

Court File Number: CU-11-9062-001

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

Castillo  
Plaintiff(s)  
AND  
Xela Enterprises et al  
Defendant(s)

Case Management  Yes  No by Judge: McGowan

Counsel	Telephone No:	Facsimile No:
<u>see counsel slip</u>		

- Order  Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: \_\_\_\_\_
- Time Table approved (as follows):

A Further case conference was convened today at my request to deal with the ongoing and protracted dispute concerning compliance with my earlier orders of Aug 28/20, Oct 27/20 (two orders) and March 25/21.

As I have previously noted the first three orders were

25 March 22  
Date

McGowan  
Judge's Signature

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granted on consent. The last order, March 25/21, resulted from a contested motion and leave to appeal was denied.

Since then Mr. Gutierrez has raised several objections concerning the methods that should be used with respect to the provision of his passwords to Epic. As a result AIS has also not provided the emails that I have ordered be produced.

I convened the case conference today to rule on the protocol given Mr. Gutierrez's most recent objections.

At today's case conference counsel for Mr. Gutierrez advised that they wished me to debate the issues concerning access and production as they wished to

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bring a motion for injunctive relief staying the enforcement of my abovementioned order, based on a draft Notice of Motion provided shortly before the case conference began.

The draft Notice of Motion generally speaking, repeats historical complaints Mr Gutierrez has raised against the Receiver, and the "appearance" that the Receiver is being "funded" by "the Nephews" with whom Mr Gutierrez has been locked in litigation outside Canada for several years.

Further, once again, Mr Gutierrez, submits that he has secured funding to satisfy the Castillo judgment, which has now been held up given recent actions

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of the Receiver - generally involving information published on its website.

Mr Gutierrez also raises other issues in the draft Notice of Motion concerning the Receiver's recent conduct concerning the access/production issues. He alleges they have failed to cooperate with him.

Overall amongst other things, Mr Gutierrez submits there is reason to believe that if access to passwords and documents is ordered as per the protocol suggested by Epig, it could fall into "The Nephews" hands, thus causing him great prejudice. This is particularly so says Mr. Gutierrez given recent developments concerning "The Nephews" in Panama.

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where Mr Gutierrez alleges the face criminal charges that are escalating in significance.

As I advised the parties at the case conference I am not prepared to defer the access/production any further, and I ordered at the case that the passwords and emails referenced in my earlier orders and endorsements (and specifically my endorsement of March 17/22) be provided to ~~the~~<sup>Mr</sup> Epic no later than Monday March 28/22 @ 5 p.m.

I made the above order for a number of reasons.

First the Receiver is an officer of the Court and Epic operates under the Receiver's mandate thus making it accountable to

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this Court.

Epig has proposed a sensible and secure manner to secure the passwords and ATS's documents.

Second, there is no reasonable basis to suggest that the Receiver has in some way colluded with "the Nephews" or that "the Nephews" can somehow engage in "Corporate espionage" to secure the data that Epig will secure. Mr Gutierrez, in some fashion or another, for some time has made these allegations without proof. In this regard it bears noting that the Receiver has consistently denied these long standing allegations.

Third, it bears noting that Mr Gutierrez has for several months contested production of

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The passwords. Notwithstanding the three Consent orders of Aug/20 and Oct 27/20 (2) Mr Gutierrez did not make any production or provide passwords. This lead to the March ~~15/21~~<sup>15/21</sup> order where I again ordered the disclosure of Mr. Gutierrez' passwords (amongst other things). Again, there has not been compliance.

Fourth, it bears noting that the Oct 27/20 order has a built in protocol that allows only Mr. Gutierrez access to the Platform to allow him the opportunity to review the documents and assert any objection to disclosure.

Until that occurs, no one else, (not Epic, the Receiver, or the Applicant, or any other person) can

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have access. The protocol was well thought out, negotiated and addressed Mr. & Gutierrez's concerns at the time.

Fifth, Compliance with my aforementioned orders took a backseat in the fall of 2021<sup>st</sup> when Mr Gutierrez claimed to have financing to pay the Castillo judgment. I passed the access/production issues to determine if the funding could lead to resolution.

Many months have passed with Mr Gutierrez offering various excuses as to why payment has not been made and financing not secured. The latest blames the actions of the Receiver in Feb /22, but several months passed before that date



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without the promised funding arriving - which was first promised in Sept /21.

It also bears noting that Mr. Gutierrez also proposed in March/21, when the motion was<sup>m</sup> argued, that the motion concerning access/production should not be pursued as the Receiver had received a settlement offer. I rejected that submission as the offer in my view for the reasons given, was no offer at all. ✓

It may be that the currently promised financing may arrive, but that cannot form the basis of a stay given the above.

Sixth, I have made no finding of any misconduct against the Receiver. I have however been critical of Mr Gutierrez

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particularly with respect to the initiation of a criminal complaint in Panama against the Receiver's agents which I ordered be withdrawn. Mr Gutierrez's involvement in the Panama matter was initiated without his Canadian solicitor's knowledge and I was of the view that the criminal complaint was a prima facie attack on my previous order in which specific rights were granted to the Receiver concerning the Panamanian company Gabinvest S.A.

Seventh, it was only today that Mr Gutierrez raised the issue of an injunction, after previous attempts to restrict Epic's access failed. None of the issues raised in the draft Notice of Motion

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were mentioned in the earlier <sup>in</sup> ~~only~~ <sup>in</sup> ~~the~~ conferences. Of all the issues ~~of~~ the elevated criminal charges against "the Nephews" has surfaced in the past few days.

In my view, given all of the above, I believe that the latest proposed motion is an attempt ~~to~~ further delay the compliance with my earlier orders concerning access/production.

The protocol suggested by Epig, as set out in Mr Knoles' email of March 23/22 @ 5:22 pm is fair and reasonable and shall be followed by Mr Gutierrez and ATS - and completed as noted, by March 28/22 @ 5 p.m.

Therefore, in accordance with Mr. Knoles' email the following shall

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occur:

① Mr Gutierrez and/or his solicitors shall attend a videconference with Epig (with the Receiver and counsel absent) and provide the passwords to Epig. After which Epig will re-lock the hard drive.

② ATS will provide Epig with Mr Gutierrez's email using Epig's secure-FTP. Thereafter the data will be subject to the abovementioned privilege protocol (as will the data in ① above) set out in my Oct 27/20 order. Last, I am releasing this endorsement today via a handwritten endorsement given the timeline imposed and Mr Gutierrez's counsel's comments about considering an appeal.

*Me [Signature]*

# COUNSEL SLIP

COURT FILE

NO.: CV-11-00009062-00CL

DATE: March 25, 2022

NO. ON LIST 6

TITLE OF  
PROCEEDING

CASTILLO v. XELA ENTERPRISES LTD et al

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**JUDICIAL NOTES:**