

**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, Executor of the Estate of Juan Arturo
Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA
ENTERPRISES LTD.

CASE CONFERENCE MEMORANDUM OF THE RECEIVER
(September 30, 2020 Case Conference)

September 30, 2020

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

Tel: (416) 865-2921

Fax: (416) 865-3558

Email: pgriffin@litigate.com

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Fax: (416) 865-2851

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Fax: (416) 865-2876

Email: dknoke@litigate.com

AIRD & BERLIS LLP

Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

TO: **THE SERVICE LIST**

A. INTRODUCTION

1. KSV Restructuring Inc. (the “**Receiver**”) requests the Court’s assistance to gain access to the property, records, and company documents of Xela Enterprises Ltd. (“**Xela**” or the “**Company**”) as already ordered by this Court on July 5, 2019 and August 28, 2020.

2. The Receiver is asking the Court’s assistance with:

- (a) Production from Juan Guillermo Gutierrez (“**Juan Guillermo**”) of his past and current cellphones, iPads, laptops, and computers (the “**Devices**”) to take a forensic image of the Devices; and
- (b) The forensic imaging and preservation of the ATS servers which are acknowledged to contain Xela data.

3. The Orders made by this Court provide for this relief:

- (a) Juan Guillermo Gutierrez (“**Juan Guillermo**”) is required to grant access to the Receiver to Xela’s Property and Records (as the case may be) regardless where or how they are stored¹ (Para. 5-7 of the July 5, 2019 Order);
- (b) The Receiver is entitled to search the Premises of the Company Agents (including Juan Guillermo) to identify, reproduce, and possess Xela’s document² (Paragraphs 2-3 of the August 28, 2020 Order);

¹ Order of McEwen J., dated July 5, 2019, Compendium of the Receiver, Tab 1

² Order of McEwen J., dated August 28, 2020, Compendium of the Receiver, Tab 2

- (c) The Receiver shall have access to email and other electronic “accounts where information related to the Company may be stored” (paragraph 5 of the August 28, 2020 Order);
- (d) The Receiver is permitted to forensically image Company Documents and Devices (paragraph 7 of the August 28, 2020 Order).

B. JUAN GUILLERMO’S DEVICES

4. Juan Guillermo has recently agreed to provide the Receiver with his old damaged iPad but not his current iPad or cell phone because the iPad has “never been used to conduct business related to Xela”³ and because the cellphone is said to be “used for personal purposes.”⁴

5. Juan Guillermo’s position is inconsistent with the evidence. He has testified that he cannot do his work for Xela,⁵ which is ongoing, without his iPad. He continues to hold himself out as acting for Xela. Any devices in his possession should be imaged in accordance with the Orders.

(i) Juan Guillermo has and continues to work for Xela

6. Juan Guillermo has worked for Xela, and he continues to do so:

- (a) On August 30, 2018, he testified under oath that:
 - (i) He had no other source of income but Xela;⁶

³ Letter from Cambridge LLP to Receiver’s Counsel, dated September 29, 2020, Compendium of the Receiver, Tab 6

⁴ Letter from Cambridge LLP to Receiver’s Counsel, dated September 29, 2020, Compendium of the Receiver, Tab 6

⁵ Transcript of the Continued Examination in Aid of Execution of Juan Guillermo Gutierrez, August 30, 2018 (“**EAE of JG, Aug. 30, 2018**”), QQ. 1093-1094, the Motion Record to Appoint the Receiver, January 15, 2019 (“**MR to Appoint**”), Tab BB, pp. 598-599; EAE of JG, Aug. 30, 2018, QQ. 951, 1069-1071, MR to Appoint, at pp. 535-536, 586-587, Compendium of the Receiver, Tab 13

⁶ EAE of JG, Aug. 30, 2018, Q. 951, MR to Appoint, at p. 535, Compendium of the Receiver, Tab 13

- (ii) He had never worked anywhere other than Xela and that he had worked there since 1984. Xela was his “only commitment”;⁷
 - (iii) When asked what further future sources of income he might have, Juan Guillermo indicated that he had no intention of searching for more work at that time. He said that his focus was on “resolv[ing] our problems down south” (the Avicola Litigation) on behalf of Xela;⁸
- (b) On November 27, 2018, Calvin Shields, the only other director at Xela, testified under oath that Juan Guillermo was still working for Xela. He said:
- (i) Juan Guillermo is “still involved” with Xela’s direct and indirect subsidiaries;⁹
 - (ii) Juan Guillermo, not Mr. Shields, was the person who would know about the status of the Avicola Litigation and the location of Xela’s most valuable asset – its share certificates (held indirectly) in the Avicola Group. Mr. Shields indicated that LISA was holding no directors’ meetings, which confirms that Juan Guillermo is orchestrating the Avicola Litigation on behalf of Xela;¹⁰ and
 - (iii) In the face of questions about Xela and its subsidiaries, Mr. Shields’s U.S. lawyer (and a former Company officer), Juan Jose Rodriguez, suggested that questions about Xela and its subsidiaries would better be directed to Juan Guillermo;¹¹ and
- (c) In his recent August 21, 2020 affidavit, Juan Guillermo continues to purport to speak for Xela. He says that he is Xela’s President and sole shareholder. He attempts to broker a deal with respect to collection of Xela’s unpaid dividends

⁷ EAE of JG, Aug. 30, 2018, Q. 1069, MR to Appoint, at pp. 586-587, Compendium of the Receiver, Tab 13

⁸ EAE of JG, Aug. 30, 2018, Q. 1070-1071, MR to Appoint, at p. 587, Compendium of the Receiver, Tab 13

⁹ Transcript of the Continued Examination in Aid of Execution of Calvin Shields, dated November 27, 2018 (“**EAE of CS, Nov. 27, 2018**”), Q. 371 (370-373), MR to Appoint, pp. 651-652, Compendium of the Receiver, Tab 14

¹⁰ EAE of CS, Nov. 27, 2018, Q. 394, 396, 400-405, 451, MR to Appoint, pp. 660-664, 678, Compendium of the Receiver, Tab 14

¹¹ EAE of CS, Nov. 27, 2018, Q. 376, MR to Appoint, p. 654, Compendium of the Receiver, Tab 14

related to the Avicola Litigation, and he acknowledges that he is currently involved in Xela's litigation in Ontario against his sister and the Avicola Group.¹²

(ii) *Xela's documents are on Juan Guillermo's past and current cellphones and iPads.*

7. Xela's documents are on Juan Guillermo's past and current cellphones and iPads. On August 30, 2018, he testified under oath that:

- (a) "I worked really hard all my life. I worked – never had less than 10, 12 hours a day work, maybe 14 hours a day. On Saturdays and Sundays I have the phone and the computer on; I was connected to our business all the time";
- (b) He said that he replaced his damaged iPad because he needed it for work. He said that he could not perform his work "without communication device[s]" such as his iPad.¹³

C. ATS AND SERVERS

8. In accordance with this Court's August 28, 2020 Order, the Receiver was advised that Xela's four servers were at Cogent Co. in North York, Ontario under the control of ATS.

9. On September 18, 2020, Cogent Co. indicated that Xela ceased to be a customer in June 2017 and that ATS has a secured cabinet where more than four servers are stored. Cogent Co. indicated that it would require ATS' consent for the Receiver to access the secured cabinet.¹⁴

¹² Affidavit of Juan Guillermo, sworn August 21, 2020, paras. 1, 2, 8, 13, 17, 25, 28, in the Responding Motion Record of Cambridge LLP, dated August 21, 2020, pp. 1-12, Compendium of the Receiver, Tab 15

¹³ EAE of JG, Aug. 30, 2018, Q. 1094, MR to Appoint, pp. 598-599, Compendium of the Receiver, Tab 13

¹⁴ Letter from the Receiver to ATS, dated September 21, 2020, Compendium of the Receiver, Tab 9

10. On September 21, 2020, the Receiver wrote to ATS, asking it to comply with the August 28, 2020 Order by granting the Receiver access to its secured cabinet at Cogent Co. to remove Xela's servers.¹⁵

11. On September 25, 2020, ATS wrote to the Receiver.¹⁶ It claimed that ATS purchased Xela's servers in January 2017. ATS confirmed that Xela's documents are on the servers but expressed concern about the Receiver having access to ATS' documents. ATS offered to segregate Xela's documents for download and delivery to the Receiver and to consult with the Receiver's forensic expert. However, ATS did not permit the Receiver access to the servers in the manner set out in this Court's August 28, 2020 Order.

12. On September 29, 2020, the Receiver wrote to ATS, expressing a willingness to work with ATS without this Court's intervention, subject to confirmation of certain terms.¹⁷ In the letter, the Receiver noted that:

- (a) Pursuant to paragraph 9 of the August 28, 2020 Order, ATS and anyone with notice of the Order is prohibited from removing, altering, concealing, touching, activating, or operating the servers. As such, it would be a breach of the Order to take steps to segregate any data on the servers;
- (b) Pursuant to paragraphs 3, 6, and 7 of the Order, the Receiver (which is already an independent, court-appointed officer) is entitled to select a forensic specialist and, together with any other Authorized Persons, conduct its own search for Xela's property, records, and documents; and
- (c) Pursuant to paragraphs 16-17, the Receiver and any Authorized Persons are permitted to determine what third-party documents may be subject to privilege, and

¹⁵ Letter from the Receiver to ATS, dated September 21, 2020, Compendium of the Receiver, Tab 9

¹⁶ Letter from ATS to the Receiver, dated September 25, 2020, Compendium of the Receiver, Tab 10

¹⁷ Letter from the Receiver to ATS, dated September 29, 2020, Compendium of the Receiver, Tab 11

the Receiver and any Authorized Persons have the obligation to segregate such documents. While ATS may assert privilege, it is not entitled to do so prior to the Receiver forensically imaging the servers.

13. The Receiver requested confirmation of the following before the Case Conference on September 30, 2020:

- (a) ATS and Company Agents have not and will not take any steps to segregate any of Xela's property, records, or documents;
- (b) ATS and Company Agents will permit the Receiver and its Authorized Persons access to Cogent Co. to forensically image the servers upon which are located Xela's property, records, and documents; and
- (c) ATS would assert privilege over any documents after the servers have been forensically imaged and not before.¹⁸

14. Later, on September 29, 2020, ATS wrote to the Receiver, objecting to the procedure proposed by the Receiver and expressing concern about confidentiality of ATS' records. ATS asked that the Receiver provide the Court with a copy of its letter, which is included as a tab to the Receiver's Compendium.¹⁹

15. The Receiver seeks authority to image the servers with Xela data. Following which, the Receiver will address a protocol with ATS. If an agreement cannot be reached, the Receiver will seek the Court's assistance as necessary.

¹⁸ Letter from the Receiver to ATS, dated September 29, 2020, Compendium of the Receiver, Tab 11

¹⁹ Letter from ATS to the Receiver, dated September 29, 2020, Compendium of the Receiver, Tab 12

D. ORDER REQUESTED

16. The Receiver respectfully requests that this Court direct Juan Guillermo and ATS to comply with the Orders by ordering:

- (a) Juan Guillermo to deliver up the Devices for forensic imaging; and
- (b) ATS to preserve the ATS servers and providing the Receiver with access to image servers with Xela data.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30^h day of September, 2020.

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com

Monique J. Jilesen (43092W)

Tel: (416) 865-2926
Fax: (416) 865-2851
Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018
Fax: (416) 865-2876
Email: dknoke@litigate.com

AIRD & BERLIS LLP

Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

SCHEDULE "A"
LIST OF AUTHORITIES

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*

1.03(1) “document” includes data and information in electronic form; (“document”).

MARGARITA CASTILLO
Plaintiff

-and- XELA ENTERPRISE LTD. et al.
Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**CASE CONFERENCE MEMORANDUM OF THE
RECEIVER
(September 30, 2020 Case Conference)**

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Barristers
Suite 2600,
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Monique J. Jilesen (43092W)
Tel: (416) 865-2926
Fax: (416) 865-2851
Email: mjilesen@litigate.com
Derek Knoke (75555E)
Tel: (416) 865-3018
Fax: (416) 865-2876
Email: dknoke@litigate.com

AIRD & BERLIS LLP

Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Kyle Plunkett
Email: kplunkett@airdberlis.com
Sam Babe
Email: sbabe@airdberlis.com
Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Receiver