

Court File Number: CV-11-9062-00CL

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: McEwen J

Counsel	Telephone No:	Facsimile No:
<u>(as per 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):

Upon the agreement of counsel the attached endorsement, marked as Schedule One, shall go along with the attached schedules A-C. Insofar as the draft order at schedule B is concerned, it shall go as per the copy I have signed and also attached to this endorsement. The Order is effective from today's date, regardless of whether or not it is entered in

26 March 20  
Date

McEwen J  
Judge's Signature

Additional Pages \_\_\_\_\_

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

BETWEEN:

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

Endorsement

*McEwen, J.*  
March 24, 2020

This case conference was held by teleconference on March 23, 2020 and March 24, 2020 in accordance with the changes to the Commercial List operations in light of the COVID-19 crisis, and the Chief Justice's notice to the profession dated March 15, 2020.

1. The Receiver's motion, solely as it relates to the request for an Order declaring that the respondent, Juan Guillermo Gutierrez, pursuant to Rule 60.11 of the Ontario Rules of Civil Procedure, in contempt of each of (i) my Order dated July 5, 2019 (the "**Appointment Order**") and (ii) my Order dated October 29, 2019 (the "**Disclosure Order**"), is adjourned to May 14, 2020, subject to the attached litigation timetable at Schedule C. Counsel to Juan Guillermo Gutierrez has accepted service of the Receiver's Motion Record dated March 3, 2020, the Supplementary Motion Record dated March 17, 2020 and the Factum

and Brief of Authorities of the Receiver each dated March 19, 2020. Each of Greenspan Humphrey Weinstein LLP and Cambridge LLP hereby agree to waive any requirement for personal service on Mr. Gutierrez and agree to accept service on his behalf by way of email.

2. By the deadlines set out below, Juan Guillermo Gutierrez, to the extent the documentation and information is in his power, possession and/or control, will deliver, or cause to be delivered, to the Receiver, the items listed below:
  - a. within 14 calendar days of this Endorsement, any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between Mr. Gutierrez and the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
  - b. within 14 calendar days of this Endorsement, any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT to Lisa and to Xela; and
  - c. within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa's interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020. Without limiting the generality of this request, the questions attached hereto as Schedule A shall be answered.

3. By the deadlines set out below, Harald Johannessen Hals, Lester Hess Jr. and Calvin Kenneth Shield, as members of the board of directors and officers of Lisa, S.A. (“**Lisa**”) will deliver, or cause to be delivered, to the Receiver, the items listed below:

- d. within 14 calendar days of this Endorsement, any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
- e. within 14 calendar days of this Endorsement, any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT to Lisa and to Xela and copies of bank statements evidencing such advances, as previously requested by the Receiver; and
- f. within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa’s interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020. Without limiting the generality of this request, the questions attached hereto as Schedule A shall be answered.

4. An Order is also made, in the form attached hereto at Schedule B, approving the fees and disbursements of the Receiver and its legal counsel as set out in Second Report of the

Receiver dated February 18, 2020 (the “**Second Report**”), approving and ratifying the Gabinvest Resolution (as defined in the Second Report) and authorizing the parties to effect service on Mr. Harald Johannessen Hals by way of email at [harald.johannessen1951@gmail.com](mailto:harald.johannessen1951@gmail.com) in accordance with the E-Service Protocol approved in these proceedings.

5. The Receiver or the Debtor’s estate shall not be responsible for any costs relating to any legal counsel retained to act as counsel to the directors of the Debtor in these proceedings, or in any foreign legal proceedings or otherwise, unless otherwise approved by the Receiver in writing, and the Debtor’s directors shall be solely responsible for the fees and disbursements incurred by such counsel.
6. I am exercising my discretion under this endorsement to waive the time period suspensions prescribed under Ontario Regulation 73/20 made under the *Emergency Management and Civil Protection Act*.

A handwritten signature in black ink, appearing to read 'McEwen', is written over a horizontal line.

Justice McEwen

**SCHEDULE A****List of Additional Questions**

1. Please provide proof of advances from BDT to Lisa totalling US47.0 million as of June 30, 2018, including any cancelled cheques payable to Lisa, wire transfers from BDT to Lisa and bank statements.
2. Please provide a detailed summary of the amounts advanced by BDT to Lisa since the date of the Assignment Transaction (as defined in the Disclosure Order), with supporting documentary evidence (copies of all cheques, wire transfers or other evidence of Lisa's use of such funds).
3. What specific date did BDT propose to satisfy LISA's debt?
4. Who on behalf of BDT made that communication?
5. Who on behalf of LISA received that communication and in what was the form of communication? Produce copies.
6. Was the BDT proposal or any similar offer reduced to writing? Produce copies.
7. When did LISA's board meet to consider the BDT proposal? Was the meeting in person or through technology?
8. Who attended the board meeting?
9. What documents or records did the Board review in considering the BDT proposal. Produce copies.
10. Produce minutes and/or notes of board meeting.
11. Produce board resolution approving the transaction.

12. What documents were signed once the board approved the BDT proposal. Produce copies.
13. Why did LISA's directors not consult with Gabinvest?
14. Why did LISA's directors not consult with Xela and/or the Receiver?
15. What was the form of assurance provided by BDT as referenced in paragraph 22 of Harald's affidavit? Produce any written assurance.
16. When did Juan learn of this February 2020 transaction?
17. Who advised him of it? Produce a copy of any written communication.
18. Produce any written communication regarding the transaction as between any of BDT, LISA, Gabinvest, Xela and all respective directors and officers

**SCHEDULE B**

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE MR

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TUESDAY, THE 24<sup>TH</sup>

JUSTICE MCEWEN

)

DAY OF MARCH, 2020

)

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

**ORDER**

**THIS MOTION**, made by KSV Kofman Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property (collectively, the “**Property**”) of Xela Enterprises Ltd. (the “**Debtor**”), for an Order, *inter alia*, (i) approving the fees and disbursements of the Receiver and its legal



counsel as set out in second report of the Receiver dated February 14, 2020 (the “**Second Report**”), and (ii) certain additional ancillary relief contained herein, was heard this day by teleconference.

**ON READING** the Motion Record of the Receiver, including the Second Report and the appendices thereto, the fee affidavit of Steven Graff sworn February 14, 2020, and the fee affidavit of Noah Goldstein sworn February 18, 2020, and on hearing the submissions of counsel for the Receiver and such other counsel as were present and listed on the Counsel Slip, no one else appearing for any other party named on the service list, although served as evidenced by each of the affidavit of Sam Babe sworn March 4, 2020 and the affidavit of Kyle Plunkett sworn March 17, 2020, filed.

## **SERVICE**

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated and that this motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Persons shall be authorized and permitted to serve Mr. Harald Johannessen Hals with copies of all court materials or documents filed in these proceedings by emailing a copy to [harald.johannessen1951@gmail.com](mailto:harald.johannessen1951@gmail.com) in accordance with the Protocol (as defined in the Order made in these proceedings on July 5, 2019 by which the Receiver was appointed (the “**Appointment Order**”)).

## **APPROVAL OF GABINVEST RESOLUTION**

3. **THIS COURT ORDERS AND DECLARES** that the resolution of the shareholder of Gabinvest S.A., dated January 16, 2020, replacing the directors of Gabinvest S.A., as described in Section 3.0 of the Second Report (the “**Gabinvest Resolution**”), was a proper exercise of the Receiver’s exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise the Debtor’s shareholder rights.

**APPROVAL OF FEES AND DISBURSEMENTS**

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$107,626.81 (excluding HST) as set out in Appendix “CC” to the Second Report, are hereby approved.
  
  5. **THIS COURT ORDERS** that the fees and disbursements of the Receiver’s legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$108,783.09 (excluding HST) as set out in Appendix “DD” to the Second Report, are hereby approved.
  
  6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.
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**ARGARITA**  
Applicant

**CASTILLO** -and-

**XELA ENTERPRISES LTD. et al.**

Respondents

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

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**Proceedings commenced at Toronto**

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**ORDER**

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181 Bay Street, 181 Bay Street  
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*Lawyers for KSV Kofman Inc., in its capacity as the court-appointed Receiver of Xela Enterprises Ltd.*

**SCHEDULE C**

**Litigation Timetable re Contempt Motion**

<b>Step to be taken</b>	<b>Delivered by:</b>
1. Motion Record of the Receiver, Supplemental Motion Record and Second Supplemental Report of the Receiver	Complete
2. Responding Motion Record of J. Gutierrez et al.	March 31, 2020
3. Delivery by the Receiver of Sworn Affidavit appending the Receiver's Reports	March 31, 2020
4. Delivery by the Receiver of any Reply Materials	April 10, 2020
5. Cross-Examination of a representative of the Receiver	Week of April 20 <sup>th</sup> 2020
6. Cross-Examination of the Respondent's affiants	Week of April 20 <sup>th</sup> 2020
7. Delivery of Factum of the Receiver	May 5, 2020
8. Delivery of Responding Factum of the Respondent	May 8, 2020
9. Delivery of Reply Factum of the Receiver	May 12, 2020
<b>10. Hearing Date:</b>	<b>May 14, 2020</b>

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE MR

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TUESDAY, THE 24<sup>TH</sup>

JUSTICE MCEWEN

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BETWEEN:

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- and -

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counsel as set out in second report of the Receiver dated February 14, 2020 (the “**Second Report**”), and (ii) certain additional ancillary relief contained herein, was heard this day by teleconference.

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## **SERVICE**

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**ARGARITA**  
Applicant

**CASTILLO** -and-

**XELA ENTERPRISES LTD. et al.**  
Respondents

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

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**Proceedings commenced at Toronto**

**ORDER**

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