

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

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

The Respondent, Juan Guillermo Gutierrez (“Respondent” or “Mr. Gutierrez”), will make a Motion for a stay of certain Orders of the Honourable Justice McEwen to a Judge of the Divisional Court on a date to be fixed by the Registrar, at 130 Queen Street West, Toronto, Ontario, M5H 2N5.

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

- in writing under subrule 37.12.1(1) because it is;
- in writing as an opposed motion under subrule 37.12.1(4);
- orally.

THE MOTION IS FOR

- (a) An order staying the Order of the Honourable Justice McEwen dated March 25, 2022 (the “**Compliance Order**”) and, if necessary, staying the Orders of the Honourable Justice McEwen dated August 28, 2020, October 27, 2020, and March 25, 2021 (collectively the “**Production Orders**”), to the extent necessary to suspend any obligation to transfer the Data (as defined hereinafter) to Epiq Systems, Inc. (“**Epiq**”), pending the determination of the Respondent’s motion for leave to appeal his Motion for Interim Order (Injunctive Relief) to suspend the Discover Orders;
- (b) The costs of this motion, if opposed, and,
- (c) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Background

- (a) The within receivership proceedings relate to the enforcement of a single creditor judgment (the “**Judgment**”) in favour of Margarita Castillo (the “Applicant”);
- (b) The Judgment arises out of certain litigation that is part of a series of long protracted and acrimonious international commercial litigation that spans multiple countries and over many years between Mr. Gutierrez, his family members and certain corporations, on one hand, and Mr. Gutierrez’ cousins

(the “**Nephews**”), their family members and certain corporations, on the other hand;

- (c) At stake are hundreds of millions of dollars of dividends improperly withheld by the Nephews, and involve allegations of money laundering, corporate espionage, and bribery;
- (d) For the past 18 months, the Receiver has expended tremendous resources to acquire and view data on Mr. Gutierrez’ personal iPad and personal iPhone (the “**Personal Devices**”) and certain emails sent or received by Mr. Gutierrez, including emails at email addresses unassociated with Xela (the “**ATS Server Emails**”);
- (e) The Receiver has also brought a motion for a contempt order against Mr. Gutierrez (the “**Contempt Motion**”) seeking, among other things, an order that Mr. Gutierrez be imprisoned, which Contempt Motion has been extant since February 9, 2021;

The Production Orders

- (f) On August 28, 2020, October 27, 2020 and March 25, 2021, the Honourable Justice McEwen made a series of Orders (collectively the Production Orders) requiring the Respondent – the president and sole shareholder of Xela Enterprises Ltd. (“**Xela**” or the “**Company**”), which is in receivership – to, among other things:
 - (i) produce all of the data on the Personal Devices;

- (ii) permit the creation of forensic images of the Personal Devices (the **“Images”**);
 - (iii) permit the data in the Images to be uploaded to an e-discovery database program (**“Relativity”**) maintained by Kroll (then, a division of Duff & Phelps), and later substituted with Epiq.
- (g) The Images of the Personal Devices have been created and reside on an external hard disk drive (the **“External Drive”**) in Epiq’s possession, which External Drive is locked with a passcode known only to Mr. Gutierrez.
- (h) The Production Orders also require Arturos Technical Services Ltd. (**“ATS”**) – the non-party IT services provider – to produce all emails sent or received by Mr. Gutierrez, including emails at email addresses unassociated with Xela (the **“ATS Server Emails”**).
- (i) The Production Orders contemplate that Mr. Gutierrez conduct advance review of the data on the Personal Devices on Relativity to assert any objections to disclosure to the Receiver of any documents on Relativity based on privilege, personal information, or any other reasonable basis (the **“Objections Protocol”**).
- (j) The Production Orders did not provide for the ATS Server Emails to be subject to the Objections Protocol, or any other protocol relating to Mr. Gutierrez’ personal solicitor-client privileged communications;

- (k) As a result, Mr. Gutierrez asserted privilege over the ATS Server Emails and insisted on a protocol to review the ATS Server Emails for privilege, which the Receiver denied;
- (l) On March 17, 2022, at a case conference, the Honourable Justice McEwen ordered that:
 - (i) Mr. Gutierrez provide the password to Epiq so that the Images could be uploaded to Relativity subject to the Objections Protocol; and,
 - (ii) The ATS Server Emails be delivered to Epiq to also be uploaded to Relativity subject to the Objections Protocol;

Events Giving Rise to Heightened Concerns

- (m) Between March 17, 2022 and March 23, 2022:
 - (i) Mr. Gutierrez, his counsel, and his IT expert (“**Teel**”) attempted to confer with Epiq to arrange for a safe, secure and appropriate method to unlock the External Drive and upload the Images to Relativity;
 - (ii) ATS and its counsel conferred with Epiq, the Receiver and its counsel to arrange for a safe, secure and appropriate method to transfer the ATS Server Emails to Epiq for upload to Relativity;
- (n) On March 23, 2022, before Epiq had responded to Teel’s suggestion, and before Mr. Gutierrez had a reasonable opportunity to consult with his

lawyers and Teel regarding the proposed method of transferring the ATS Server Emails, the Receiver's counsel wrote to the Honourable Justice McEwen reporting that both Mr. Gutierrez and ATS were not in compliance with the Production Orders.

- (o) Also, between March 17, 2022 and March 23, 2022, Mr. Gutierrez learned through social media reports that the Nephews were recently sanctioned by the Panamanian Court as a result of certain criminal investigations arising out of the Nephews activities indirectly related to these receivership proceedings.
- (p) Mr. Gutierrez has serious and legitimate concerns regarding the safety and security of the data on the Personal Devices and the ATS Server Emails given prior incidents of data breaches and public disclosure of documents that were utilized by the Nephews in other jurisdictions to support spurious litigation against Mr. Gutierrez.
- (q) The Receiver's sudden reporting of non-compliance in the midst of bona fide attempts to arrive at a reasonable, safe and secure method of transferring the data to Epiq, shortly after the recent escalation of sanctions against the Nephews in Panama, gives cause for Mr. Gutierrez to have serious concerns about the risk of malfeasance and corporate espionage as retaliatory actions by the Nephews.
- (r) These concerns are heightened by other actions taken by the Receiver in the weeks leading up to March 23, 2022, including but not limited to, the

Receiver inexplicably publishing on its website the confidential banking transaction information of a wire transfer in the amount of \$4.24 million USD (the “**Loan Proceeds**”) intended to satisfy the Judgment and terminate these Receivership proceedings, knowing that the Nephews have been closely monitoring and participating in these Receivership proceedings.

March 25, 2022 Case Conference

- (s) As a result of the Receiver’s report that Mr. Gutierrez and ATS remained non-compliant, the Honourable Justice McEwen (the “**Case Conference Judge**”) ordered an urgent case conference, which was returnable on March 25, 2022.
- (t) On March 25, 2022, Mr. Gutierrez advised the Case Conference Judge of his concerns arising from recent events and requested a short suspension of all obligations under the Productions Orders to permit Mr. Gutierrez to bring a motion for an interim interlocutory injunction (the “**Injunction Motion**”) to stay the enforcement of the Production Orders for a period of 60 days to allow the Loan Proceeds, sufficient to pay the Judgment and approved receivership fees and expenses to clear through the international SWIFT banking network.
- (u) On March 25, 2022, the Case Conference Judge denied the request for a short suspension and instead ordered compliance with the Production Orders by requiring Mr. Gutierrez to divulge the External Drive password to an Epiq representative via video conference and requiring ATS to deliver

the ATS Server Emails by a secure file transfer protocol connection no later than 5:00 p.m. on March 28, 2022 (the “**Endorsement**”).

Leave to Appeal

- (v) Mr. Gutierrez will seek leave to appeal the Endorsement on the question of whether the Case Conference Judge erred:
 - (i) in failing to exercise his discretion to allow for a short suspension of the Production Orders to permit Mr. Gutierrez to seek injunctive relief;
 - (ii) in ordering compliance with the Production Orders by a particular date and time in the circumstances, particularly given the concerns raised by Mr. Gutierrez regarding the Receiver’s conduct and the intention to seek injunctive relief;
- (w) At the Case Conference, Mr. Gutierrez filed a draft Notice of Motion for injunctive relief setting out specific the grounds on which relief was sought.
- (x) Notwithstanding, the Case Conference Judge refused to grant a short suspension of the Production Orders and instead issued the Endorsement.

Need for a Stay

- (y) If the Endorsement and Production Orders are not stayed pending the motion for leave to appeal (and ultimately, pending the motion for injunctive

relief), the appeal will be rendered nugatory because the data will have been released into the possession of Epiq.

- (z) There is a serious issue to be tried with respect to the correctness of the Endorsement.
- (aa) Mr. Gutierrez will suffer irreparable harm if a stay of the Endorsement and Production Orders is not granted because highly confidential and personal information of Mr. Gutierrez will be transferred to Epiq, with the knowledge of the Nephews who have a history of malfeasance and corporate espionage.
- (bb) Conversely, the Receiver will not suffer any non-compensable prejudice if it must wait a further period to access the data given that it has already waited 18 months.
- (cc) The balance of convenience, therefore, favours the granting of an interim stay of the Endorsement and Productions Orders to the extent that no data shall be required to be provided to Epiq or uploaded to Relativity pending the determination of Mr. Gutierrez' motion for leave to appeal the Endorsement.
- (dd) Sections 19 and 101 of the *Courts of Justice Act*, RSO 1990, c C.43, as amended.
- (ee) Rules 62.02 and 63.02 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended.

(ff) Such further and other grounds as the lawyers may advise.

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

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

March 28, 2022

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-and- Xela et al.
Respondents

Court File No. CV-

**ONTARIO
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