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Court File No. CV-11-9062-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED,  
FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO  
GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of  
Juan Arturo Gutierrez

Respondents

**NOTICE OF MOTION  
[Injunctive Relief]**

The Respondent Juan Guillermo Gutierrez, will make a Motion to a Judge presiding over the Commercial List on Wednesday, March 30, 2022 at 10:00 a.m., or as soon after that time as the Motion can be heard.

**PROPOSED METHOD OF HEARING:** The Motion is to be heard

By video conference.

at the following location

**THE MOTION IS FOR**

1. An interim Order staying the enforcement of all Orders for disclosure of Juan Guillermo Gutierrez's emails and information on the Personal Devices (defined below)

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and the ATS Server Emails (defined below), including without limitation the Orders of Justice McEwen dated October 27, 2020 and March 25, 2021, and any endorsements made in respect thereof (collectively the “**Discovery Orders**”), for a period of 60 days, subject to further extension for good cause shown;

2. the Costs of this motion, if opposed; and
3. such further and other Relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

a) The Discovery Orders require Mr. Gutierrez to permit all of the data on a personal iPad and a personal iPhone (the “**Personal Devices**”) to be uploaded to a Relativity database maintained by Epiq, an IT consultant unilaterally identified and retained by the Receiver. The Personal Devices have been imaged, and all of the data currently resides on a hard drive in Epiq’s possession, locked with a passcode known only to Mr. Gutierrez.

b) The Discovery Orders also require Arturos Technical Services (“**ATS**”) – the third-party data storage provider that maintains all emails to or from Mr. Gutierrez with an @xela.com or an @arturos.com domain (the “**ATS Server Emails**”) – to be uploaded to Epiq’s Relativity database. The ATS Server Emails include *all* emails involving Mr. Gutierrez between [date] and [date], representing more than 70 gigabytes of data.

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- c) The Discovery Orders contemplate that Mr. Gutierrez conduct advance review of the Personal Devices and the ATS Server Emails by examining the data on Epiq's Relativity platform for issues of privilege and other potential objections to disclosure, whereupon any disputes would be resolved by the Court and, if applicable, the resulting discoverable data would be supplied to the Receiver.
- d) Mr. Gutierrez's family – through LISA, S.A. ("**LISA**"), an indirect Panamanian subsidiary of Xela – are the ultimate beneficiaries of a 1/3 stake in a lucrative poultry conglomerate in Guatemala (the "**Avicola Group**"). The majority shareholders (the "**Nephews**") have improperly withheld hundreds of millions of U.S. dollars in corporate dividends from Mr. Gutierrez's family since 1998 (the "**Unpaid Dividends**"), while continuing to pay dividends to themselves. Mr. Gutierrez and his family have been involved in bitterly contentious, multi-jurisdictional litigation with the Nephews for more than two decades in an effort to recover the Unpaid Dividends.
- e) The Nephews have historically engaged in and/or benefited from corporate espionage to the prejudice of Mr. Gutierrez and his family. Specifically, in 2011, they used stolen confidential/privileged documents from Xela's computer servers – with the complicity of the Applicant, who sponsored the theft and placed the documents in the public record by appending them to an unrelated lawsuit – as bases for frivolous legal actions and improper corporate resolutions in Guatemala and Panama, all designed to
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misappropriate LISA's shares in the Avicola Group. Those actions have all been resolved in LISA's favor, at great cost and expense, over a period of some ten years.

f) Facts have emerged over the past two days, relating to criminal proceedings against the Nephews in Panama (outlined further below), to suggest a very high risk that the Nephews will engage in new malfeasance and corporate espionage to try to obtain copies of the Personal Devices and the ATS Server Emails. Should those data fall into the Nephew's hands, – Mr. Gutierrez's family would suffer overwhelming, irreparable injury.

g) There is a historical mistrust of the Receiver in the conduct of this receivership grounded in, among other things:

1. the appearance that the Receiver is being funded by the Nephews;
2. the appearance that the Receiver is coordinating with the Nephews – based upon, *inter alia*, billing records submitted by the Receiver that suggest ongoing strategic discussions between the Receiver's counsel and the Nephews' lawyers – to use this receivership as a vehicle to prejudice the recovery of Unpaid Dividends rather than to pursue monies that might satisfy the judgment herein (the “**Castillo Judgment**”);

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3. the propensity of the Receiver to dismiss legitimate concerns about the confidentiality, privilege, privacy and security of the ATS Server Emails and the data on the Personal Devices;
  4. the propensity of the Receiver to publish on its website, without any apparent reason or any articulated justification, massive amounts of Xela data and other information that Mr. Gutierrez would consider confidential and inappropriate for public disclosure;
  5. the appearance that the Receiver is actively seeking to prevent a discharge of this receivership by interfering with third-party funding that would satisfy the Castillo Judgment and approved receivership expenses.
- h) Mr. Gutierrez has secured a third-party loan sufficient to satisfy the Castillo Judgment in its entirety, along with the approved receivership costs (the “**Loan**”). The lender has transferred the full amount of the Loan proceeds to the client trust account of Mr. Gutierrez’s counsel for deposit with the Court pending consideration of a motion to discharge the receivership. The Loan proceeds reached Canada in February 2022 but were returned to the lender bank because the funds were inadvertently transferred to counsel’s Canadian-dollar-denominated trust account rather than its U.S.-dollar-denominated account. The Loan proceeds were transferred a second time to Mr. Gutierrez’s counsel, in February 2022; however – after the Receiver inexplicably published on its website the SWIFT banking confirmation for the
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second transfer, which Mr. Gutierrez had provided to the Court as a courtesy – the intermediary bank in the U.S. undertook to conduct additional due diligence, which is presently in process.

- i) The Nephews (and others) have been under criminal investigation and prosecution in Panama on charges of, among other things, embezzling and laundering Unpaid Dividends. Social media reports indicate that within the past two days, those criminal proceedings have entered a new phase. Specifically, it has been reported that the Nephews were required to make personal appearances in Panama in connection with the criminal charges, and that the Panamanian Court thereafter arrested their return to Guatemala and is barring them from departing Panama. Those recent developments exponentially increase the risk of malfeasance and corporate espionage in retaliation against Mr. Gutierrez.
- j) The progress of the criminal proceedings in Panama raises the question whether the Nephews may already have misused the SWIFT transfer confirmations published by the Receiver on its website.
- k) The Receiver has refused to cooperate with good-faith attempts by both Mr. Gutierrez and ATS to discuss a reasonable and satisfactory method to upload the ATS Server Emails and the data on the Personal Devices to Epiq's Relativity platform while preserving appropriate security. In that regard, the Receiver has shown a complete lack of consideration for the safety of Mr.
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Gutierrez's data, which concerns are magnified in light of the recent developments in the criminal proceedings against the Nephews in Panama.

l) Moreover, the Receiver has consistently mischaracterized Mr. Gutierrez's level of cooperation, as well as ATS's cooperation, in the receivership, placing Mr. Gutierrez in a false light. Most recently, on 23 March 2022, the Receiver falsely represented that Mr. Gutierrez and ATS were in non-compliance with the Discovery Orders, when in fact counsel for ATS were in the midst of discussions with the Receiver's counsel and the experts retained by Mr. Gutierrez were in the midst of discussions with the with Epiq in an effort to address Mr. Gutierrez's legitimate concerns over the safety and security of the data on the Personal Devices and the ATS Server Emails. Indeed, it was the Receiver that failed reasonably to cooperate in the process to protect Mr. Gutierrez's legitimate privacy concerns. The Receiver's failure to provide objective reporting to this Court concerning Mr. Gutierrez's cooperation as it relates to the data in question signals a further red flag.

m) Indeed, the tendency of the Receiver to misreport the facts has been manifest from the outset of the receivership. Every official report submitted by the Receiver has been replete with inaccuracies and omissions of material fact, all with an unreasonably biased tone against Mr. Gutierrez designed to cast him as uncooperative. Moreover, the Receiver has refused to acknowledge the inaccuracies when the facts are clarified by Mr. Gutierrez, or to correct the record. Further, the Receiver has twice sought contempt against

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Mr. Gutierrez, but on both previous occasions adjourned the contempt motions *sine die* when faced with the prospect of cross-examination.

- n) The Receiver has incurred more than a million dollars in fees in the receivership without recovering one single dollar toward satisfaction of the Castillo Judgment. Neither has the Receiver ever identified any rational relationship between the data in question and any potential recovery of funds toward satisfaction of the Judgment. Equally as important, the cost implications of proceeding under the Orders is staggering; the ATS Server Emails alone represent some 70 gigabytes of data, largely in Spanish, without any articulated urgency.
- o) There will be no prejudice to the Receiver or any other person if a stay of the Discovery Orders is ordered for a period of 60 days, subject to extension for good cause shown.
- p) The circumstances constitute grounds for an interim Order suspending the Discovery Orders for a reasonable period of time, to permit the Loan proceeds to clear the international banking system and be deposited with the Court for satisfaction of the Castillo Judgment and approved receivership expenses.
- q) Sections 101 and 106 of the *Courts of Justice Act*, RSO 1900, c C43, as amended;
- r) Rule 40 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended;
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- s) Such further and other grounds as the lawyers may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

- (a) The Affidavit of Juan Gutierrez;
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

March 25, 2022

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