuration of hardware and software components; documents setting out various technical specifications or guidelines, diagrams and schematics; and documents with discussions between Behold stakeholders discussing technical aspects of the components of the Behold System. Mr. Strauss also swore that the volume-based pricing or costs and margin calculations associated with Behold's pricing model is confidential information.

[14] Mr. Strauss exhibited to his affidavit four documents that he claims were provided to RACE in the course of their commercial dealings, as follows: a Hardware Agreement; a Software as a Service Agreement (the "SaaS Agreement"); an End User License Agreement; and a Consolidated Agreement that merges the terms of the Hardware Agreement and the SaaS Agreement (collectively, the "Commercial Agreements"). Mr. Strauss deposed that the Commercial Agreements contain confidentiality terms that set out Behold's expectation of confidentiality regarding the Behold System and its pricing.

[15] Mr. Strauss deposed that the Scheduled Documents, and any other documents tendered during trial that contain confidential information, are highly commercially and competitively sensitive and that the public disclosure of this information will seriously undermine Behold's ability to compete effectively in the market and to secure opportunities with future customers.

[16] The Defendants took no position on the Confidentiality Motion but without waiver of their pleaded defences that the Scheduled Documents are not confidential and that the Commercial Agreements are invalid, ineffective and breached by Behold. The Defendants do not intend to seek any order limiting court openness at trial.

D. Applicable Legal Principles – The *Sherman* Test

[17] The Behold Parties based their Motion on s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), which provides that "[a] court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of

the public record." The test for granting a sealing order under s. 137(2) of the *CJA* is provided by the Supreme Court of Canada in *Sherman Estate v. Donovan.*[8]

[18] The Supreme Court emphasized that "there is a strong presumption in favour of open courts."[9] Notwithstanding this presumption, where "exceptional circumstances"[10] arise that are said to call for a limitation on openness, the applicant must show that the order is necessary and proportionate and that the benefits of the restriction on openness outweigh its negative effects, by establishing the following:

> (a) Court openness poses a serious risk to an important public interest.
>
> (b) The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (c) As a matter of proportionality, the benefits of the order outweigh its negative effects.[11]

[19] The Court can exercise its discretion to grant a discretionary limit on court openness, whether in the form of a sealing order, a publication ban, an order excluding the public from a hearing or a redaction order, only when all these three requirements have been established by the party seeking the confidentiality order.[12]

[20] As the Court of Appeal explained in *S.E.C. v. M.P.*, the three-part *Sherman* test developed incrementally from previous Supreme Court decisions on sealing orders,[13] including *Sierra Club of Canada v. Canada (Minister of Finance)*.[14] In *Sierra Club*, the Supreme Court held that a confidentiality order 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

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[8] 2021 SCC 25, [2021] 2 SCR 75.
[9] *Sherman Estate*, at para. 2. See also, at para. 37: "Court proceedings are presumptively open to the public."
[10] *Sherman Estate*, at para. 3.
[11] *Sherman Estate*, at para. 38, as applied in *S.E.C. v. M.P.*, 2023 ONCA 821, at para. 55; *Fletcher v. Ontario*, 2024 ONCA 148, at para. 137; and *Reference re iGaming Ontario*, 2024 ONCA 569, at para. 20.
[12] *Sherman Estate*, at para. 38; *Fletcher*, at para. 138.
[13] *S.E.C.*, at paras. 52-55.
[14] [2002] 2 S.C.R. 522, 2002 SCC 41.

effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[15]

[21] In *Sherman Estate*, the Supreme Court re-cast the two-part *Sierra Club* test to the three core prerequisites in the *Sherman* test, "without altering its essence", to "help to clarify the burden on the applicant seeking an exception to the open court principle."[16] In applying the *Sherman* test, the Court of Appeal has observed that "the [Supreme] Court emphasized the foundational nature of the open court principle in a democracy and the exceptional nature of limitations on that principle."[17]

E. Analysis

[22] *Sherman Estate* dealt with an order sealing a probate file, wherein the Supreme Court affirmed the Ontario Court of Appeal's decision to vacate a sealing order that had been issued by an application judge. The analysis focused on a privacy interest, which was found not to be sufficiently serious to overcome the strong presumption of openness.

[23] The Behold Parties' Confidentiality Motion draws factual parallels with *Sierra Club*. The purpose of the confidentiality request in *Sierra Club* related to the commercial interests of a defendant who sought to seal confidential documents that were said to be required for their presentation of a full and fair defence. Here, the Behold Parties submit that to present their claims fully and fairly they may rely on the Scheduled Documents at trial, but that their disclosure at trial and the public disclosure of any examination conducted on them, would be to make public the very information that the Behold Parties say that the Defendants have misappropriated. This is the basis on which the Behold Parties contend that the Scheduled Documents should be sealed together with any examination conducted on them at trial.

[24] In *Sierra Club*, the Supreme Court stated that the right to a fair trial is a fundamental principle of justice, and that all disputes should be decided under a fair trial standard that calls for all relevant evidence to be before the court so that justice can be done.[18] The Supreme Court identified that the interests that would be promoted by a confidentiality order were the preservation of commercial and contractual relations and the right to a fair trial, while a confidentiality would impact the fundamental principle of court openness, which has been described by the Supreme Court as "the very soul of justice."[19]

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[15] *Sierra Club*, at para. 53.
[16] *Sherman Estate,* at para. 38.
[17] *Fletcher*, at para. 138.
[18] *Sierra Club,* at para. 50.
[19] *Sierra Club*, at paras. 51-52, citing *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 22.

[25] In assessment of whether a confidentiality order is necessary to prevent a serious risk to an important commercial interest in the context of civil litigation under the first part of the *Sierra Club* test, the Supreme Court instructed as follows:

> (a) The serious risk must be "real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question."[20]
>
> (b) The serious risk to an "important commercial interest" cannot merely be a commercial risk to the party requesting the order, but must be a general commercial interest, such as a public interest in preserving confidential information. "Simply put, if there is no general principle at stake, there can be no 'important commercial interest' for the purposes of this test."[21]
>
> (c) The court must consider whether reasonable alternatives to a confidentiality order are available and reasonably restrict the order while preserving the important commercial interest.[22]

[26] In *Sherman*, the Supreme Court affirmed the principle stated in *Sierra Club* that to establish a harm to an "important interest, including a commercial interest", the party seeking the sealing order must show that the important interest is a public interest.[23] A harm to a particular business interest, alone, is insufficient to support a sealing order.

[27] Since the commercial interest at stake relates to the Behold Parties' objective of sealing the Scheduled Documents, the starting point in assessment of whether the Behold Parties have satisfied the *Sherman* test is to determine whether the Behold Parties have established, on a balance of probabilities, that the Scheduled Documents contain confidential or proprietary information. In *Sierra Club*, the Supreme Court stated that the preservation of confidential information constitutes a sufficiently important commercial interest provided that the following criteria relating to the information are established by the party seeking the confidentiality order: (a) the information has been treated at all relevant times as confidential; (b) the proprietary, commercial and scientific interests of the applicant could reasonably be harmed by the disclosure of the information; and (c) the information has been "'accumulated with a reasonable expectation of it being kept

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[20] *Sierra Club*, at para. 54.
[21] *Sierra Club*, at para. 55.
[22] *Sierra Club*, at para. 57.
[23] *Sherman Estate*, at para. 41.

confidential' as opposed to 'facts which a litigant would like to keep confidential by having the courtroom doors closed'".[24]

[28] There is another requirement in the assessment of the confidentiality of the Scheduled Documents. In *Fletcher v. Ontario*, the Court of Appeal held that "[i]t is trite law that neither a sealing order nor a publication ban may be granted for information that is already in the public domain".[25] This was emphasized by the Court of Appeal in *Reference re iGaming*: "There is little justification or purpose in granting a sealing order over information that is already in the public domain."[26]

[29] The determination of whether the Scheduled Documents contain confidential or proprietary information, as alleged by the Behold Parties, requires a fact-based finding well-grounded in the evidence.[27] As stated by the Supreme Court in *Sherman* in reference to the two-step analysis to determine if the open court principle can be said to pose a serious risk to an important public interest:

> Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context.[28]

[30] The determination of this Confidentiality Motion prior to trial falters on this fact-based analysis. The fact-based contextual finding necessary to determine whether the Scheduled Documents are confidential or contain proprietary information cannot properly or fairly be completed on the evidence contained in the Motion Record, particularly where the affiant has deposed, and the parties have submitted that there is further evidence relevant to the issue of confidentiality to be presented at trial. And there is a second reason. The issue of whether the Scheduled Documents are Confidential, and whether the Commercial Agreements calling for their confidentiality are valid, are central issues to be determined at trial on a full record, giving rise to the potential for different determinations on the pre-trial motion than at trial. I will explain these findings.

[31] The 26 Scheduled Documents consist of 10 emails with redactions; 12 documents said to contain technical data, schematics and bills of materials; and four documents said

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[24] *Sierra Club*, at para. 60.
[25] *Fletcher*, at para. 141.
[26] *Reference re iGaming*, at para. 22.
[27] *Sherman*, at paras. 42, 54, 62, 76, and 79.
[28] *Sherman*, at para. 42, as applied in *S.E.C.*, at para. 57, and in *Fletcher*, at para. 139.

to contain Behold's volume-based pricing model, and the analysis and calculations of the costs and margins. Six of the 12 documents containing technical information were produced in this litigation by the Defendants, not by the Behold Parties (the "Defendants' Documents"). The Behold Parties emphasized that the 26 Scheduled Documents constitute a modest portion of the joint document collection of approximately 1,600 documents that the parties have under consideration for use at trial. The Defendants do not seek any sealing order regarding the Defendants' Documents.

[32] Rather than provide evidence regarding the Scheduled Documents individually, Mr. Strauss mostly referred to the Scheduled Documents by two categories: (a) technical specifications; and (b) pricing and profitability information and analysis. The sealing order sought in this Motion applies to the sealing of documents, not to categories of documents.

[33] Mr. Strauss deposed that the documents contain "highly commercially and competitively sensitive" information. This evidence is both conclusory and de-contextualized. The Behold Parties did not provide sufficient evidence to allow for a fact-based analysis of the issues pertinent to the *Sherman* test, including the following: (a) the context in which the Scheduled Documents were prepared, or even the year; (b) whether the Scheduled Documents were provided to the Defendants, and if so, when; (c) the circumstances or contractual framework present at the time that the documents were provided or made available to the Defendants. Furthermore, the Behold Parties did not provide evidence of whether the Scheduled Documents, or any of them, are available, or were at any time available in the public domain. Some of the Scheduled Documents refer to publicly available websites.

[34] The Defendants intend to contest at trial Mr. Strauss' evidence that the Defendants' Documents contain bills of materials, schematics and correspondence with third party designers that are derived from the Behold System and thereby reflect Behold's confidential information, although the Defendants take no position on this Motion. The Defendants did not file any evidence on this Motion and did not test the evidence filed by the Behold Parties. The Motion Record does not contain sufficient evidence that would allow for a fact-based analysis of the documents sought to be sealed, including whether they are part of the public domain.

[35] Mr. Strauss deposed that the Behold Parties "expect to rely at trial" on certain of the Scheduled Documents, supporting a submission made by their lawyers that they have not yet determined whether the Scheduled Documents, or all of them, will be tendered at trial. This gives rise to the possibility of a pre-trial sealing order being rendered unnecessarily to the extent that the order should include documents that are not tendered to form part of the trial record.

[36] Last, there was insufficient evidence on this Motion of reasonable alternatives to a sealing order. Mr. Strauss deposed that the Behold Parties are prepared to confer with the Defendants and consider alternative ways of putting documents into evidence without

including the actual confidential information. However, the moving parties did not provide evidence of reasonable alternative measures that might be available to prevent the commercial risk to the Behold Parties, or that there are none. While the Behold Parties are not required to adopt the "absolutely least restrictive option", they are required to provide evidence of workable or effective measures, or that none are available.[29]

[37] The Defendants' Amended Statement of Defence and Counterclaim denies that they are bound by the Commercial Agreements. The moving parties' submission that the Scheduled Documents are protected under the Commercial Agreements presumes findings that the Commercial Agreements are binding on the Defendants and that the information conveyed to them by Behold was confidential. These issues are important to the claims advanced by Behold in its action and the Defendants in their counterclaim. These issues will be determined at trial on a full evidentiary record and arise in the Confidentiality Motion on the evidence set out in a single affidavit. I decline to decide on this interlocutory pre-trial Motion issues that will shortly be presented for determination at trial.

[38] The request for a pre-trial sealing order in this case is unlike the cases heavily relied on by the Behold Parties. In *PointOne Graphics Inc. v. Roszkowski et. al.*, the plaintiff sought interlocutory injunctive relief to restrain a former employee from competing with customers of the plaintiff and from using the plaintiff's confidential information. The Court dismissed the claim for injunctive relief but held that it was "appropriate to seal the [alleged confidential information] so as not to destroy the very subject matter of the litigation itself."[30] Similarly, in *Concrete Cashmere Ltd. v. Lo*, the British Columbia Supreme Court granted a sealing order over portions of the evidence filed in an application for injunctive relief to restrain breach of confidence on the court's finding that the requirements of the *Sherman* test had been satisfied.[31]

[39] The purpose of the sealing orders in both *PointOne Graphics* and *Concrete Cashmere* was to preserve the confidentiality of corporate documents pending trial. Here, the purpose of interlocutory preservation of not only the Scheduled Documents but all "Protected Information" is already addressed by the 2020 Protective Order and the 2021 Production and Protection Order, which preserve the Scheduled Documents from disclosure by the parties through to trial. The sealing order sought by the Confidentiality Motion pertains to the use of the Scheduled Documents at trial and, in my view, is best considered then in the factual context of the evidence tendered at trial. The necessity for

[29] *Sierra Club*, at paras. 65-66.
[30] 2021 ONSC 629, at para. 83.
[31] 2023 BCSC 1502, at para. 27.

interlocutory preservation of confidentiality served by the holdings in *PointOne Graphics* and *Concrete Cashmere* is not present here.

[40] In *Andersen v. St. Jude Medical,* the Court granted an order sealing documents belonging to a non-party for the purpose of their use at trial, finding that the requirements of the *Sierra Club* test were established.[32] The Court dismissed the request to seal documents that were said to contain confidential pricing information on the finding that the pricing information was dated. I find that the holding in *Andersen* is distinguishable because there was no contest that the documents that were subject to the sealing order contained confidential and proprietary information and had been treated as such with a reasonably-held expectation that harm would result from disclosure. Similarly, in *Rogers v. TELUS Communications Inc.*, the Court granted a sealing order on the uncontested finding that the information was confidential and that the parties had, throughout, treated the information as confidential.[33]

[41] Last, I have considered trial efficiency. The Behold Parties submitted that trial efficiency is enhanced by a pre-trial determination of the sealing of the Scheduled Documents. I do not accept this submission. Even if the sealing of evidence sought by the Behold Parties were granted on this pre-trial motion, it would be subject to the sealing either being rendered permanent or vacated later depending on the determination of the issues raised by this Proceeding. For illustration, a pre-trial order to seal documents as confidential, unopposed by the Defendants, could be vacated if the Defendants were to establish at trial that the documents do not contain confidential or proprietary information. Conversely, if the sealing of evidence sought by the Behold Parties were dismissed on this pre-trial motion, the issue of the treatment of documents shown at trial to contain confidential or proprietary information compliant with the *Sherman* test could still be considered for sealing during the trial in the interests of ensuring trial fairness, subject to the sealing being rendered permanent or vacated as part of the trial judgment.

F. Conclusions

[42] To grant the sealing order sought on this pre-trial motion would be to fail to heed the caution clearly stated by the Supreme Court that limitations on court openness – whether in the form of a sealing order, a publication ban, an order excluding the public from a hearing or a redaction order – are reserved for exceptional circumstances where the evidence allows for a fact-based contextual analysis that shows that all the requirements of the *Sherman* test are met. Here, the public interest of protection of commercial and contractual relations in enforcement of confidential information is best determined on a full record at trial, and the use of a sealing order as a tool to achieve trial

[32] 2010 ONSC 5191, 104 O.R. (3d) 192.
[33] 2023 ONSC 5398, at paras. 103-117.

fairness is best determined at trial. So too, the analysis of reasonable alternatives to a sealing order to allow for the full presentation of evidence at trial is best determined at trial.

[43] I see no enhancement of efficiencies in trial preparation by a pre-trial Order for sealing considering the terms of the 2020 Protective Order and the 2021 Production and Protection Order, and I see the possibility of incomplete fact-finding affecting the substantive determination of the claims to be determined at trial through pre-trial determination on a limited Motion Record.

G. Disposition

[44] On the basis of these reasons, I decline to grant the sealing order sought by the Behold Parties on the Motion Record, without prejudice to the Behold Parties renewing this Confidentiality Motion at trial.

[45] In accordance with Rules 59.04(1), 77.07(6) and 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, this order is effective from the date that it is made and is enforceable without any need for entry and filing, and without the necessity of a formal order.

A.A. Sanfilippo J.

Released: November 4, 2024