

SE 214966

No. \_\_\_\_\_  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**ENCANN SOLUTIONS INC.**

PETITIONER

AND:

**BC HOP COMPANY LTD.**

RESPONDENT

**NOTICE OF APPLICATION**

Name of applicant: Encann Solutions Inc.  
Counsel: Tim Louman-Gardiner  
Telephone: 604-661-1729  
Email: tlg@farris.com

To: BC Hop Company Ltd.

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at Vancouver on June 4, 2021 at 9:45 a.m. by EnCann Solutions Inc. for the order set out in Part 1 below.

**Part 1: ORDER SOUGHT**

1. An order for the preservation of assets (*Mareva* injunction) as set out in the draft order attached as Appendix 1 to this notice of application, or on such other terms as the Court may order.
2. Costs of this application in the cause.

**Part 2: FACTUAL BASIS**

1. EnCann Solutions Inc. ("EnCann") is a startup stage business focusing on extraction in the cannabis sector.
2. A growing sector of the cannabis market consists of products made using cannabinoids extracted from cannabis; notable cannabinoids include tetrahydrocannabinol (THC) and cannabidiol (CBD). The extracts are incorporated into products for sale to retail and wholesale purchasers, including oils, beverages, and edibles.

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3. EnCann's business is in its proprietary extraction system, designed to extract a high volume of high-quality extracts from cannabis products, including hemp.
4. BC Hop Company Ltd. ("BC Hop") is a grower of, and service provider for growers of, hops and hemp. Hemp contains cannabinoids that can be extracted to produce cannabis products described above.
5. On December 4, 2018, following negotiations between the parties, EnCann and BC Hop entered into a binding letter of intent dated November 30, 2018 (the "Agreement") pursuant to which BC Hop agreed to sell and EnCann agreed to purchase hemp biomass at a fixed price.
6. The Agreement was important to EnCann. It intended to use the hemp biomass for two purposes:
  - (a) First, it intended to sell some to third parties at a profit to fund its startup operations; and
  - (b) Second to extract the oils using its proprietary process to demonstrate and grow its business.
7. EnCann paid a deposit of \$100,000 plus GST of \$5,000 to BC Hop pursuant to the Agreement.
8. BC Hop breached the Agreement, by failing to deliver to EnCann the biomass it had agreed to sell. BC Hop in turn sold that biomass to different third party purchasers at an increased price.
9. The Agreement contained an arbitration provision referring any disputes arising thereunder to arbitration.
10. EnCann commenced an arbitration on August 6, 2019. The arbitrator granted a Partial Final Award (the "Award") on May 10, 2021. Pursuant to the Award, the Arbitrator:
  - (a) Declared that the Agreement was binding, and was breached by BC Hop;
  - (b) Awarded EnCann:
  - (c) \$105,000 being the return of the deposit plus GST, and
  - (d) \$760,763.40 in restitutionary damages; and
  - (e) Directed the exchange of submissions on interest and costs.
11. The damages set out in the Award were money that EnCann expected to receive from BC Hop. EnCann had expended its resources in the expectation that BC Hop would pay the proceeds accordingly; once BC Hop breached its agreement EnCann had to seek additional investors, lay off staff, defer salaries, and was unable to purchase the

equipment it needed to become a functioning enterprise. EnCann had purchased equipment and negotiated a lease, but instead had to downsize and could not take any steps to grow or develop its business. In October, 2020 when the City of Kelowna finally awarded building permits, the executives of EnCann had to assemble and fit out its facility by hand.

12. EnCann needs the proceeds from this award to develop its business. It has spent time and capital developing its business to give effect to the Agreement. The entire business development and growth plan of EnCann was predicated upon BC Hop performing its contractual obligations by supplying raw material that could be monetized by EnCann. Thus, the breach by BC Hop has devastated EnCann's ability to acquire biomass and investors, so it needs the proceeds from the award in order to continue to develop its technology and grow its business.

### **The Respondent's Business**

13. BC Hop is not listed as the registered owner of any real property in B.C. in the Land Title Office. From that, the Petitioner infers that the BC Hop conducts its business on leased premises.
14. BC Hop grows hops and industrial hemp, on land owned by third party farmers and on land owned by related entities. It then sells those hops and that hemp to purchasers. Their hemp purchasers apparently include some significant customers in the cannabis industry, including Aphria, Tilray/High Park, Aurora, Dosecann, Agripharm, Hexo, BlissCo, and Valens. And their purchasers for hops will include breweries, including Molson-Coors.
15. BC Hop also sells seed to farmers.
16. According to its web site, BC Hop has partner farmers across Canada. And on a podcast called the "Everyday Millionaire" podcast, Dwayne Stewart, BC Hop's principal, said in February 2020 that BC Hop had 35 full-time staff operating across British Columbia.
17. BC Hop will enter into agreements to sell hops or hemp periodically throughout the year. The harvest season for hops and hemp is in the autumn. Accordingly, to the knowledge of the Petitioner, it harvests its inventory in the autumn, and sells it throughout the year, likely delivering its harvest over time to its purchasers throughout the calendar year. As the end users of hops and hemp do not want to store the product before use, BC Hop will store the inventory on its leased premises, in cool or cold storage.
18. Based on the Petitioner's knowledge of the BC Hop business, its assets include:
  - (a) Leases for the farms, and for storage facilities;
  - (b) Equipment located within its facilities and on farms;
  - (c) Hops and hemp crops, both harvested and on the farms;

- (d) Agreements for purchase of the crops;
  - (e) Cash on hand in the form of pre-payments from purchasers;
  - (f) Accounts receivable; and
  - (g) Shares in Flow Scientific Ltd.
19. In the summer of 2020, in a presentation to Entrepreneurs' Organization Canada, the principal of BC Hop, Dwayne Stewart, claimed that:
- (a) He owned the farm on which the Respondent does business; and
  - (b) The Respondent had secured "nine figures" worth of sales.
20. Likewise, the chief liabilities of BC Hop, in addition to the Award, will be its obligations to deliver crops to purchasers.

### **The June 12, 2020 Meeting**

21. In a meeting on June 12, 2020, at a meeting for the purpose of discussing a resolution to the underlying dispute, the principal of the Respondent, Dwayne Stewart, made the certain statements to Lincoln Johnson, principal of the Petitioner. Mr Stewart advised Mr. Johnson that, in the event of an arbitral award in favour of the Petitioner:
- (a) the Respondent would "shut the company down and we start a new one and move on";
  - (b) the Respondent would "use every tool at my disposal to never pay you"; and
  - (c) that the Respondent has "lots of ways of making you not get anything"
- (collectively, the "Statements").

### **Part 3: LEGAL BASIS**

1. The Petitioners rely on the *Law and Equity Act*, RSBC 1996, c. 253, and the *Arbitration Act*, 1996 c. 55.

### **Admissibility of Affidavit #2 of Lincoln Johnson**

2. There is no question that communications made in respect of settlement negotiations are privileged, and inadmissible.
- Middelkamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4<sup>th</sup>) 227 (BC CA)
3. The rationale for the privilege is well-known: it promotes frank discussion between parties, and furthers the policy aim of encouraging settlement of litigious disputes.

4. The privilege is particularly designed to protect against disclosure of admissions, or of statements, that would be used against a party against its interest in the litigation.

Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (5<sup>th</sup> Ed., LexisNexis Canada, 2018), at §14.338-14.346

5. However, the privilege is not absolute. Our Court of Appeal has identified generally that there will be exceptions, typically on the basis that a competing public interest outweighs the public interest in encouraging settlement, and where documents sought to be admitted are both relevant and necessary in the circumstances of the case.

*Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4

6. There are two recognized exceptions:

- (a) Where communications constitute threats; or
- (b) Where the correspondence itself is prejudicial.

*I. Waxman & Sons Tobacco Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642 (Ont. H.C.J.), aff'd [1968] 2 O.R. 452 (On CA)

7. On the first category, our Court of Appeal has held that a threat to leave Canada to avoid a judgment and to induce perjury, even delivered in a settlement discussion, is not protected by “without prejudice” privilege.

*Greenwood v. Fitts*, (1961) 29 DLR (2d) 260 (BC CA)

8. In the affidavit #2 of Lincoln Johnson, Mr. Johnson deposes to the Statements. The Statements were made during a conversation that was taking place for the purpose of negotiating a settlement.

9. First, admissibility of the Statements does not offend the underlying rationale for protection of settlement privilege, as they are not admissions sought to be used against the party making them on the merits of the litigation.

10. However, if they are *prima facie* admissible, then they fall within the recognized categories of exceptions. In particular, the communications are threats analogous to those in *Greenwood*, to effectively bankrupt the Respondent or to remove assets from the reach of the jurisdiction. They are threats to remove assets from the reach of the courts. The policy underlying settlement privilege is not advanced by protecting statements such as the Statements, but is in fact undermined if parties can make those statements without repercussion in order to leverage a settlement.

### **Mareva Injunctions**

11. The purpose of a *Mareva* injunction is to ensure the retention of sufficient assets so that the plaintiff will not be left with a hollow judgment if he or she succeeds in obtaining

judgment against the defendant at trial. Its object is to prevent a potential judgment debtor from removing assets from the jurisdiction that would satisfy the judgment.

David Moonje, Kimberly A. Robertson and Katherine M. Wellburn, eds., *B.C. Creditors' Remedies: An Annotated Guide*, loose-leaf (Vancouver: The Continuing Legal Education Society, 2017) at § 5.4

12. The tests for obtaining a *Mareva* injunction are similar to those for obtaining injunctions generally, with two qualifications:

- (a) The applicant needs to show a strong *prima facie* case that is more than an arguable case, but it does not mean that the applicant's case is bound to succeed;
- (b) The applicant should demonstrate a real risk that the assets will be disposed of or dissipated, such that without the injunction, a judgment would be hollow.

*Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41

13. As with any injunction, the overarching consideration in each *Mareva* case is the balance of justice and convenience between the parties.

*Silver Standard Resources Inc. v. Joint Stock Company Geolog* (1998), 59 B.C.L.R. (3d) 196 (C.A.)

14. In assessing the balance of convenience, the following factors are relevant:

- (a) evidence showing the existence of assets within British Columbia or outside;
- (b) evidence showing a real risk of the disposal or dissipation of assets to render a judgment nugatory;
- (c) evidence of irreparable harm;
- (d) the strength of the plaintiff's case;
- (e) the nature of the transaction giving rise to the action;
- (f) the risks inherent in the transaction;
- (g) the amount of the claim;
- (h) the defendant's assets; and
- (i) the history of the defendant's conduct, including past dishonest activity.

*567 Hornby Apartments Ltd. v. Le Soleil Hospitality Inc.*, 2009 BCSC 711

15. The test for a worldwide *Mareva* injunction is:

- (a) Has the plaintiff shown a *prima facie* case?
- (b) Has the plaintiff shown that there is a real risk of removal or dissipation of assets?
- (c) Has the plaintiff show that there are assets outside B.C., the disposal of which would frustrate any judgment obtained against the defendant?

*Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (S.C.)

#### Strong Prima Facie Case

16. Section 29 of the *Arbitration Act* authorizes this Court to recognize and enforce an arbitral award. That application is not a re-hearing on the merits, and there usually has to be a reason provided by BC Hop as to why the award ought not be enforced.

*MSI Methylation Sciences, Inc. v Quark Ventures Inc.*, 2019 BCSC 440, aff'd 2020 BCCA 448

17. Based on the presumption that the Award much be recognized and enforced, the applicant has made out a *prima facie* case that it is entitled to the relief sought.

*China Citic Bank Corporation Limited v. Yan*, 2016 BCSC 2332

#### Real Risk of Removal or Dissipation of Assets

18. There is a very real risk of dissipation of assets. The principle of BC Hop has advised that it will dissipate assets to avoid paying the judgment.

19. Indeed, that will not be difficult to do. BC Hop has no readily exigible real property inside or outside of British Columbia, and its assets are limited to leasehold interests, receivables, and agreements that could easily be assigned to third parties, or allowed to terminate on their own terms and then be assumed by other parties.

#### Irreparable Harm

20. If the Petitioner is unable to recover the Award, it may cease to be viable as a going concern. By contrast, the injunction sought is designed to prevent only outside ordinary course transactions or payments to shareholders, which cannot cause any irreparable harm to BC Hop.

#### The Respondent's Conduct

21. In addition to the Statements, Mr. Stewart has acknowledged, in cross-examination at the arbitration, that:

Q So is that something you do often, Mr. Stewart? Do you enter into contracts that you're not sure you can fulfil?

A Yes, it's been my entire career. That's how I figure stuff out.

Q Right. So you sign contracts, and you don't really know if you have the intent of following through. You just sign them and whatever happens, happens; correct?

A No, I make sure that I have a limited liability, and I make sure that I don't take money that I can't perform on. Which is why I told Lincoln I'm okay to take \$100,000. Because it's within 21 days, I will have enough material to satisfy my limited liability of \$100,000. So I don't do it without care and caution, but very often I'll say yes, figure it out later period, that is what entrepreneurs do.

22. BC Hop is, on the face of the available evidence, prepared to knowingly breach agreements, and has set itself up to be creditor-proof, in order to minimize any liability from its commercially unreasonable approach to binding agreements.

Balance of Convenience

23. The balance of convenience favours the granting of an injunction. The injunction is not designed to interfere with the ordinary course business operations of BC Hop, and it can apply to vary the injunction at any time. It is only directed at out of the ordinary course transfers of assets.
24. By contrast, in the absence of an injunction, EnCann will be prejudiced, as there is a very real risk of dissipation of assets. Likewise, there has already been a finding that BC Hop breached the agreement; that BC Hop breached the relevant agreement is not in dispute. As between the parties, there is no dispute that BC Hop has caused the loss suffered between them, and BC Hop has likewise refused to pay.

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Lincoln Johnson, sworn May 20, 2021
2. Affidavit #2 of Lincoln Johnson, sworn May 20, 2021
3. Affidavit #1 of Laura Ferguson, sworn May 21, 2021

The applicant estimates that the application will take 30 minutes.

This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

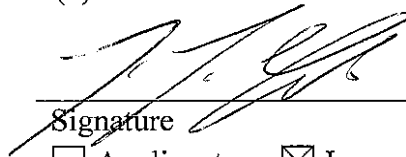
TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and



- (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: May 21, 2021



Signature

Applicant       Lawyer for applicant

**Tim Louman-Gardiner**

THIS NOTICE OF APPLICATION is prepared and delivered by Tim Louman-Gardiner of the firm Farris LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: 604-661-1729. Email: [tlg@farris.com](mailto:tlg@farris.com). **Attention: Tim Louman-Gardiner.**

**To be completed by the court only:**

**Order made**

- in the terms requested in paragraphs of Part 1 of this notice of application
- with the following variations and additional terms:

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**Dated:**

**Signature of**

**Judge**       **Master**

**Appendix**

*[The following information is provided for data collection purposes only and is of no legal effect.]*

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- other

No. \_\_\_\_\_  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**ENCANN SOLUTIONS INC.**

PETITIONER

AND:

**BC HOP COMPANY LTD.**

RESPONDENT

**ORDER**

BEFORE THE HONOURABLE )  
MR./MADAM JUSTICE ) May \_\_\_\_, 2021  
\_\_\_\_\_ )  
)

ON THE APPLICATION of the Petitioner, coming on for hearing at Vancouver, British Columbia on June 4, 2021 and on hearing Tim Louman-Gardiner, counsel for the Petitioner, and on reading:

1. Affidavit #1 of Lincoln Johnson, made May 20, 2021,
2. Affidavit #2 of Lincoln Johnson, made May 20, 2021, and
3. Affidavit #1 of Laura Ferguson, made May 21, 2021.

AND ON the Petitioner having undertaken to comply with the terms of the undertaking set out in Schedule "A" to this Order, which among other things requires service of the notice set out in Schedule "B" to this Order;

THIS COURT ORDERS THAT:

1. The Respondent, BC Hop Company Ltd., be restrained and enjoined, anywhere in the world, subject to paragraph 3 below, and to pay its reasonable legal expenses in this action, from disposing of, transferring, encumbering, mortgaging, pledging, assigning, dissipating,

concealing or otherwise dealing with any assets owned directly, indirectly or beneficially by it, held on its behalf, or effectively controlled by it, whether solely or jointly owned, until:

- a. The hearing of the Petition in this matter is concluded, and the Respondent has paid to the Petitioner in full any monies or other assets it is ordered to pay, including any costs ordered to be paid to the Petitioner; or
  - b. Further order of the Court.
2. This Order will cease to have effect if the Respondent provides security by paying the sum of \$865,763.20 CAD into Court or makes provision for security in that sum by some other method agreed in writing with the Petitioner.
3. The prohibition set out in paragraph 1 does not apply to any payments or dispositions that the Respondent BC Hop Company Ltd. makes in the ordinary course of its business, including but not limited to:
  - a. Payment of wages to employees or contractors, and associated remittances;
  - b. Rent payments to any arm's-length landlords;
  - c. Payment of taxes to any governmental authority;
  - d. Payment of costs to third party suppliers or parties providing goods and services to the Respondent; and
  - e. Delivery of inventory to third party purchasers in the ordinary course of business.
4. The prohibition set out in paragraph 1 applies to all of the Respondent's assets, including but not limited to the following assets in particular:
  - a. Any monies in the Respondent's accounts at any financial institution;
  - b. Any leases or leasehold interests held by the Respondent;
  - c. Any plants planted by the Respondent, or any inventory harvested by the Respondent; and
  - d. The proceeds from the sale of any of these assets if any of them have been sold.
5. Within 21 days of the service of this Order, the Respondent must produce a list, verified by an affidavit setting out all of the Respondent's assets as of the date of this Order, whether in or outside British Columbia and whether in its own name or not and whether solely or jointly owned, and details of all such assets, including the nature of each asset, all identifying numbers and other identifying information, its exact location as of the date of this Order, and whether the asset is held in the Respondent's name or jointly held with another person, or by another on its behalf (the "**Respondent's Asset List**").

6. If the Respondent holds any assets over which it has no beneficial interest, that asset shall be included in the Respondent's Asset List, along with an indication that the asset is held in trust for others.
7. The Petitioner's solicitor shall not disclose the Respondent's Asset List or the information contained in it except for the purpose of this proceeding. Before making such disclosure, counsel shall obtain a written undertaking from the person to whom disclosure is to be made in the form attached to this Order as Schedule "C".
8. Anyone affected by this Order may apply to the Court at any time to vary or discharge it. All applications to vary or discharge this Order, or arising out of the issuance or enforcement of this Order, shall be heard by the Judge who issued this Order with the exception of:
  - a) urgent matters for which the Judge is not available; or
  - b) as otherwise directed by the Judge.
9. Except as permitted by this Order, no person or other legal entity with notice of this Order may deal with any assets of the Respondent in his/her/its possession or control without further order of this Court.
10. No person or other legal entity with notice of this Order shall breach or permit a breach of this Order.
11. Anyone with notice of this Order who aids and abets in a breach of this Order will be deemed to be in breach of it.
12. This Order does not prevent any bank, financial institution or secured party from exercising any rights to claim interest, to levy service charges, to claim set off, to enforce security, or to enforce any other contractual right, arising from contracts made before being notified of this Order.
13. No bank or financial institution needs to inquire as to the application or proposed application of any money withdrawn by the Respondent if the withdrawal is permitted by this Order.
14. This Order binds the Respondent and every other person who is subject to this Order and obtains notice of the Order, as of the time such Respondent or person first receives notice of the Order, and whether or not such Respondent or person has been served with a copy of the Order.

\_\_\_\_\_  
Signature of  
Lawyer for the Petitioner  
**Tim Louman-Gardiner**

BY THE COURT

\_\_\_\_\_

REGISTRAR

**SCHEDULE "A"**

I, Lincoln Johnson, declare as follows:

1. I have read the attached draft Order (the "Order").
2. I am authorized by the corporate Petitioner to give its undertaking and it does hereby undertake to do the following:
  - a. to take reasonable steps to ensure service on the defendant of a copy of the Petition, the Order and every affidavit referred to in the Order, and a separate copy of the Notice to Respondent which is Schedule "B" to the Order;
  - b. to provide a copy of the Order to any person who the plaintiff intends will be bound to honour the terms of the Order;
  - c. to abide by any Order the British Columbia Supreme Court may make as to damages in the event that this Court is of the opinion that the Respondent, or any of them, or any other person served with this Order has sustained damages by reason of this Order which the Petitioner ought to pay;
  - d. to pay the reasonable costs of complying with the Order which are incurred by anyone, other than the Respondents, to whom or to which the Petitioner provides a copy of this Order, including the reasonable costs of ascertaining whether that person or entity holds any of the Respondent's assets; and
  - e. to take all reasonable steps to notify, in writing, any person or entity which the Petitioner serves with a copy of the Order of any changes to the Order that might affect that person, including any occurrence which results in the Order ceasing to have effect.
3. I understand that if I breach this undertaking or the Order, I may be imprisoned or fined.

Dated: May , 2021

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Signed

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Witness

**SCHEDULE "B"**

**IMPORTANT**

**NOTICE TO THE RESPONDENT**

1. The Order of Mr./Madam Justice \_\_\_\_\_ dated \_\_\_\_\_ ("Order") prohibits you from dealing with your assets. The Order is subject to the exceptions stated in the Order. You should read it all carefully.
  
2. You are entitled to seek legal advice from your own lawyer regarding this Order and the rights you may have. You are advised to consult a lawyer as soon as possible. You have a right to ask the Court to vary or discharge this Order.
  
3. If you disobey this Order you may be found guilty of contempt of court and you may be sent to prison or fined or your assets may be seized.

Dated: \_\_\_\_\_  
*Month/Day/Year*

I acknowledge receipt of a copy of this notice.

**Acknowledged and delivered in the )  
presence of: )**

\_\_\_\_\_  
*Witness Signature*

**Name:**

**Address:**

\_\_\_\_\_  
**Recipient:**

) **Name:**

) **Address:**

)

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**SCHEDULE "C"**

1. I understand, agree and undertake to the Court that I will not disclose the Respondent's Asset List, or any information contained in that list, to anyone other than counsel for the Petitioner in this action, or a person who is designated in writing by counsel and who signs a separate form of this undertaking and provides me with a signed and witnessed copy.
2. I agree and undertake to the Court that I will only use the Respondent's Asset List or the information contained in the Respondent's Asset List for the purpose of this litigation and proceedings to execute on any order made in this litigation and for any purpose that is expressly permitted by a court order.
3. I understand, agree and undertake to the Court that I will destroy or return to the plaintiff's counsel my copy of the Respondent's Asset List, and any other document that contains information derived from the Respondent's Asset List, by [DATE], or such later date expressly permitted by court order.

\_\_\_\_\_  
Dated

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Witness