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, Executor of the Estate of Juan Arturo Gutierrez

Respondents

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

COMPENDIUM OF THE APPLICANT
(Receiver's Access to ATS Documents, returnable August 28, 2020)

August 25, 2020

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INDEX

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE) FRIDAY, THE 5th

JUSTICE MCEWEN) DAY OF July, 2019

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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
(appointing Receiver)

THIS MOTION made by the Applicant for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing KSV Kofman Inc. as receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of Xela Enterprises Ltd. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Margarita Castillo sworn January 14, 2019 and the Exhibits thereto and on hearing the submissions of counsel for Margarita Castillo and Xela Enterprises Ltd., and on reading the consent of KSV Kofman Inc. to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 101 of the CJA, KSV Kofman Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $1,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

(l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and

on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(q) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

(r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

4. THIS COURT ORDERS that, notwithstanding any other provision in this Order, the Receiver shall not take any steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between the Debtor and its subsidiaries and/or affiliates and any third party, including the litigation involving or related to the Avicola companies (as defined and further set out in the affidavit of Juan Guillermo Gutierrez ("Juan"), sworn June 17, 2019). Such steps shall include but not be limited to:

a) selling or publicly marketing the shares of Lisa S.A., Gabinvest S.A., or any shares owned by these entities;

b) publicly disclosing any information about the above-mentioned litigation and/or the Receiver's conclusions or intentions, provided that the Receiver may disclose such information to Juan and Margarita Castillo ("Margarita") and their counsel upon Juan and Margarita each executing a non-disclosure agreement in a form reasonably acceptable to the Receiver, and if the Receiver does disclose such information, conclusions or intentions, the Receiver shall disclose equally to Juan and Margarita;

c) replacing counsel in the above mentioned litigations; and

d) engaging in settlement negotiations or contacting opposing parties in the above-mentioned litigation.

This paragraph applies only until December 31, 2019 or such other date as this Court may order.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

5. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request. The Receiver shall treat as confidential all information received relating to litigation involving or related to the Avicola companies.

6. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

7. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service

provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

8. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

9. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Receiver are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as

amended (the "BIA"), and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be

opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or

collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory

or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The amount of such borrowing shall not, subject to further order of this Court, exceed $500,000 before December 31, 2019. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

THIS IS TO CERTIFY THAT THIS DOCUMENT, EACH PAGE OF WHICH IS STAMPED WITH THE SEAL OF THE SUPERIOR COURT OF JUSTICE AT TORONTO, IS A TRUE COPY OF THE DOCUMENT ON FILE IN THIS OFFICE

LA PRÉSENT ATTEST QUE CE DOCUMENT, DONT CHACUNE DES PAGES EST REVÊTUE DU SCEAU DE LA COUR SUPÉRIEURE DE JUSTICE A TORONTO, EST UNE COPIE CONFORME DU DOCUMENT CONSERVÉ DANS CE BUREAU

DATED AT TORONTO THIS 6th DAY OF February 20 20
FAIT À TORONTO LE JOUR DE

C. Irwin
Registrar

REGISTRAR GREFFIER

23. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

24. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

TERMINATION OF RECEIVERSHIP

25. THIS COURT ORDERS that the Debtor may make a motion to this Court for the termination of the receivership upon receipt by Margarita of the judgment debt owing to her by the Debtor, plus receivership fees and expenses, and that upon such motion the burden shall be on Margarita to justify that it remains just and equitable to continue the receivership.

SERVICE AND NOTICE

26. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'http://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises'.

27. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as

last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

28. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. 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.

31. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. THIS COURT ORDERS that the Applicant shall have its costs of this motion, up to and including entry and service of this Order, in the amount of $40,000, all inclusive, to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUL 05 2019

PER / PAR:

THIS IS TO CERTIFY THAT THIS DOCUMENT, EACH PAGE OF WHICH IS STAMPED WITH THE SEAL OF THE SUPERIOR COURT OF JUSTICE AT TORONTO, IS A TRUE COPY OF THE DOCUMENT ON FILE IN THIS OFFICE

LA PRESENT ATTEST QUE CE DOCUMENT, DONT CHACUNE DES PAGES EST REVETUE DU SCEAU DE LA COUR SUPERIEURE DE JUSTICE A TORONTO, EST UNE COPIE CONFORME DU DOCUMENT CONSERVÉ DANS CE BUREAU

DATED AT TORONTO THIS 6th DAY OF February 20 20
FAIT À TORONTO LE JOUR DE

C. Irwin
REGISTRAR Registrar GREFFIER

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that KSV Kofman Inc., the receiver (the "Receiver") of the assets, undertakings and properties Xela Enterprises Ltd. acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of _____, 20__ (the "Order") made in an action having Court file number CV-11-9062-00CL, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

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DATED AT TORONTO THIS 6th DAY OF February, 20 20
FAIT À TORONTO LE JOUR DE

G. IRWIN
Registrar

REGISTRAR GREFFIER

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

KSV Kofman Inc., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

17

MARGARITA CASTILLO
Moving Party

-and-

XELA ENTERPRISES LTD. et al.
Respondents
Superior Court File No.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

ORDER

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Lawyers for the moving party, Margarita Castillo

CITATION: Margarita Castillo v. Xela Enterprises Ltd. et al, 2015 ONSC 6671
COURT FILE NO.: CV-11-9062-00CL
DATE: 20151028

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: **MARGARITA CASTILLO**

Applicant

AND:

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and JUAN ARTURO GUTIERREZ

Respondents

BEFORE: Newbould J.

COUNSEL: *Jeffery S. Leon and Jason W.J. Woycheshyn*, for the Applicant

Joseph Groia, Kevin Richard and Martin Mendelzon, for the Respondents

HEARD: June 4 and 5, 2015

[1] The applicant moves for an order requiring the respondents[1] to buy her shares in Tropic International Limited ("Tropic"). The respondents take the position that the issues raised by the

[1] The order sought is against all respondents other than the respondent 696096 Alberta Ltd., which is Margarita's company to hold her preference shares in Xela.

applicant should proceed to trial and that in any event there is no basis for the relief sought by the applicant.

[2] For the reasons that follow, I hold that the issues can and should be determined without the necessity of a trial and that the applicant is entitled to have her shares in Tropic bought out at a price of $4.25 million.

[3] In this oppression application, Margarita Castillo (“Margarita”) alleges that her father Juan Arturo Gutiérrez (“Arturo”) and her brother Juan Guillermo Gutiérrez (“Juan”) have conducted the business and affairs of certain family companies in a manner that has been oppressive. The close family ties that once existed are no more. Margarita alleges that for several years there has been a complete breakdown in the relationship among shareholders and a state of animosity exists that precludes all reasonable hope of reconciliation. Accordingly, Margarita seeks to have the respondents buy her shares of Tropic at fair value.

[4] Arturo was one of three children of Juan Bautista Gutiérrez who emigrated from Spain to Guatemala in 1911 and created a flour milling and animal feed business. By 1965, Arturo was running the family business. Arturo and his two siblings incorporated Avicola Villalobos for the purpose of engaging in poultry production. Avicola expanded to become a fully-integrated set of companies engaged in the production of poultry. In addition to its poultry business, the Gutiérrez family also developed a highly successful chain of chicken restaurants. Ownership of the Avicola Group was divided equally among Arturo and his brother and sister.

[5] In 1974, after his brother and his sister’s husband died, their roles in the family business were assumed by their respective children (the Bosch and Gutiérrez Mayorga families, also known as the "Cousins"). Arturo says that from the time one of the Bosch sons, Juan Bosch, became involved in the business, tensions grew in the family and in the operation of the business. Because of that and the societal strife and civil war, Arturo decided to leave Guatemala. After Arturo emigrated from Guatemala, the Cousins were left with two-thirds ownership of the Avicola Group and Arturo retained his one-third stake in the business. Arturo has been in

litigation in various jurisdictions for many years against the Cousins whom he alleges have defrauded him out of his interest in the Avicola Group.

[6] Arturo emigrated to Canada in 1984. His son Juan and his daughter Margarita and her husband Ricardo Castillo emigrated to Canada at about the same time.

Xela Enterprises Ltd.

[7] Arturo formed Xela Enterprises Ltd. as the corporation holding his business interests. It is an Ontario corporation. Initially, he gifted to each of Juan and Margarita 75 Class B non-voting shares of Xela, while he retained control. He also hired his son, Juan, and Margarita's husband Ricardo to work for Xela. In 1996 Arturo effected an estate freeze in Xela under which Margarita and Juan exchanged their common stock in Xela for preferred shares with a fixed value to each of approximately $14 million that would be redeemable at Arturo's death. The common stock was put into a Gutiérrez family trust in which Arturo retains voting control and whose beneficiaries are his grandchildren.

Tropic International Limited

[8] Ricardo and Charles Graham, a business colleague of Ricardo's, founded Tropic in 1989. Tropic's business was initially focused on the sale and distribution of ginger and cassava root. Ricardo and Mr. Graham were the founding shareholders of Tropic and its officers and directors. Margarita was also a founding officer and director. Arturo and Juan were not shareholders, officers or directors, and had no role in operating Tropic.

[9] As part of Tropic's initial business plan, Xela's indirect subsidiary Mayacrops S.A. grew the ginger and cassava root to be sold and distributed by Tropic. However, Mayacrops could not successfully grow cassava, and absorbed its own losses. Tropic did not seek alternate suppliers, and from approximately 1990 to 1994 the company was inactive. Ricardo acquired Mr. Graham's Tropic shares, leaving Ricardo as the sole shareholder of Tropic during this period.

[10] In 1994, Tropic assumed ownership of Northern Produce Inc., a business primarily involved in importing melons into North America from Central America. Northern Produce Inc. was incorporated as a Tropic subsidiary. Northern Produce Inc. initially functioned as one of four partners in a Florida general partnership, with Xela having 55% and the other three partners 15% each. Xela acquired the interests of the other partners on July 1, 2003 at which time Northern Produce Inc. changed its name to Fresh Quest, Inc. Since 2003, Fresh Quest's business has involved importing and distributing fruit products throughout the United States and Canada. Farm operating companies in Guatemala and Honduras owned by Xela sell fruit directly to Fresh Quest.

[11] Fresh Quest has never existed as a separate entity apart from Tropic and is the only asset of Tropic. Northern Produce Inc. was placed in Tropic at the time of its formation. Arturo claims however that it was a mistake and an oversight to place Northern Produce Inc. in Tropic, an entity owned entirely by Ricardo, rather than in a company owned by Xela. He states that when he realized that Tropic was not a Xela subsidiary, he asked Ricardo to increase the capital so that some of the shares could be transferred to Juan and himself "in order to keep family peace".

[12] Ricardo agreed to do so and the resulting share structure of Tropic was that Ricardo and Juan each held 44.44% of the shares and Arturo held 11.11%. Arturo said on his cross-examination that in this way everyone was participating, that he did not expect any problems but that he held his 11.11% to use as a tie breaker just in case there was a problem. Ricardo puts a different slant on the transfer of shares to Juan. He says that that it was Arturo's desire to allow "the next generation" to develop businesses of its own. Arturo and Juan became shareholders of Tropic on October 17, 1994, and directors on Jan 5, 1995. Neither Arturo nor Juan paid anything for their Tropic shares.

[13] In 2007 Ricardo stopped working for Xela and he resigned from the Xela board in April 2007. Margarita took his seat on the Xela board. Each side blames the other for Ricardo leaving the Xela business. At that time, Arturo asked Ricardo to transfer his Tropic shares to Xela for nothing. Ricardo refused to do so, believing that his shares in Tropic were worth several

millions. In the end at the urging of Arturo and Juan, Ricardo's shares of Tropic were transferred to his wife Margarita for $1.00 on April 2, 2008. On the same day Ricardo resigned from the board of Xela and was replaced by Margarita.

[14] While there are statements in the material filed on behalf of the respondents that Margarita held her shares in Tropic for the benefit of Xela, Arturo admitted on his cross-examination that the shares legally belong to Margarita and that she is entitled to whatever benefit flows from them. Juan admitted the same on his cross-examination.

[15] While Margarita was a shareholder and director of Tropic, she was given financial information from the CFO of Xela that had been prepared by the comptroller of Xela that her shares of Tropic were worth US$20,111,500. This information was required by Margarita who had been asked to sign a personal guarantee of Tropic's line of credit with its banker. Juan's shares in Tropic were valued as well at this figure of US$20,111,500.

[16] Despite Tropic's separate legal identity, the respondents have historically treated Tropic and Fresh Quest like any other Xela subsidiary. As CEO, the day-to-day management of both Tropic and Fresh Quest are controlled by Juan. Before 2012, Fresh Quest matters were only addressed at Xela board meetings. Tropic never held its own board meetings until after Margarita was removed as a director and officer. Margarita started attending Xela board meetings in 2007 and acquiesced in the practice of determining Fresh Quest matters at Xela board meetings.

Removal of Margarita from the Xela and Tropic boards

[17] The Xela companies have been embroiled in a bitter dispute with the Cousins regarding Arturo's one third interest in the Avicola Group. The interest in the Avicola Group is held by a Xela subsidiary named Lisa S.A. A judgment was obtained against the Cousins in Bermuda in which it was found that the Cousins had conspired to defraud Lisa through the misappropriation of corporate profits. The Cousins have responded with a series of lawsuits in Guatemala seeking to expropriate Lisa's interest in the Avicola Group.

[18] Arturo and Juan accuse Margarita of siding with the Cousins and of scuppering settlement discussions in 2009. Much of their accusations are based on speculation. Margarita denies the accusations. Be that as it may, it is clear that the accusations against Margarita led to her removal from the boards of both Xela and Tropic.

[19] The friction between Margarita, Juan and Arturo escalated in April 2010, when Juan and Arturo, through their accounting advisors, proposed that Tropic should be sold to Xela at a total valuation of $8 million. Margarita's shares were accordingly valued at $3.52 million. This valuation shocked Margarita, after being told that her Tropic shares were valued at approximately US$20 million.

[20] Margarita received no explanation for this $8 million valuation of Tropic. On April 7, 2010, Arturo phoned Margarita to try to get her to agree to the transaction. Arturo refused to give Margarita any information on the valuation of Tropic or provide her with any of Tropic's or Fresh Quest's financial statements. She says that he threatened that if she did not agree to sell her shares, her monthly draws from Xela would stop.[2] When she refused, Arturo demanded she resign as a director of Xela by April 15, 2010.

[21] On April 28, 2010, Arturo asked Margarita why she had not resigned from Xela's board. When Margarita told him that she had no desire to resign, her father demanded that she not attend the Xela board meeting scheduled for the next day, April 29, 2010. Margarita emailed the Xela Board members to explain that she would not be attending the April 29th meeting as she had not received any prior notice of the board meeting or any of the standard materials provided to board members.

[2] Margarita states that her father took a portion of his wealth and gifted it to her and her brothers Luis and Juan. They were then required to loan this money back to the corporate predecessor of Xela. For the following 25 years, until May 2010, she received monthly "draws" which were characterized as shareholder loan repayments. In April, 2010 the Xela tax advisor was told that the shareholder advances and paid-up capital of the Xela group at the individual shareholder level had been exhausted, and he recommended an alternative. Juan and Arturo say the draws were simply gifts.

[22] On April 30, 2010, Margarita received an email which attached a resolution of the voting shareholder of Xela, being Arturo, dated April 28, 2010 which removed her as a director of Xela and was effective immediately. Despite her entitlement as director to receive notice of and to attend this meeting of shareholders, she received no notice of any such meeting. In May, 2010, Arturo caused Xela to stop making monthly payments to Margarita.

[23] The special resolution removing Margarita as a Xela director made no reference to Tropic. Margarita discovered that she had been removed as an officer of Tropic when her lawyers conducted a corporate search. A search of Tropic as of May 17, 2010 showed that she was still an officer and director. A search conducted as of June 8, 2010 showed that Margarita was still a director, but no longer an officer.

[24] In late December 2010 the respondents' lawyer advised Margarita that he believed she had been removed as a director of Tropic around the same time she was removed from the Xela board; i.e. in April, some eight months earlier. In Arturo's supplemental affidavit, dated August 11, 2011, he revealed for the first time that there had been a "Special Meeting of the Shareholders of Tropic" on April 29, 2010, at which Margarita was removed as a director of Tropic.

[25] While there is a dispute as to whether Margarita had been given meaningful notice of the Xela board meeting scheduled for April 29, 2010, there is no doubt that she was not given notice of a shareholder's meeting of Tropic for that day.

[26] On his cross-examination, Arturo admitted that he made a conscious decision not to tell Margarita at the time that she had been removed from the board of Tropic. He said that "I didn't want her to receive two bad news together", meaning news of her removal not just from the Xela board but also from the Tropic board.

Request for financial information

[27] On June 18, 2010, Margarita sent to Arturo, Juan and Mr. Karol, the CFO of Xela, a request for financial statements and information regarding Tropic and Fresh Quest. In her email enclosing the request, she stated "Now that the growing season is over, as a director and 45% shareholder of Tropic, I would like to have some information to help me understand Tropic's current financial position." She did not yet know that she had been removed as a director of Tropic on April 29, 2010.

[28] On June 25, 2010, the respondents' lawyer sent a letter to Margarita dated June 22, 2010, on instructions from Juan, stating that Xela's board had unanimously approved an offer to purchase Tropic shares at a valuation of $8 million at its meeting on April 29, 2010. The purchase price was to be preference shares in Xela redeemable with periodic payments over five years. The letter stated that the offer would only be open to Margarita for 10 days, and that it included a 40% premium. It said that Arturo and Juan had each accepted Xela's offer. The letter ignored Margarita's request for information made three days before and did not explain the $8 million valuation of Tropic. Margarita was out of the country at the time in South Africa and says that Arturo was aware of it, having being told on June 19, 2010. Arturo said he could not remember whether he knew at the time that Margarita was out of the country.

[29] On June 28, 2010 Margarita's lawyers replied and asked that the deadline for the offer be extended until Margarita had a reasonable opportunity to review the requested financial information. They stated that she could not be expected to make an informed decision on the offer in the absence of financial information to support the valuation and the alleged 40% premium.

[30] On July 1, 2010, the respondents' lawyer responded to Margarita's request for financial information by acknowledging that Margarita was certainly entitled to view the financial information of Tropic, but not entitled to view the financial information relating to Fresh Quest, because she was not a shareholder of Fresh Quest. The respondents' lawyer further stated that the basis of the respondents' Tropic valuation was proprietary to Xela.

[31] The position taken by the respondents, therefore, was that although Tropic was a holding company and its valuation depended entirely on the valuation of its subsidiary Fresh Quest, Margarita as a shareholder of Tropic was not entitled to financial information about Fresh Quest as she was not a shareholder or director of that company.

[32] In August 2010, Margarita retained Farley Cohen of Cohen Hamilton Steger & Co. Inc. to help value her shares in Tropic. The respondents at first refused to produce any documents to Mr. Cohen. On May 13, 2011, after a failed without prejudice process in which a confidentiality agreement was signed and some information was provided to Mr. Cohen, the parties consented to an order requiring information to be provided to Mr. Cohen as requested by Mr. Cohen. A further order was made on June 13, 2011 and again on August 17, 2011 requiring the respondents to deliver the documents requested by Mr. Cohen no later than August 30, 2011. On December 3, 2013 the requested documents had not all been delivered, as the respondents took the position that Mr. Cohen did not need, or should not see, all that he had requested, and on that day a further order was made that the documents were to be delivered by January 17, 2014.

Pressure to sign a guarantee of Fresh Quest line of credit

[33] Although Margarita was denied access to financial information regarding Fresh Quest because she was merely a Tropic shareholder, the respondents demanded that Margarita continue to personally guarantee Fresh Quest's line of credit with the International Finance Bank.

[34] On December 9, 2010, the respondents' lawyer sent to Margarita an unconditional guarantee unlimited as to amount to support Fresh Quest's line of credit. She was asked to sign it as soon as possible and told that time was of the essence. Additional documentation enclosed with the letter revealed that the Tropic board had passed a resolution on September 1, 2010, a little more than three months earlier, guaranteeing the liabilities and obligations of Fresh Quest to International Finance Bank for approximately US$7 million, and that Juan and Arturo had signed personal guarantees on the same day. Both pieces of information came as a surprise to Margarita, who still believed that she was a director of Tropic, having been told so in the

respondents' lawyer's letter to her of July 10, 2010, and who did not know of the September directors' resolution. No explanation was given why they waited three months to send the requested guarantee to Margarita.

[35] Margarita's lawyers wrote in reply to this request on December 22, 2010 to the respondents' lawyer and relayed Margarita's concerns and additional requests for information were made. In reply to those concerns, on December 22, 2010, the respondents' lawyer disclosed Margarita's removal from the Tropic Board on April 29, 2010 at the time she was removed as a director of Xela. The requests for financial information were not answered. The respondents' lawyer said that the bank wanted Margarita's guarantee, that time was critical and that it would be harmful to the best interests of Tropic and Fresh Quest for Margarita to refuse.

[36] On the following day, December 23, 2010, Margarita's lawyers wrote back to the respondents' lawyer and explained that it was not reasonable to ask her to sign the guarantee of Fresh Quest's line of credit and put all of her assets as risk without having been properly informed. They stated that notwithstanding this, and out of a concern for the best interests of the entities involved, and the representation that the entities would suffer irreparable harm if she did not sign the guarantee, Margarita conditionally agreed to sign the personal guarantee. Among the conditions were that Margarita be provided with information showing that the bank still required a guarantee from her, that she be provided with any supporting financial documents given to the bank in connection with renewing the line of credit, that she be indemnified by Arturo, Juan and Xela for any liability she might have under the guarantee and that arrangements be made with the bank so that Margarita would not be forced to sign a guarantee in the future.

[37] On January 6, 2011 the respondents' lawyer replied. No further financial information was provided. The letter said that if Margarita wanted an indemnity from Xela, it would make Xela effectively the sole guarantor of Tropic (no explanation of the guarantees already given by Arturo and Juan was given) and that Xela would indemnity her only if given further shares in Tropic. That would of course have diluted Margarita's shareholding in Tropic. Shortly after this letter was received, Margarita commenced this application on January 18, 2011.

Events post-application

[38] By letter dated April 1, 2011, the respondents' lawyer Kevin Sherkin advised Margarita that the Fresh Quest line of credit had been terminated by the International Finance Bank, alleging that the termination was the result of Margarita telling the bank of her litigation. Margarita denies telling the bank that. The letter stated that Margarita was now required within seven business days to personally advance 44% of the $7 million, being the amount of the line of credit before it was said to have been terminated by the bank.

[39] The letter from Mr. Sherkin also stated that because of the position of Margarita, there would be a restatement to the financial statements of Tropic:

> In the event that the funds are not confirmed to be committed and delivered within seven business days, you will leave us with no alternative but to consider a new strategy for the company.
>
> Also be advised that given the nature of how the Tropic Group of Companies was treated by Xela, and given your client's position, the accounting for the group is presently being restated to reflect all of the proper expenses on Tropic's accounts and books in order to give the true picture of it's [sic] profitability. This is going to result in a sizeable deficit for the group.

[40] On April 12, 2011, the same day the statement of claim was issued, a Xela wholly-owned subsidiary, Xela International Inc. posted two journal entries effective May 31, 2010 that caused the shareholders' equity of Tropic to be decreased from approximately $580,000 to approximately a negative $3.5 million.

[41] On April 8, 2011, Margarita's lawyers requested that she be provided with information about the "new strategy for the company" referred to in the April 1 letter.

[42] A reply dated April 15, 2011 from the respondents' lawyer ignored the request. It stated that Margarita had destroyed a longstanding relationship with the bank. It enclosed a statement of claim issued on April 12, 2011 by Xela, Arturo, Juan and other corporations against

Margarita, her husband Ricardo and 10 other defendants associated with the Cousins claiming damages of $400 million. It also claimed a further $4,350,000 against Margarita and Ricardo for breach of their fiduciary duties as directors of Xela which had caused damage to Xela. No allegations were pleaded that Margarita or Ricardo breached any duties owing to Tropic or Fresh Quest and those companies were not parties to the action.

[43] The credit facility for Fresh Quest with the International Finance Bank was still in place when Mr. Korol, the CFO of Xela, was cross-examined on July 12, 2012. There is no evidence that it has since been terminated by the bank.

Issues

1. **Should Tropic and Xela issues be tried together?**

[44] In my decision of July 3, 2014 I did not accede to a request of the respondents that the application of Margarita regarding Tropic should go to trial to be dealt together with her application regarding Xela. Rather, because it was not clear at that stage whether the Tropic and Xela issues in the application could or could not be severed, I permitted the applicant to proceed with her application relating to Tropic and permitted the respondents to contend on the hearing of the application that the Tropic and Xela issues could not be severed and should proceed together to trial.

[45] Having heard the evidence, I am satisfied that the applicant's claim that she is entitled to an order requiring her Tropic shares to be purchased can be dealt with separately from her claim for relief relating to her interest in Xela. There are a number of reasons for this.

[46] The allegations made by the respondents against Margarita regarding her alleged damage caused to Xela include no allegations that her alleged activity caused any damage to Tropic or to Fresh Quest. The statement of claim against her and the Cousins for in excess of $400,000 million includes no such allegations and Tropic and Fresh Quest are not referred to. The

evidence of the alleged conduct referred to on behalf of the respondents on the hearing of this application, apart from being nearly entirely speculation and innuendo based on no cogent evidence, all relate to the claims that Margarita has been assisting the Cousins who have deprived Arturo of his one-third interest in the Avicola Group, which is entirely separate from Tropic and Fresh Quest

[47] On his cross-examination, Arturo stated that what Margarita did with the Cousins was not relevant to her claim with respect to her shares in Tropic as the two things were separate matters. On his cross-examination, Juan stated that information regarding Tropic was irrelevant to what the Cousins were interested in, being Xela information. I accept that the two issues are separate. What Margarita is alleged to have done with the Cousins to harm Arturo's interest in the Avicola Group cannot affect her rights as a shareholder of Tropic.

[48] I further find that it is possible on the evidence to determine if there has been conduct on the part of the respondents towards Margarita that gives rise to a right of relief and if so what that relief should be.

2. Has there been oppressive conduct towards Margarita regarding her position in Tropic?

[49] The proper approach in dealing with a claim for oppression is first to look to the concept of reasonable expectations and, if a breach of a reasonable expectation is established, to then consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 248 of the OBCA. See *BCE Inc. v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 at paras. 56 and 68.

[50] Relationships in closely held family businesses and the practices carried out can be of importance in considering the reasonable expectations of a family member who is a complainant and cause a court to look at more than simply legal rights. In *BCE*, the Court stated:

> **75** Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp*. (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).
>
> **76** Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

[51] Practices and expectations can change over time. Where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice. See *BCE* at para. 77.

[52] There are a number of matters that lead to the conclusion that there has been oppressive conduct that has at least unfairly disregarded Margarita’s interest in Tropic as a shareholder and director and in some cases has been coercive and abusive. It has been borne out of a family dispute that has nothing to do with Tropic, but rather involves a dispute of Arturo with the Cousins regarding his one-third interest in the Avicola Group.

[53] Until she was secretly removed as a director of Tropic in April, 2010, Margarita had been a director since the formation of Tropic in 1989. When shares in Tropic were acquired in late 2004 by Arturo and Juan, who became directors of Tropic in January 2005, Margarita continued as a director of Tropic. She had an expectation that she would remain a director. This was no accident. When Arturo and the family emigrated to Canada in 1984, Arturo told the family that everybody was going to be treated equally. She, like Juan, acquired the same percentage of

shareholding in Xela. When the shareholding of Tropic was restructured in 2004 and Ricardo no longer was its shareholder, Margarita acquired the same 44% shareholding as Juan, and she continued as a director with Juan. Her continuing as a director of Tropic was a reasonable expectation. Her removal as a director for reasons unrelated to Tropic was oppressive.

[54] There can be no doubt that Margarita was entitled to expect honesty from her father Arturo and her brother Juan in their dealings with her interest in Tropic. Her secret removal as a director at a special meeting of shareholders in April 2010 of which she had no notice and then not being told for some eight months later after a number of prodding questions from her lawyer about the financial affairs of Tropic and Fresh Quest completely disregarded her interests as a director of Tropic. Arturo's explanation that it was bad enough for Margarita to be removed as a director of Xela at the same time and that he did not want to give her two pieces of bad news at once was no excuse, even if true. He admitted that he did deliberately did not tell her of her removal as a director of Tropic.

[55] Although Fresh Quest was a wholly owned subsidiary of Tropic since the commencement of the Fresh Quest business, Tropic and Fresh Quest were treated like any other Xela subsidiary. As CEO, the day-to-day management of both Tropic and Fresh Quest were controlled by Juan and Fresh Quest matters were only addressed at Xela board meetings. Tropic held no board meetings. As long as Margarita was a director of Xela, she had access to financial information regarding Fresh Quest. That stopped when she was removed as a director of Xela by Arturo on April 28, 2010. It had negative consequences so far as Margarita was concerned.

[56] The way in which Margarita was treated in connection with the attempt to get her to sell her shares of Tropic to Xela was coercive and abusive. It is no answer that she resisted and refused to sell her shares in the circumstances in which she was denied financial information to assess their value. In particular:

(a) The Xela offer to acquire the Tropic shares was approved at an April 29, 2010 Xela board meeting which Margarita was told not to attend. Margarita had no

knowledge that the offer was going to be made. She had talked to Arturo in early April when he tried to get her to sell her shares based on a valuation of $8 million for Tropic, but he had refused to give her any information on the valuation of Tropic. She understandably had an interest in understanding the basis of the $8 million valuation for the whole company as she had been told by the Xela financial people two years earlier that her Tropic shares alone were worth approximately $20 million.

(b) When Margarita refused to accede to her father's demand that she sell her Tropic shares to Xela, his threats to remove her as a director of Xela and to stop monthly payments from Xela to her were abusive and intended to coerce her into selling her Tropic shares to Xela. The refusal to give her financial information supporting the $8 million valuation disregarded her rights and expectations and was part of the coercive tactic being employed by her father to get her to sell her Tropic shares.

(c) After Margarita through her lawyers requested financial information about Tropic and Fresh Quest on June 18, 2010, Margarita was told by letter sent on June 25, 2010 of Xela's offer that had been approved on April 29, 2010 and that Arturo and Juan had already accepted it. Margarita was entitled to know of the offer at the same time and no explanation was given why she was only told of the offer two months after it was made. The deadline of 10 days she was given to accept the offer without any reply to the request for financial information was part of the coercive attempt to get her to sell her Tropic shares.

(d) The respondents argue that Margarita had sufficient information to value Tropic. I do not accept that. Margarita did not have up to date information. More importantly, no one could have expected Margarita to be able to value the company. She had been a homemaker since the birth of her first child. She did have financial information as a director of Xela but she was removed as a director

in April, 2010 and had not received the board package of material with up to date financial information. As well, Mr. Korol, the CFO of Xela, had done a rough calculation of value of Tropic but evidently this was not considered sufficient because Xela commissioned a valuation of a Michael Badham that Arturo said on cross-examination was seen by Arturo and Juan by the time of the April, 2010 Xela board meeting. If Arturo, Juan and Mr. Korol thought a valuation by an accredited appraiser was necessary, it does not lie in their mouth to say that Margarita should have been able to determine the value of Tropic when she was given 10 days in late June, 2010 to respond to the offer made to her. Margarita had a reasonable expectation that she would be provided with the financial information regarding Tropic that Arturo, Juan and Xela had, including the valuation obtained by Xela. For the respondents to take the position that its valuation of the Tropic shares was propriety to Xela ignores completely the relationship of the parties and Margarita's reasonable expectations of being properly informed.

(e) As well, Farley Cohen, the valuer retained by Margarita to provide her with a value of Tropic, felt unable to value Tropic without information from Xela about the business of Fresh Quest, and several court orders were required before the requested information was disclosed in 2014. Mr. Cohen is a senior respected business valuer and if he needed more information, it cannot be seriously said that Margarita had enough information.

(f) The position taken by the respondents' lawyer on July 1, 2010 in response to Margarita's further request for financial information that Margarita was entitled to view the financial information of Tropic, but not entitled to view the financial information relating to Fresh Quest because she was not a director or shareholder of Fresh Quest completely disregarded her rights and expectations as a shareholder of Tropic (and from what she had been told as a continuing director of Tropic). The only business of Tropic was the Fresh Quest business and the

> argument that she was not entitled to financial information of Fresh Quest because she was not a director or shareholder of Fresh Quest was a contrivance and ignored the relationships and availability of financial information to Margarita that had occurred in the family until then. It was part of the abusive treatment of Margarita.

[57] The attempts by the respondents to get Margarita to sign a guarantee of the Fresh Quest line of credit with its banker was also unequal treatment and abusive. It was completely inconsistent with the position taken that she was not entitled to financial information regarding Fresh Quest because she was not a director or shareholder of Fresh Quest. Pressure was put on Margarita to sign the guarantee quickly yet the line of credit had been approved three months earlier when Arturo and Juan signed guarantees. No explanation was given for the three month delay. When Margarita through her lawyers offered to sign the guarantee if certain conditions were agreed to, including a request that Xela indemnify Margarita, the response on behalf of the respondents was part of the abusive treatment. The conditions requested by Margarita were not unreasonable. Margarita was no longer a director of Xela or being provided with financial information regarding Fresh Quest. The response that Xela would need more shares of Tropic if Margarita were provided with an indemnity was a tactic to pressure her to sign the guarantee. It would have diluted her interest in Tropic at a time when the respondents were attempting to get her to sell her Tropic shares to Xela.

[58] Actions taken on behalf of the respondents after this application was commenced continued the abusive treatment of Margarita and unfairly disregarded her interests. The demand in April, 2011 that she personally advance 44% of $7 million said to be needed by Fresh Quest because of the termination of the line of credit by Fresh Quest's bank was inconsistent with the position taken that she was not entitled to financial information of Fresh Quest because she was not a director or shareholder of Fresh Quest. The demand that she provide the funds within seven business days, failing which the respondents would be left with no alternative but to consider a new strategy for the company, was a tactic to pressure her. The fact that Fresh Quest's bank

continues to lend to Fresh Quest, as acknowledged by Mr. Korol on his cross-examination, raises doubts that Margarita was required to advance the money as demanded.

[59] The statement of April 1, 2011 made by Mr. Sherkin on behalf of the respondents to Margarita's lawyers that "given your client's position, the accounting for the group is presenting being restated to reflect all of the proper expenses on Tropic's accounts and books in order to give the true picture of its profitability", was a litigation tactic and no way to treat Margarita as a shareholder of Tropic. It was an attempt to load Tropic with debt and negatively affect Tropic's balance sheet and the value of her shares in Tropic that she was asking the Court to order to be bought out at a fair valuation. Even if the restatement of Tropic's books was a legitimate exercise, which I do not think was the case, it meant that for several years before the restatement the books of Tropic that were kept by Xela accounting personnel were not true statements. As a shareholder and director of Tropic, Margarita had a reasonable expectation that Xela, which was operating the Fresh Quest business, would accurately record the financial affairs of the business. Those books were not adjusted to put debt on the books of Tropic when Arturo and Juan had earlier sold their Tropic shares to Xela, and the change to the books now that Margarita was asking to be bought out at a fair price was oppressive conduct.

[60] The restatement of the books of Tropic was made by a journal entry on April 12, 2011, the same date that the action against the Cousins and Margarita for in excess of $400 million was started. The impact of the adjustment was that the shareholders' equity of Tropic went from approximately $580,000 as at May 31, 2009 to approximately a negative $3.5 million as at May 31, 2010

[61] XGL was a logistics transportation business operated at a loss by Xela International Inc., a subsidiary of Xela, from 2007 to 2010. Mr. Soriano of Campbell Valuation Partners Limited, the expert valuer retained by the respondents in this application, said in his report that management advised that it was always the case that XGL was a business division of Fresh Quest. Mr. Soriano said on his cross-examination that management advised him that while the XGL business was being run, the losses were reported in Xela because it was too complicated

with banking relationships to set it up within Tropic at that time. What he said he was advised by management is of course hearsay and the respondents put forward no direct evidence that XGL was a business division of Fresh Quest or as to why the losses were booked in Xela when they were incurred.

[62] It makes little sense that a business such as XGL being run by Xela International would have a right to book its losses in any other company. The losses were carried on the financial statements of Xela which were audited, as were the financial statements of Fresh Quest. There was no suggestion of a mistake when Arturo and Juan accepted the Xela offer to acquire their shares of Tropic. The corporate organization of Xela was sophisticated with sophisticated financial people and advisers. Tropic and Fresh Quest were separate companies with separate financial statements. If it was the case that the losses were intended all along to be losses of Tropic or Fresh Quest, it means that Arturo and Juan, both directors of Tropic, failed in their duty as directors to see that the financial statements properly recorded the financial results of Tropic. They were the management of Xela that managed the business of Fresh Quest, for which Xela charged Fresh Quest $80,000 per month and a sales commission on Canadian sales made by Fresh Quest fixed at US$12,500 per month. Margarita had a reasonable expectation that Arturo and Juan would properly and timely record the financial results of Tropic and Fresh Quest.[3]

[63] Mr. Korol advised Mr. Cohen that at the time of the restatement when the XGL losses were transferred from the books of Xela International, Xela's management decided that the losses should be borne by Fresh Quest. However, according to what Mr. Korol told Mr. Cohen, the losses could not be booked in Fresh Quest's financial statements due to certain of Fresh Quest's banking financial covenants, resulting in the losses being booked in Tropic instead. That statement of course is hearsay. What was in evidence was from the cross-examination of Mr.

[3] The lease of the property used by XGL was signed by Fresh Quest. Why that was done was not the subject of any direct evidence from the respondents. In his report, Mr. Soriano said that "management" advised that Fresh Quest signed the lease because XGL was a business division of Fresh Quest. That is hearsay that was not proven.

Korol in which he stated that Fresh Quest sent $11,000 to a Xela-related company "to pay some perks to a couple of XGL executives". Mr. Korol pointed out that this amount was not expensed in Fresh Quest but was booked as an intercompany loan payable from Xela to Fresh Quest. There would have been no need for this intercompany loan payable from Xela to Fresh Quest if XGL was a division of Fresh Quest. That transaction was completely inconsistent with the position now being taken by the respondents.

[64] Another aspect of booking the losses in Tropic rather than Fresh Quest was that there would have been significant tax benefits from booking the losses in Fresh Quest as it would have reduced the tax payable by Fresh Quest. Tropic was not an operating company and had no income against which the losses could have been written off for tax purposes. A higher profit for Fresh Quest would make its valuation higher and thus result in a higher equity value of Tropic.

[65] Mr. Cohen points out as well another negative effect of transferring the losses to Tropic rather than to Fresh Quest. Under the transfer pricing agreement made by Fresh Quest with Xela and three Xela subsidiaries, 80% of the Fresh Quest residual profits are allocated to Latin American Procurement Ltd ("LAP"), a Barbadian company which provides technical services to farms owned by Xela in Central America. By recording the amounts in Tropic, rather than Fresh Quest directly, management did not accurately reflect the impact on Fresh Quest. As Fresh Quest's residual profits are allocated 80%/20% between LAP and Fresh Quest, Fresh Quest would have effectively allocated 80% of the expenses, or approximately $3.29 million, to LAP via a reduction through its residual profit allocation. Higher expenses of LAP, a Xela subsidiary, would have reduced its profits. I find it much more likely that this motivated Arturo and Juan to cause the XGL losses to be booked in Tropic rather than Fresh Quest, not a suggested bank covenant problem for which there was no evidence.

[66] I cannot find that the transfer of XGL losses from the books of Xela International to the books of Tropic was a legitimate step taken in good faith. In the circumstances, I find it was a tactic to harm the interests of Margarita who had started an application to be paid the fair value of her shares in Tropic, and was oppresive.

[67] In my view of the evidence, and I so find, the actions of the respondents other than 696096 Alberta Ltd. (Margarita's holding company) as discussed were individually and cumulatively oppressive. The actions were not taken in good faith and were abusive. They were oppressive to Margarita's interests as a director and shareholder of Tropic.

3. Appropriate relief

[68] Section 248 of the OBCA gives wide scope to fashion a remedy once oppressive conduct has been established. Subsection 248(2) provides that a court may make an order to rectify the matters complained of. Subsection 248(3) provides that a court may make any order it thinks fit including the power to direct a corporation or any other person to purchase securities of a security holder.

[69] I do not accept the arguments made on behalf of the respondents that Margarita had no reasonable expectation, by gift from Arturo or otherwise, that she was to have a stake in Tropic separate and apart from what she had in Xela shares. Both Arturo and Juan have admitted that Margarita is the owner of her Tropic shares and entitled to what they are worth. The offer from Xela to Margarita to buy her shares in Tropic belies any notion that she has no reasonable expectation to the value of those shares. Moreover, neither Arturo nor Juan paid anything for their shares of Tropic and yet they sold them to Xela. What would be a gift to Margarita if her shares were bought by Xela would be just as much a gift to Arturo and Juan. Juan has the same preferred shares in Xela as does Margarita.

[70] In my view, the appropriate relief under section 248(3) of the OBCA is to order that Margarita's Tropic shares be bought by the Arturo, Juan and Xela or any one or more of them at fair value. It is clear that the relationship of these respondents with Margarita has completely broken down and that Margarita cannot expect to be treated properly as a shareholder of Tropic. The past actions of Arturo and Juan make that very clear. Their past threats or actions are an indication of how they are likely to deal with Margarita. Leaving her as a shareholder of Tropic would make her vulnerable to Arturo and Juan who have indicated a complete antipathy towards

her. Such potential vulnerability could include diluting her shareholding in Tropic by the issuance of more shares to them or Xela, transferring liabilities to Tropic or Fresh Quest or changing the business relationships of Fresh Quest in a way that would lessen its revenues. As well, it is clear that Arturo and Juan do not want Margarita to continue to own her shares in Tropic. Their steps to try to force her to sell her shares to Xela make that clear.

[71] Reinstating Margarita as a director of Tropic would do little. The gravamen of Margarita's complaint is the way she was treated in an attempt to get her to sell her shares of Tropic to Xela without being provided appropriate financial information and the way she was treated when pressure was put on her to sign a guarantee of the Fresh Quest line of credit and then to personally put up cash for Fresh Quest without proper financial disclosure of Fresh Quest. Margarita cannot expect to be treated fairly as a director of Tropic by Arturo or Juan. Taking the position that the financial affairs of Fresh Quest are not open to her as she is not a director or shareholder of Fresh Quest belies any suggestion that she will be treated fairly.

4. Fair Value of Margarita's Tropic shares

[72] Fair value is not the same as fair market value, but rather is a value based on principles of equity. In *Glass v. 618717*, 2012 ONSC 535 at para. 246 Brown J. (as he then was) quoted with approval:

> 5. Market value "is the highest price expressed in money obtainable in an open and unrestricted market between knowledgeable, prudent, and willing parties dealing at arm's length, who are fully informed and under no compulsion to transact". However, "market value" is not equivalent to "fair value", although ... fair market value can be an important part of the fair value determinate depending on the circumstances.
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> 6. Fair value is a value that is "just and equitable" - one which provides "adequate compensation (indemnity), consistent with the requirements of justice and equity." One important implication of the distinction between market and fair value is that, in general, no minority discount can be applied in determining "fair value" ...

[73] The issue therefor is the fair value of Margarita's Tropic shares that is to be paid to her.

[74] Each side engaged an expert valuer to provide a market value evaluation of the Tropic shares. Mr. Farley Cohen was retained by Margarita. Mr. Errol Soriano was retained by the respondents. Both are highly qualified expert valuers. Both prepared an en bloc fair market valuation of Tropic using a valuation date of December 31, 2010.

[75] As in many cases, Mr. Cohen and Mr. Soriano have reached quite different conclusions. Mr. Cohen estimates the fair market value of Margarita's Tropic shares as between $5.2 and $5.6 million. Mr. Soriano estimates the fair market value of Margarita's shares as $0.9 million or $2.6 million depending on whether the XGL adjustment transferring liabilities to Tropic should be recognized.

[76] Margarita contends that it would be inequitable for Arturo and Juan to assert a lesser valuation of Tropic shares than the $8 million en bloc valuation that was the basis for the Xela offer in April 2010 that they directed Xela to make and which they accepted. If not for the respondents' oppressive conduct in withholding information from her, Margarita could have taken advantage of that same offer whether or not it reflected fair value at the time. The respondents say that Margarita refused the offer and initiated expensive and lengthy proceedings and that it would be inequitable to permit a party to reject an offer, put everyone through the expense of a lengthy legal proceeding to try to get more, and then ask that she at least be able to accept the offer made and rejected 5 years ago. This position of the respondents ignores their failure to provide Margarita with appropriate financial information which I have held unfairly disregarded her interests. It also ignores the evidence of Arturo given on his cross-examination that he would still have Xela buy Margarita's shares at the price offered in 2010 if she were willing to do so.

[77] One consideration is that the $8 million offer was to be paid in preference shares of Xela that were non-dividend bearing and on their face redeemable with annual payments over five years. One may consider that if the $8 million figure was payable over five years, the shares

were worth less than $8 million on the date of the offer because of the time value of money. However, Xela had the option at its sole discretion to redeem the shares at any time. As a practical matter Arturo had the right to pay himself out immediately as he controlled the voting shares of Xela. As he and Juan were working hand in glove together, Juan could have been expected to do the same if he wished. I would pay little attention, therefore, to the fact that the redemption payments could have been deferred. They had a right to have them made immediately.

[78] Mr. Cohen in his report stated that as the sale transaction from Arturo and Juan to Xela of their Tropic shares involved non-arm's length parties, he did not rely on it for the purposes of his fair market value analysis. That may be, but it does not prevent the use of the amount paid to Arturo and Juan for their Tropic shares from being considered in what is a fair and just amount to be paid to Margarita for her Tropic shares. In my view, it would be inequitable in the circumstances of this case for Margarita to receive less than her pro rate share of the $8 million figure used to acquire the Tropic shares of Arturo and Juan. Arturo and Juan refused to provide Margarita with financial information, and had they, Margarita would have been in a better position to asses and perhaps accept the offer, in which case she would have had use of the money for the five years that have occurred since the offer. The amount that would be paid to Margarita for her 44% interest in Tropic using the $8 million valuation would be $3,520,000.

[79] Mr. Cohen used an adjusted book value technique to value Tropic as it was a holding company with its main asset being 100% of Fresh Quest. He used a capitalized earnings technique to value Fresh Quest based on a multiple of earnings before interest, taxes, depreciation and amortization ("EBITDA"). He arrived at an en bloc fair market value of the shares of Fresh Quest that ranged from $11.2 million to $12 million and the adjusted book value of Tropic that ranged from $11.8 million to $12.6 million resulting in the fair market value of Margarita's 44% interest in Tropic to be in a range of $5.2 million to $5.6 million.

[80] Mr. Soriano valued the fair market value of Fresh Quest's shares by using a capitalized cash flow approach. He concluded that the value of Fresh Quest's equity is in the range of $2.6

million to $4.4 million, which is less than the net book value of Fresh Quest at the valuation date of $5.6 million. He therefore concluded that whereas Fresh Quest is capable of continuing to operate, the value of the business does not include commercial goodwill. He adopted the net book value of $5.6 million as the equity value of Fresh Quest. He concluded that the book value of Tropic's investment in Fresh Quest should be increased from $100 to $5.6 million. He then derived two figures for the fair market value of the Tropic shares. One figure was $2.1 million on the assumption that the XGL adjustment would be taken into account and the other figure was $5.8 million on the assumption that the XGL adjustment would not be taken into account. The resulting fair market value of Margarita's shares in Tropic therefore was either $900,000 or $2.6 million.

[81] It must be recognized that while the role of an expert valuer is to provide guidance to the Court as to what fair market value is, in the end it is ultimately a matter of judgment for the Court to determine what the fair value should be. A trial judge is entitled to accept or reject the evidence of an expert witness in whole or in part. A trial judge need not accept the valuation of the experts, and is entitled to make his or her own calculations to arrive at a valuation. See *R. v. Towne Cinema*, [1985] 1 S.C.R. 494, *Connor v The Queen*, [1979] C.T.C. 365, 79 D.T.C. 5256 (F.C.A.) and *Muscillo v. Bulk Transfer Systems Inc*. 2010 ONSC 490.

[82] In *Re Brant Investments Ltd. et al. and KeepRite Inc. et al*. (1987), 60 O.R. (2d) 737; aff'd (1991), 3 O.R. (3d) 289 (C.A.), the trial judge Anderson J. discussed the method to be used in considering the expert valuations. He put it well in stating:

> 112 Three expert witnesses were called to give valuation evidence: Campbell for KeepRite, and Louden and Wise for the dissenting shareholders. All three used basically the same technique: capitalization of earnings to determine value, with subsidiary use of other techniques as a check on the result. It was common ground among them that valuation is not an exact science. Some judicial and other learned opinion to this effect is accumulated by Greenberg J. and set out at p. 223 et seq. of *Domglas, supra*. While due application of the methodical approaches adopted by the experts is useful, it is dependent upon factors which are entirely a matter of judgment and the end result is an opinion, not a precise solution arrived at by precise methods utilizing only known and constant factors. That this is the

> nature of valuation is well illustrated in the end results arrived at by the three experts who testified. Leaving aside any question of a premium for the inclusion of synergies, the results arrived at were: Campbell $9; Louden $22; and Wise $28.
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> 113 The court is to be guided by the evidence given by the experts but is not bound by their opinions. In arriving at my valuation I do not propose to go through the valuation exercise followed by the experts, substituting my own conclusions as to the basic ingredients for theirs. The wide disparity exhibited by them in the application of their technique does not inspire me with any confidence in the result which I would achieve as an amateur in its application. Consequently, I do not intend to examine the fine details of the exercise gone through by each of the experts, although I recognize that for them they were essential to the integrity of the process. Rather, I intend to focus on the most important elements and to express my preferences and conclusions with respect to those. In the light of those preferences and conclusions, and the other evidence available to me, I have arrived at a valuation.

[83] Brown J. in *Glass, supra*, adopted the admonition that judges should exercise caution in attempting to mix and match portions of competing expert reports and thereby cast themselves in the role of performing their own valuation, with support from Anderson J. in *Brant Investments* as quoted.

[84] The experts differed on several assumptions, the most important as I see it being the use of a transfer price agreement made by Fresh Quest with related companies, the applicability of the XGL transfer of losses to Tropic undertaken in June, 2010 and an appropriate capitalization rate to be used. I will deal with these.

(1) Transfer pricing

[85] Fresh Quest is a Florida corporation and is part of a vertically integrated group of companies ("Fresh Quest Group") that grows, packages and ships fresh produce (mostly cantaloupes and honeydew melons) and vegetables (i.e. okra) from Central America to North America and Europe. The Fresh Quest Group is one of the largest melon producers in the world and has offices in Florida, Canada, Guatemala, Honduras and Panama. The Group is comprised of Nobleza and Excosur, being farming companies in Guatemala and Honduras, Latin American

Procurement Ltd. ("LAP"), a Barbadian company which provides technical services to the Guatemalan and Honduran farming companies and Fresh Quest, which purchases product from the Guatemalan and Honduran farming companies and then sells and distributes this product to its customers in the US, Canada and Europe.

[86] Fresh Quest was a party to a transfer pricing agreement ("TPA") with Xela, LAP and the farming companies made on July 1, 2004. The TPA originally provided for the following:

(a) Fresh Quest was entitled to earn a 2.5% profit margin on internal revenues and share any profit above this level with LAP on a 20%/80% basis, respectively;

(b) LAP was to receive 80% of profits in excess of the 2.5% profit margin earned by Fresh Quest, plus a 10% mark-up on administrative fees for technical services provided to the Farms. LAP provided an indemnity to Fresh Quest for any losses that resulted from adverse events (i.e. spoilage, quality issues, and natural disasters) and was to reimburse the Farms for any spoilage and/or crop losses that result from research and development activities undertaken by LAP;

(c) The Farms were to sell product to Fresh Quest at a price that provides a 15% gross margin to Fresh Quest on sales of product bought from the Farms; and,

(d) Xela provides administrative and management support to Fresh Quest at its cost and receives a sales commission of 2% of Canadian sales made by Fresh Quest. Commencing July 1, 2005, Xela charged Fresh Quest USD $80,000 per month for administrative and management support services provided by it and the commission received by Xela was to be USD $12,500 per month.

[87] The TPA was made after a review of the transfer pricing policies of the Fresh Quest Group and Xela by Ceteris Canada Ltd, a Canadian company that provides transfer pricing services. Transfer pricing is important to tax authorities who are interested in seeing that multi-national enterprises pay their proper tax in the jurisdictions in which they carry on business. Ceteris identified three potential options which would result in Fresh Quest retaining a portion, none or all of its residual profits. Xela management decided on having 80% of the Fresh Quest profits paid to LAP in Barbados under the TPA.

[88] Mr. Soriano, with some relatively minor adjustments, accepted the income generated by Fresh Quest under the TPA in carrying out his capitalized cash flow valuation of Fresh Quest. He

concluded that the methodology employed to establish the terms of the TPA was consistent with the definition of fair market value employed in his report. On this basis, he concluded that to the extent the TPA terms were reflected in the prices charged for the transactions, no adjustment was required in his calculation of the fair market value of Fresh Quest's equity using a capitalized cash flow approach.

[89] Mr. Cohen chose not to rely on the income derived by Fresh Quest under the TPA. His view was that the related party transactions resulting from the TPA between the Fresh Quest Group and Xela would not necessarily occur if Fresh Quest was operated by a third party. He noted that in exchange for the profit share split between Fresh Quest and LAP, LAP provided only an indemnity to Fresh Quest in respect of any losses that were created by events that adversely impact revenues due to quality issues, spoilage and natural disasters. There has been only one payment in respect of this indemnity, which was limited to approximately 50% of the estimated total loss, or $540,000, whereas LAP had received $10.228 million as a result of receiving 80% of the profits earned by Fresh Quest after its 2.5% profit margin.

[90] Mr. Cohen noted also that the TPA is brief and does not include any terms in respect of an assignment of the agreement, a sale of one of the Fresh Quest Group's companies independent of the other entities, termination terms or an expiry date. In light of this, it was his understanding from Ceteris that, in the event there was to be a sale of Fresh Quest on a stand-alone basis, it is highly likely that the terms of the TPA would be amended in order to reflect the current risks and responsibilities, and thereby maximize the value of Fresh Quest. For example, a purchaser of Fresh Quest would likely not want to provide 80% of the company's residual profit to LAP, which Mr. Cohen said effectively transferred the majority of the Fresh Quest profits to LAP, given that LAP is reimbursed by the Farms for providing administrative services to them.

[91] The respondents point to the fact that the TPA apparently received the blessing of CRA in Canada and the IRS in the United States. Regarding the CRA, Fresh Quest is a Florida company that pays no taxes in Canada, and therefore CRA would be interested only in what Fresh Quest was paying Xela for the administrative services provided by Xela to Fresh Quest. It

would not be interested in what Fresh Quest, a Florida company, was paying LAP, a Barbadian company.

[92] Exactly what the IRS in the U.S. looked at regarding the TPA is not known. Mr. Cohen asked for, but was not given, any documentation regarding the IRS audit. The fact that the IRS may have blessed the TPA a few years prior to the effective date of the valuations does not in itself mean that the TPA represented the fair market value in that it was the highest amount that Fresh Quest would necessarily receive for its distribution role. Ceteris had pointed out at the time it did its study in 2005 that there were several different amounts that Fresh Quest could receive that would satisfy the market value standards used by the tax authorities.

[93] Without going into all the details of the two experts regarding this transfer pricing issue, I agree with the basic position of Mr. Cohen. The issue is what a third party buyer would pay for the Fresh Quest business and what income it thought it could achieve. If the buyer did not want to pay 80% of the residual profits of Fresh Quest to LAP, a Barbadian company that provided administrative services to the farm companies in Honduras and Guatamela, the U.S. tax authorities would have no difficulty if Fresh Quest started retaining more of its income rather than paying it to LAP. The fact that Fresh Quest paid out in excess of $10 million to LAP and got only one payment of $500,000 for spoiled produce on one occasion supports the notion accepted by Mr. Cohen that the TPA would likely not be continued by a third party purchaser. The fact that Xela management was able to transfer 80% of the residual profits of Fresh Quest to LAP, a subsidiary of Xela in Barbados that would not be subject to U.S. tax, presumably because it was tax advantageous to Xela, does not in itself mean that the TPA reflected fair market value, which is defined to be the highest value that an arm's length party would pay.

[94] As a result of his conclusions about the TPA, Mr. Cohen applied a profit margin to Fresh Quest's historical average annual revenues derived from looking at operating profit margins for fresh fruit and vegetable wholesalers. Mr. Soriano did not comment on the source used by Mr. Cohen. I see no reason to question Mr. Cohen's imputed profit margins he used in arriving at the earnings to be capitalized.

(2) XGL adjustment

[95] The XGL adjustment made on April 12, 2011 by journal entry effective May 31, 2010 was made after the effective date of the appraisals of December 31, 2010 that both valuers have used. To accept this adjustment as Mr. Soriano did was to impermissibly accept and rely on hindsight evidence of something that occurred after the effective date of the valuation. It is a basic principle of valuation that a valuer may not rely on hindsight evidence post the valuation date and that events that were not known as of the valuation date are not relevant to determination of fair value on the valuation date. See *Glass, supra* at para. 246. Thus, even if the XGL adjustment was otherwise proper, it should not have been taken into account in arriving at a fair market valuation effective some months before the adjustment was made and known.

[96] So far as a fair value is concerned, it would be very unfair to Margarita to recognize the XGL adjustment. It was made only because Margarita had brought an application to be paid a fair value for her Tropic shares and it was intended to decrease the value of Tropic and thus the amount that might be ordered to be paid to her. The adjustment had not been made before Arturo and Juan had agreed to sell their Tropic shares to Xela, or before the valuation by Mr. Badham was made that preceded that sale. The adjustment was not made in good faith, as I have held, and was oppresive. It should not be reflected in the amount to be paid to Margarita for her Tropic shares.

[97] The XGL adjustment to the Tropic balance that was made by journal entries on April 12, 2011 backdated to May 31, 2010 was as follows:

	Debit	**Credit**
	$	$
Retained Earnings	4,117,479	
Due from Xela Enterprises (Asset)		464,855
Due to Xela International (Liability)		3,652,624

[98] These journal entries:

> (a) Transferred historical expenses incurred by Xela International Inc. in the unsuccessful launch of the XGL operations, totaling approximately $3.65 million to Tropic; and,
>
> (b) Recorded a further adjustment of approximately $465,000, which represented a break fee which was paid to exit the lease agreement, which was entered into for facilities of the XGL operations.

[99] Mr. Cohen points out that in Mr. Soriano's report he has omitted adding back the break fee portion of the entry, totaling approximately $465,000, which was also booked in Tropic. Mr. Cohen is of the opinion that if the adjustments were inappropriate, Mr. Soriano has underestimated the value of Tropic with respect to the XGL adjustment by at least a further $465,000 over and above Mr. Soriano's figure of $3.65 million allocated to Tropic in the XGL adjustment. Mr. Soriano put the fair market value of Margarita's Tropic shares at $900,000 including the XGL adjustment and at $2.6 million excluding the XGL adjustment. This difference of $1.5 million would increase by 44% of $465,000 or $200,640 on Mr. Cohen's analysis for an upward adjustment of Mr. Soriano's valuation of Margarita's Tropic shares by approximately $1.7 million on the assumption that the XGL adjustment should not be recognized.

(3) Capitalization rate

[100] Mr. Cohen used a multiple of ranging from 5 to 6 times to apply to the maintainable EBITDA for Fresh Quest that he concluded was in a range of $1.7 to $2.2 million. This multiple was based on his review of multiple transactions involving grocery wholesalers and food wholesale/distribution companies and on offers made between 2004 and 2007 for the entire Fresh Quest Group. Mr. Soriano used what he called a buildup method, or a weighted average cost of capital method, in determining his multiple.

[101] Mr. Soriano was critical in the use by Mr. Cohen of multiples derived from offers made some three years prior to the valuation date and before the financial crisis of 2008 to acquire the entire Fresh Quest Group as he viewed the risks to Fresh Quest alone higher than the risks to the Fresh Quest Group as a whole. He concluded that the appropriate multiple would be less than 5 to 6 times and he adopted capitalization rates based on multiples of 3.4 and 4.7 to be applied to his maintainable EBITDA of Fresh Quest.

[102] There is something in the criticism of Mr. Soriano to the multiples used by Mr. Cohen. The entire Fresh Quest Group for which the offers were made was different from just Fresh Quest itself and the comparable transactions used by Mr. Cohen could be looked at as being not entirely comparable. If the multiples of 3.4 and 4.7 derived by Mr. Soriano were to be applied to the maintainable EBITDA of Fresh Quest as adopted by Mr. Cohen, that would result in an en bloc fair market value of Tropic of $8.7 to $9.5 million, or $3.83 to $4.1 million for Margarita's 44% interest.

(4) Minority discount

[103] In argument, Mr. Groia for the respondents contended that there should be a minority discount to be applied to Margarita's Tropic shares. I do not agree. The respondents rely on a statement of Blair J.A. in *Mason v. Intercity Properties Ltd*. (1987), 59 O.R. (2d) 631 (C.A.) at para. 48 that in order to justify the deduction of a minority discount in the valuation of minority shares, the conduct of a minority shareholder must be of such a grave character that he or she deserved to be excluded from the company. I cannot find the conduct of Margarita to fit within such language at all. Even if the dislike of Arturo and Juan towards Margarita was valid, which on the evidence before me is speculative at best as to alleged "wrongdoing", it is in relation to the dispute with the cousins and as admitted by Arturo, has nothing to do with Tropic.

[104] Normally in a family situation in which one side is required to buy out the other at a fair value, no minority discount is ordered. In this case Xela offered to purchase the Tropic shares held by Arturo, a minority shareholder, without applying a minority discount, and did the same

with Juan, both of whom accepted the offer. I would not apply a minority discount to derive a fair value for Margarita's Tropic shares.

(5) Conclusion of fair value

[105] There are other nuances of the valuations that I do not propose to delve into, such as the appropriate deduction for indebtedness of Fresh Quest and what should be included in redundant assets and whether Fresh Quest could be considered to have goodwill, which in part at least involves the appropriate use of the TPS.

[106] In the end, and adopting the approach of Anderson J. in Brant, I have concluded that in all of the circumstances, the fair value of Margarita's 44% of Tropic is $4.25 million. Arturo, Juan and Xela are jointly ordered to pay Margarita this amount.

Costs

[107] Margarita is entitled to her costs. If these cannot be agreed, brief written submissions along with a proper cost outline may be made within 10 days and brief reply submissions may be made by the respondents within a further 10 days.

Newbould J.

Date: October 28, 2015

First Report of
KSV Kofman Inc.
as Receiver and Manager of Xela Enterprises Ltd.

October 17, 2019

Contents

Appendices

COURT FILE NO.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.
FIRST REPORT OF KSV KOFMAN INC.

OCTOBER 17, 2019

1.0 Introduction

1. On January 18, 2011, Margarita Castillo ("Margarita") commenced an application in the Ontario Superior Court of Justice (the "Court") seeking, among other things, relief against her now-deceased father, Juan Arturo Gutierrez ("Juan Arturo"), and her brother, Juan Guillermo Gutierrez ("Juan Guillermo"), in her capacity as a director of Tropic International Limited ("Tropic"), a wholly-owned subsidiary of Xela Enterprises Ltd. (the "Company").

2. Pursuant to a judgement issued by the Court on October 28, 2015, the Company, Juan Guillermo and Juan Arturo, became jointly obligated to pay Margarita approximately $5 million, plus interest and costs (the "Judgment Debt").

3. Margarita, through an Alberta company, also owns preference shares in the Company with a face amount of approximately $14 million. The Alberta company continues to own these shares.

4. On January 15, 2019, Margarita made an application to the Court for, among other things, the appointment of KSV Kofman Inc. ("KSV") as receiver and manager of the Company (the "Receiver") pursuant to Section 101 of the *Court of Justices Act* (Ontario). The Receiver understands that the present balance owing under the Judgment Debt is approximately $4.1 million, plus interest and costs which continue to accrue.

5. In response to Margarita's application, the Company filed an application for protection under the *Companies' Creditors Arrangement Act* ("CCAA") on June 17, 2019.

6. On July 5, 2019, the Court dismissed the CCAA application and appointed KSV as Receiver. A copy of the receivership order is attached as Appendix "A" (the "Receivership Order").

7. The Company is the parent company of more than two dozen subsidiaries, located predominantly in Central America, that carry or carried on business in the food and agricultural sectors. Most of these businesses have been discontinued, are no longer operating or, as discussed in this report ("Report"), were conveyed to the ARTCARM Trust (the "Trust"), a Barbados domiciled trust, the beneficiaries of which are Juan Guillermo's children. The Trustee of the Trust is Alexandria Trust Corporation ("ATC").

8. Presently, the Company's most significant asset is its indirect one-third interest in a group of successful family-owned vertically integrated poultry businesses operating in Central America referred to as the "Avicola Group". The Company's interest in the Avicola Group is held as follows:

   a) 25% through its wholly owned indirect subsidiary, Lisa, S.A. ("Lisa"), a Panamanian holding company; and

   b) 8.3% through Villamorey S.A. ("Villamorey"), a Panamanian holding company[1].

   Attached as Appendix "B" is the Company's present corporate organizational chart.[2]

9. Dionisio Gutierrez Sr., Isabel Gutierrez de Bosch and their children (collectively, the "Cousins") are believed to own the remaining two-thirds of the Avicola Group through entities they own, including the remaining two-thirds of Villamorey.

10. Margarita, Juan Guillermo and the Cousins have been litigating for decades, primarily related to shareholder disputes involving the Avicola Group (the "Avicola Litigation").

11. As of mid-2018, the Company and Lisa had received approximately $43 million and US$57 million, respectively, from BDT, Arven and a subsidiary of Arven, Preparados Alimenticios Internacionales, CA ("PAICA"), to assist them to fund the Avicola Litigation.

12. The Receiver understands that prior to April 2016, Empress Arturo International ("EAI"), a Barbados company and a wholly owned subsidiary of the Company, directly and indirectly owned and operated the "Arturos" restaurant business in Venezuela through BDT and Arven. The Receiver has been advised by Juan Guillermo that the Arturos restaurant chain is still operating and that BDT and Arven are now owned by the Trust.

[1] Villamorey owns 25% of the Avicola Group, of which the Company has an indirect one-third ownership interest.

[2] The Company's corporate organizational chart does not show the Villamorey interest in the Avicola Group; however, the Receiver understands based on court pleadings and its conversations with Juan Guillermo that Villamorey owns a 25% interest in the Avicola Group.

13. The effect of the transactions discussed in this Report (the transactions are defined below as the EAI Transaction and the Assignment Transaction) was to transfer from the Company to the Trust all or the majority of the potential value of the Avicola Litigation and the Arturo business (owned by BDT and Arven) to Juan Guillermo's children as beneficiaries of the Trust.

1.1 Purposes of this Report

1. The purposes of the Report are to:

   a) provide background information concerning the Company;

   b) discuss the Receiver's concerns regarding:

      i. the sale, conveyance or transfer in early 2016 by EAI of the shares of BDT and Arven to Juan Arturo, and then from Juan Arturo to the Trust (the "EAI Transaction"); and

      ii. the assignment in January 2018 by Lisa of the proceeds from the Avicola Litigation to BDT (the "Assignment Transaction");

   c) recommend that the Court issue an order:

      i. requiring each of BDT, Arven, the Trust and ATC, the directors of EAI and any other person with information concerning the EAI Transaction, to deliver such information to the Receiver, including any and all documentation related to the EAI Transaction;

      ii. requiring each of Lisa, BDT, the Trust and ATC and any other person with information concerning the Assignment Transaction to deliver such information to deliver to the Receiver, including any and all documentation related to the Assignment Transaction;

      iii. sealing Confidential Appendices "1" and "2" pending the issuance of a further order of the Court unsealing the Confidential Appendices;

      iv. approving the fees and disbursements of the Receiver and its legal counsel, Aird & Berlis LLP ("A&B"), arising for the periods referenced in the attached fee affidavits; and

      v. approving this Report and the Receiver's activities, as described herein.

1.2 Currency

1. All references to currency in this Report are in Canadian dollars unless otherwise stated.

1.3 Restrictions

1. In preparing this Report, the Receiver has relied upon unaudited financial information of the Company, the books and records of the Company, materials filed in the Avicola Litigation, discussions with representatives of the Company and discussions with Margarita. The Receiver has also relied upon answers to questions it submitted to Juan Guillermo and on the information provided by Juan Guillermo during meetings between him and the Receiver and their respective legal counsel.

2. The Receiver has also relied upon the Examination of Juan Guillermo held on June 26, 2019 (the "Examination") and the related Answers to Undertakings, Advisements and Refusals from the Examination (the "Examination Undertakings"). Copies of the Examination and Examination Undertakings are attached hereto as Appendices "C" and "D", respectively.

3. The Receiver has not audited, or otherwise attempted to verify the accuracy or completeness of the financial information relied on to prepare this Report in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the *Chartered Professional Accountants of Canada Handbook* and, accordingly, the Receiver expresses no opinion or other form of assurance contemplated under the CAS in respect of such information.

4. This Report provides an update relating to these receivership proceedings and support for the relief to be sought by the Receiver at its motion returnable October 29, 2019. This Report should not be relied upon for any other purpose. The Receiver expresses no opinion or other form of assurance with respect to the financial and other information presented in this Report or relied upon by the Receiver in preparing this Report. Any party wishing to place reliance on the financial information should perform its own diligence.

1.4 Receivership Materials

1. All materials filed in the receivership proceedings are available on the Receiver's website at: https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd.

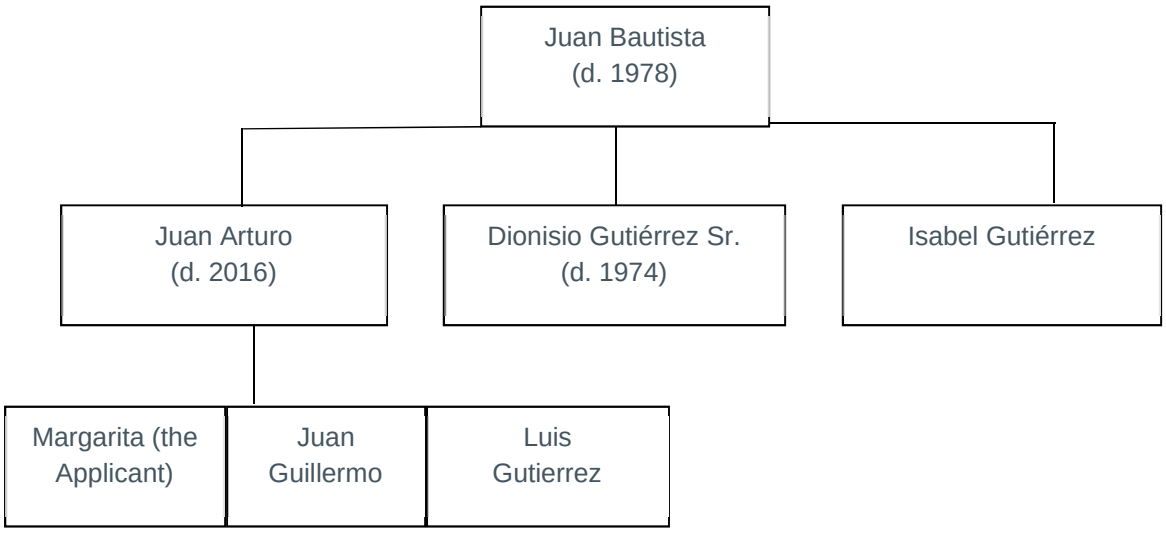
2.0 Executive Summary

1. As a result of the EAI Transaction (i.e. the sale, transfer or conveyance of the shares of each of BDT and Arven to the Trust) and the Assignment Transaction, the majority of the economic interest in the Company has been transferred from the Company to the Trust, the beneficiaries of which are Juan Guillermo's children. The EAI Transaction and the Assignment Transaction were completed at a time when Juan Guillermo was litigating with Margarita. While the Receiver has not completed its review of the EAI Transaction and the Assignment Transaction because several information requests made of Juan Guillermo and others remain outstanding, it is apparent that Juan Guillermo had (and has) several conflicts of interest related to these transactions, including that his children will benefit from them if there is a recovery by Lisa on the Avicola Litigation. Juan Guillermo appears to be leading the Avicola Litigation on behalf of Lisa, notwithstanding he is not an officer or director of that company.

2. As the Receiver is continuing to review the EAI Transaction, the Assignment Transaction and other matters related to these proceedings, the Receiver is of the view that any settlement of the Avicola Litigation and/or the sale of the Company's interests in Avicola Group should require consultation with the Receiver and approval of the Court.

3.0 Background

1. Juan Bautista Gutierrez ("Juan Bautista") was the patriarch of the Gutierrez family and the founder of the Avicola Group. A condensed family tree is provided below:



2. The Avicola Group is based in Guatemala. The Avicola Group carries on a large and successful poultry business in Central America.

3. The Receiver understands that in 1978, Juan Bautista conveyed his interest in the Avicola Group equally to his three children, Juan Arturo, Dionisio Gutierrez Sr. and Isabel Gutierrez. Juan Arturo's interest in the Avicola Group was indirectly held by the Company through Lisa.

4. A dispute arose in 1998 as to whether the Cousins were concealing the Avicola Group's financial results from Lisa. The Avicola Group has not paid dividends to Lisa since that time. The Receiver understands that Lisa is presently involved in over 100 lawsuits with the Cousins in multiple jurisdictions, including Canada, the State of Florida, Panama and Guatemala with respect to, among other things, dividends totalling approximately US$360 million[3] owing to Lisa and Villamorey from the Avicola Group.

3.1 The Company

1. The Company is a holding company incorporated in Canada. The Company's major shareholders include members of Juan Arturo's family.[4] Juan Guillermo is a director and the President of the Company.

2. The Company has six wholly owned subsidiaries, as detailed below.

Subsidiary	Jurisdiction	Status
Gabinvest, S.A.	Panama	Owns Lisa, which holds the Avicola Group Interest
Xela International Inc.	Canada	Inactive
Tropic International Ltd.	Canada	Inactive
Empress Arturo International	Barbados	See Section 4
Xela Global Resources	Canada	Inactive
Boucheron Universal Corp.	Panama	Inactive

[3] Paragraph 121 of the Examination.

[4] As reflected in the Affidavit of Juan Guillermo sworn June 17, 2019 in support of the CCAA application (the "Guillermo Affidavit").

3. The Company's most recent financial statements were prepared as of May 31, 2018. A summary of the Company's unaudited and unconsolidated[5] balance sheet as of that date is provided below[6]:

(unaudited; $000s)	
Assets	
Investments	270
Advances to related parties	22,485
Total assets	22,755
Liabilities	
Accounts payable and other current liabilities	9,459
Due to shareholders	671
Due to related parties	72,944
Total liabilities	83,075
Equity	(60,319)
Total liabilities and equity	22,755

4. As reflected above, as at May 31, 2018, the Company had significant liabilities owing to related parties. A summary of these balances as at May 31, 2018 is provided below:

(unaudited; $000s)	Amount	Status
BDT	24,194	See Section 4 below
Badatop Holdings Inc.	21,884	Inactive
PAICA	11,835	See Section 4 below
Arven	6,508	See Section 4 below
Other	8,523	Inactive
Total due	72,944	

[5] The Company has not provided consolidated financial statements.

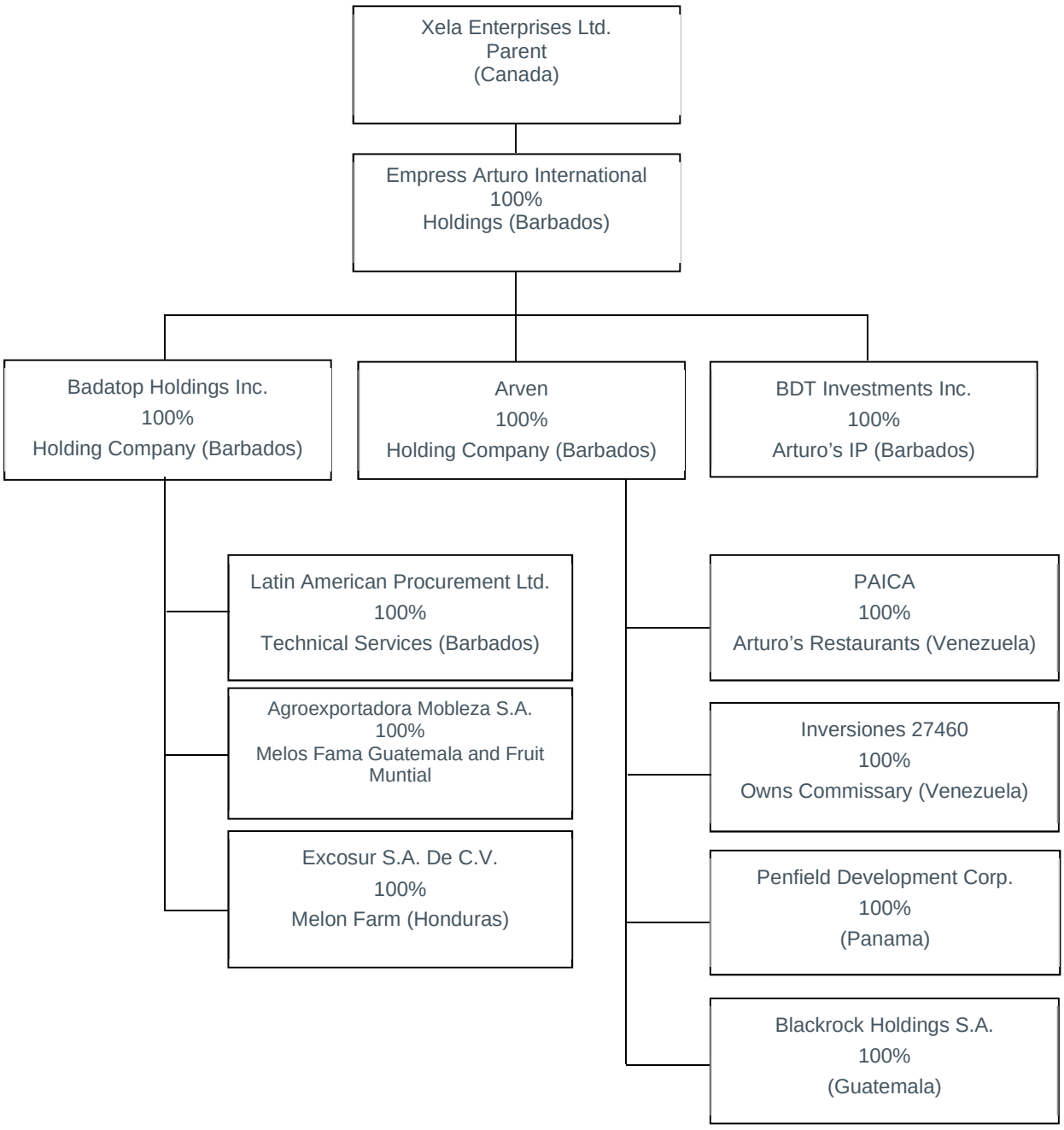
[6] The Company's financial statements exclude the debt owing to Margarita.

4.0 EAI Transaction and Assignment Transaction

4.1 EAI Transaction

1. The Company is the sole shareholder of EAI. At the time of the EAI Transaction, Juan Guillermo was a Director of EAI and its President.

2. BDT and Arven were subsidiaries of EAI prior to April 2016. The corporate chart for EAI prior to the EAI Transaction is reflected below.



3. The Receiver understands that BDT owns the intellectual property used by "Arturos", a chain of 90 fast food chicken restaurants operating in Venezuela. The Arturos restaurants are owned by PAICA, a Venezuelan entity which is wholly owned by Arven. PAICA pays royalties and service fees to BDT.

4. The Receiver understands that BDT, Arven and PAICA have a history of profitability. Juan Guillermo has advised that the Arturos business has suffered in recent years due to the political and economic situation in Venezuela. The Receiver understands that BDT, Arven and PAICA have collectively advanced a total of approximately USD$57 million to Lisa and $43 million to the Company to fund the Avicola Litigation as of the dates reflected in the table below.

(unaudited; $000s)	Company (CAD) (as at May 31, 2018)	Lisa (USD) (as at June 30, 2018)	Total
BDT	24,194	47,076	71,270
Arven	6,508	12,727	19,235
PAICA	11,835	(2,913)	8,922
	42,537	56,890	99,427

5. According to information provided to the Receiver by Juan Guillermo, at the time of the EAI transaction (around April 2016), EAI owed Juan Arturo approximately US$9 million on account of loans purportedly advanced by Juan Arturo to EAI. To date, the Receiver has not been provided with any evidence of advances by Juan Arturo to EAI despite the Receiver's requests for this evidence.

6. The Receiver has been advised by Juan Guillermo that EAI was unable to repay the amounts owing to Juan Arturo and, as a result, EAI conveyed the shares of BDT and Arven to Juan Arturo for US$6.5 million[7] in partial satisfaction of EAI's obligation to him. The Receiver understands from Juan Guillermo that the balance of the debt remains outstanding.

7. The Receiver has been further advised by Juan Guillermo that Juan Arturo subsequently transferred the BDT and Arven shares he acquired from EAI to the Trust. The effect of the EAI Transaction was to remove the shares of BDT and Arven from the Company's organization and to transfer them to the Trust. The Receiver is concerned that the consideration paid by Arturo for the shares of BDT and Arven may not have reflected the value of the Arturos' business, nor that sufficient value was attributed to the receivables owing by Lisa and the Company to BDT, Arven and PAICA.

8. Juan Arturo died in June 2016. Juan Guillermo advises that: (a) he only learned of the sale, transfer or conveyance of the shares in BDT and Arven to the Trust from his father just prior to father's death; (b) he has no information concerning the Trust or the details of the EAI Transaction; and (c) he is not presently involved in the business and operations of either of BDT and/or Arven.

[7] Comprised of US$3.75 million for the shares of BDT and US$2.75 million for the shares of Arven.

9. Juan Guillermo provided the Receiver with valuations of BDT and PAICA[8] (the "Valuations") in the context of the EAI Transaction. Copies of the Valuations are attached hereto as Confidential Appendix "1". The Receiver's concerns with the Valuations are provided in Confidential Appendix "2".

10. The Receiver has the following additional concerns with respect to the EAI Transaction:

    a) BDT, Arven and PAICA have advanced tens of millions of dollars to Lisa to fund its costs (and the Receiver understands that they continue to fund, or are prepared to continue to fund, Lisa's litigation); however, it is unclear to the Receiver why EAI decided not to use the cash flow generated by these entities to repay the amounts EAI owed to Juan Arturo. This could have been done through payment of a dividend from some or all EAI's subsidiaries to EAI; and

    b) it is unclear how the Boards of Directors of each of the Company and EAI satisfied themselves as to the value of BDT and Arven, including the receivables owing from Lisa. It is also unclear whether the Boards of the Company and EAI had separate legal counsel when completing the EAI Transaction, and the extent of Juan Guillermo's participation in the EAI Transaction.

11. Based on the foregoing, the Receiver requires additional information from each of BDT, Arven, and ATC to further investigate the EAI Transaction[9]. The Receiver recommends that the Court issue an order requiring these and any other party with information concerning the EAI Transaction to provide all such information to the Receiver forthwith, so that the Receiver can complete its review of the transaction.

12. In the interim, as EAI is incorporated in Barbados, the Receiver has engaged local counsel in Barbados.

4.2 Assignment Transaction

1. In January 2018, BDT sought additional consideration from Lisa for amounts advanced, or to be advanced, by BDT to Lisa to fund the Avicola Litigation. Pursuant to the Assignment Agreement, BDT agreed to fund Lisa's costs in the Avicola Litigation, provided Lisa assign its interest in the Avicola Litigation to BDT. BDT agreed to pay Lisa 30% of the net litigation proceeds, after deducting costs and the repayment by Lisa of any amounts owing to BDT. A copy of the Assignment Agreement is attached as Appendix "E".

[8] The BDT valuation was prepared by Deloitte LLP. The PAICA valuation was prepared by Lara Marambio & Asociados, which is a subsidiary of or related to Deloitte LLP.

[9] The Receiver has requested details regarding the Trust, including a copy of the Trust Agreement and the names of the law firms that represent the Trust. Juan Guillermo has advised the Receiver that ATC will not provide any information concerning the Trust.

2. The effect of the Assignment Transaction is to transfer further recoveries from the Avicola Litigation to BDT. At the time of the Assignment Transaction, Lisa owed BDT approximately $47 million. The Receiver understands that the amounts advanced from BDT to Lisa since the date of the Assignment Agreement are insignificant[10]. Accordingly, it is unclear whether Lisa received any consideration for entering into the Assignment Agreement. If the litigation is settled in the near term, BDT will receive a windfall despite making no material additional advances to Lisa to fund the Avicola Litigation since the date of the Assignment Agreement.

3. The Receiver is concerned, again, that Juan Guillermo is conflicted as President of the Company, a director of the Company and the father of the beneficiaries of the Trust (who stand to benefit from the Assignment Transaction).

4.3 Confidential Appendices

1. Torys LLP ("Torys"), which is acting as counsel to the Company (but not to the Receiver) required that the Receiver sign a Non-Disclosure Agreement in order to be provided with a copy of the Valuations. Accordingly, the Receiver respectfully requests that the Valuations be filed with the Court on a confidential basis and be sealed as the documents contain confidential information and are currently subject to confidentiality restrictions as ordered by the Court under the Receivership Order. In the circumstances, the Receiver is of the view its concerns with the Valuations should also be subject to the confidentiality provisions as they reference the Valuations. The Receiver is not aware of any party that will be prejudiced if the information in the Confidential Appendices is sealed. Accordingly, the Receiver believes the proposed Sealing Order is appropriate in the circumstances.

5.0 Receivership Order – Clarification re Paragraph 4

1. Pursuant to paragraph 4 of the Receivership Order, the Receiver is not permitted to, among other things, take steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between the Company and its subsidiaries and/or affiliates and any third party until December 31, 2019 or such other date as the Court may order.

2. The Avicola Group presently represents substantially all the Company's value and currently is the only potential source of recoveries for the Company's stakeholders. In the circumstances, the Receiver is of the view that it should be consulted with respect to any settlement or transaction negotiated by Juan Guillermo, and that any such settlement or transaction must be approved by the Court given Juan Guillermo's conflicts of interest. The Receiver also believes that Court approval of any settlement or transaction involving the Avicola Group is required until the Receiver can fully investigate the transactions discussed in this Report. The Receiver is of the view that this requirement is not inconsistent with paragraph 4 of the Receivership Order.

[10] According to answer 15 to the undertakings at the Examination, the debt owing by Lisa to BDT is less than $50 million. An exact amount was not provided in the answers.

3. The Receiver has been advised by Juan Guillermo that he disagrees with the Receiver's position that Court approval is required of any settlement. Despite efforts to bridge the gap between the parties, and to avoid involving the Court, the parties were required to attend before Justice McEwen to request advice and direction in this regard. The Court requested that the Receiver, Margarita and Juan Guillermo provide written submissions by no later than October 25, 2019 outlining their respective interpretations of paragraph 4 of the Receivership Order. This matter is to be determined by the Court at a case conference on October 29, 2019, following the Receiver's motion.

6.0 Professional Fees

1. The fees of the Receiver and A&B are summarized in the table below:

		($)			
Firm	Period	Fees	Disbursements	Total	Average Hourly Rate
KSV	Jan 7/19 – Aug 31/19	36,763.75	65.92	36,829.67	620.49
A&B	Jan 10/19 – Sept 11/19	42,636.50	852.15	43,488.65	549.44
Total		79,400.25	918.07	80,318.32	

2. Detailed invoices for the Receiver and A&B can be found in the affidavits sworn by their representatives in Appendices "F" and "G", respectively.

3. The Receiver is of the view that the hourly rates charged by A&B are consistent with the rates charged by law firms practicing in the area of insolvency and restructuring in the Toronto market, and that the fees charged are reasonable in the circumstances.

4. Funding for these proceedings has been provided by Margarita pursuant to Receiver Certificates. There is presently no source of liquidity in the Company to fund the costs of these proceedings.

7.0 Overview of Receiver's Activities

1. The Receiver's activities in respect of these proceedings include the following:

   a) familiarizing itself with the status and history of the litigation involving the Company;

   b) corresponding with A&B concerning all matters in connection with the receivership proceedings;

   c) preparing the Notice and Statement of the Receiver pursuant to subsections 245(1) and 246(1) of the *Bankruptcy and Insolvency Act*;

   d) attending two meetings with Margarita and Bennett Jones;

   e) attending two meetings with Torys and Juan Guillermo;

   f) preparing questions for Juan Guillermo, reviewing his responses and sending follow-up questions;

g) reviewing financial information concerning the Company;

h) reviewing the EAI Transaction and the Assignment Transaction;

i) dealing with Torys regarding various matters in these proceedings, including several information requests and the dispute as to whether Court approval is required of any settlement of the Avicola Litigation;

j) engaging with Barbados and Panamanian counsel to assist the Receiver with a review of the subsidiaries, the Avicola Litigation and the EAI Transaction;

k) reviewing, commenting and executing a confidentiality agreement between the Receiver and Juan Guillermo; and

l) corresponding with Stikeman Elliot LLP, Canadian counsel to the Cousins.

8.0 Conclusion and Recommendation

1. As a result of the transactions discussed in this Report, the Receiver is concerned that EAI may have received inadequate consideration when it sold, conveyed or transferred the shares of BDT and Arven to Juan Arturo. In addition to further investigating the EAI Transaction and the Assignment Transaction, further investigation is required into the Valuations of BDT, Arven and PAICA to assess the reasonableness of the consideration paid by Juan Arturo to EAI for the shares of BDT and Arven.

2. Based on the foregoing, the Receiver respectfully recommends that this Court make an Order granting the relief detailed in Section 1.1(1)(c) of this Report.

* * *

All of which is respectfully submitted,

KSV Kofman Inc

KSV KOFMAN INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF
XELA ENTERPRISES LTD. AND
NOT IN ITS PERSONAL OR CORPORATE CAPACITY

Second Report of
KSV Kofman Inc.
as Receiver and Manager of
Xela Enterprises Ltd.

February 18, 2020

Contents

Page

Appendices

COURT FILE NO.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

SECOND REPORT OF KSV KOFMAN INC.

FEBRUARY 18, 2020

1.0 Introduction

1. On January 18, 2011, Margarita Castillo ("Margarita") commenced an application in the Ontario Superior Court of Justice (the "Court") seeking, among other things, relief against her now-deceased father, Juan Arturo Gutierrez ("Juan Arturo"), and her brother, Juan Guillermo Gutierrez ("Juan Guillermo"), in her capacity as a director of Tropic International Limited, a wholly-owned subsidiary of Xela Enterprises Ltd. (the "Company").

2. Pursuant to a judgement issued by the Court on October 28, 2015, the Company, Juan Guillermo and Juan Arturo became jointly obligated to pay Margarita approximately $5 million, plus interest and costs (the "Judgment Debt"). The Receiver understands that the present balance owing in respect of the Judgment Debt is approximately $4.4 million, plus interest and costs which continue to accrue, including costs incurred during these proceedings.

3. Margarita, through an Alberta company, also owns preference shares in the Company in the face amount of approximately $14 million.

4. On January 15, 2019, Margarita made an application to the Court for, among other things, the appointment of KSV Kofman Inc. ("KSV") as receiver and manager of the Company (the "Receiver") pursuant to Section 101 of the *Court of Justices Act* (Ontario). A copy of the receivership order is attached as Appendix "A" (the "Receivership Order").

5. The Receivership Order contained certain limitations regarding the Receiver's involvement in the Avicola Litigation (as defined below). Effective January 1, 2020, such restrictions expired and the Receiver is fully empowered and authorized under the Receivership Order to manage and deal with any and all of the property and assets of the Debtor, including the Avicola Litigation.

6. Further details regarding the background and the lead up to the Receivership Order are set out in the Receiver's First Report to Court dated October 17, 2019 (the "First Report"). A copy of the First Report is attached as Appendix "B", without appendices.

1.1 Avicola Group

1. As described in the First Report, the Company is the parent of more than two dozen direct or indirect subsidiaries located predominantly in Central America that carry on, or carried on, business in the food and agricultural sectors. Most of these businesses are no longer operating or, as discussed in the First Report and below, were conveyed to the ARTCARM Trust (the "Trust"), a Barbados domiciled trust, the beneficiaries of which are Juan Guillermo's children. The Trustee of the Trust is Alexandria Trust Corporation ("ATC").

2. The Company's most significant asset is its indirect one-third interest in a group of successful family-owned vertically integrated poultry businesses operating in Central America known as the "Avicola Group". The Company's interest in the Avicola Group is held as follows:

   a) 25% through its wholly owned indirect subsidiary, Lisa, S.A. ("Lisa"), a Panamanian holding company; and

   b) 8.3% through Villamorey S.A. ("Villamorey"), a Panamanian holding company[1].

   Attached as Appendix "C" is what the Receiver believes to be the Company's present corporate organizational chart.[2]

3. Dionisio Gutierrez Sr., Isabel Gutierrez de Bosch and their children (collectively, the "Cousins") are believed to own the remaining two-thirds of the Avicola Group through entities they own, including the remaining two-thirds of Villamorey.

4. Margarita, Juan Guillermo and the Cousins have been litigating for decades, primarily related to shareholder disputes involving the Avicola Group (the "Avicola Litigation").

1.2 EAI Transaction and Assignment Transaction

1. The Receiver previously detailed certain reviewable transactions in the First Report which were completed in April 2016 by the Company and its direct subsidiary, Empress Arturo International ("EAI"), a Barbados company. Prior to April 2016, EAI indirectly owned and operated the "Arturos" restaurant business in Venezuela through its wholly-owned subsidiaries, BDT Investments Ltd. ("BDT") and Corporacion Arven, Limited ("Arven").

[1] Villamorey owns 25% of the Avicola Group, of which the Company has an indirect one-third ownership interest.

[2] The Company's corporate organizational chart does not show the Villamorey interest in the Avicola Group; however, the Receiver understands based on court pleadings and its conversations with Juan Guillermo that Villamorey owns a 25% interest in the Avicola Group.

2. Juan Guillermo has advised the Receiver that the Arturos restaurant chain has a history of profitability. BDT, Arven and a subsidiary of Arven, Preparados Alimenticios Internacionales, CA ("PAICA") are purported to have advanced over $100 million to the Company and to Lisa to fund the Avicola Litigation, which amounts are purported to still be owing (the "Intercompany Receivables"). Despite several requests by the Receiver to Juan Guillermo and others who should have information relating to the Intercompany Receivables, the Receiver has not been provided with any evidence of these advances.

3. In 2012, judgment was issued by the Panamanian Court in favour of BDT against Lisa in the amount of approximately $25,323,773 (the "BDT Judgement"). At the time of the BDT Judgement, Lisa and BDT were both indirectly owned by the Company. The Receiver has not been able to confirm that the obligations which gave rise to the BDT Judgement were advanced by any of BDT, Arven or PAICA to Lisa and/or the Company.

4. In April 2016, EAI transferred the shares of BDT and Arven to Juan Arturo for US$6.5 million in partial satisfaction of a debt then owing to Juan Arturo by EAI. Juan Arturo then transferred the shares of BDT and Arven to the Trust (the "EAI Transaction").

5. The Receiver was advised by Juan Guillermo that in January 2018, BDT agreed to fund Lisa's costs in the Avicola Litigation, provided Lisa assigned its interest in the Avicola Litigation to BDT. Under this agreement, BDT agreed to pay Lisa 30% of the net litigation proceeds, after deducting costs and the repayment by Lisa of any amounts it then owed to BDT (the "Assignment Transaction" and together with the EAI Transaction, the "Reviewable Transactions"). At the time of the Assignment Transaction, Lisa allegedly owed BDT approximately $47 million.

6. As a result of the Reviewable Transactions, the majority of the economic value of the Company (which is indirectly held through Lisa) has been transferred outside of the Company to the Trust, the beneficiaries of which are Juan Guillermo's children. The Reviewable Transactions and the BDT Judgement all occurred at a time when Juan Guillermo was litigating with Margarita. The Receiver has concerns that, *inter alia*, EAI received inadequate consideration for the shares of BDT and Arven.

7. The First Report further details the Receiver's concerns with respect to nature and terms of the Reviewable Transactions.

8. As previously noted in the First Report, the Receiver advised the Court that it required further information in order to come to final conclusions concerning the Reviewable Transactions. The Receiver has made numerous information requests from Juan Guillermo that remain outstanding as at the date of this Report. As set out below, many information requests have been refused or frustrated by individuals and entities taking direction from Juan Guillermo.

9. As a result of the Receiver's inability to obtain information, on October 29, 2019, the Receiver sought an order from the Court requiring Lisa, BDT, Arven, the Trust and ATC to deliver information to the Receiver concerning the Reviewable Transactions. On October 29, 2019, the Court issued the order (the "Disclosure Order"). A copy of the Disclosure Order is attached as Appendix "D".

[3] The BDT Judgement was issued in the amount of $19,184,680 Balboas, being the currency in Panama. The exchange rate as at January 31, 2020 for Balboas into Canadian currency was C$1.32/B$1.

1.3 Purposes of this Report

1. The purposes of the Report are to:

   a) provide an update to the Court on the status of the receivership proceedings since the First Report, including the responses, or lack thereof, received from Lisa, BDT, Arven, the Trust and ATC to the Receiver's information requests pursuant to the Disclosure Order;

   b) provide a summary of the actions taken by the Receiver to protect the Company's interest in Lisa;

   c) advise the Court that Juan Guillermo is not respecting the orders and directions of this Court, and if such conduct continues that he should be found in contempt of such orders; and

   d) recommend that the Court issue an order:

      i. approving the fees and disbursements of the Receiver and its legal counsel, Aird & Berlis LLP ("A&B"), arising for the periods referenced in the attached fee affidavits;

      ii. approving this Report and the Receiver's activities, as described herein; and

      iii. finding Juan Guillermo in contempt of the Court's orders issued in these proceedings if he continues to frustrate the Receiver's efforts and these proceedings.

1.4 Currency

1. All references to currency in this Report are in Canadian dollars unless otherwise stated.

1.5 Restrictions

1. In preparing this Report, the Receiver has relied upon unaudited financial information of the Company, the books and records of the Company, materials filed in the Avicola Litigation, discussions with representatives of the Company and discussions with Margarita and Juan Guillermo.

2. The Receiver has not audited, or otherwise attempted to verify the accuracy or completeness of the financial information relied on to prepare this Report in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the *Chartered Professional Accountants of Canada Handbook* and, accordingly, the Receiver expresses no opinion or other form of assurance contemplated under the CAS in respect of such information.

3. The Receiver expresses no opinion or assurance with respect to the financial and other information presented in this Report or relied upon by the Receiver in preparing this Report. Any party wishing to place reliance on the financial information should perform its own diligence.

1.6 Receivership Materials

1. All materials filed in the receivership proceedings are available on the Receiver's website at: https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd.

2.0 Disclosure Order

2.1 BDT, Arven and the Trust

1. On October 31, 2019, the Receiver sent letters, enclosing a copy of the Disclosure Order, to each of BDT, Arven, the Trust, Debbie McDonald, a representative of ATC, the Trustee of the Trust, and to Patrick Doig ("Doig"), a director of BDT and Arven, requesting all information in their possession concerning the Reviewable Transactions (the "Transaction Records") be provided to the Receiver by November 8, 2019. Copies of the October 31st letters are attached as Appendix "E".

2. On November 8, 2019, McDonald responded to the Receiver advising, *inter alia*, that the Transaction Records are confidential, and that ATC required until November 20, 2019 to obtain the consent of the Trust to provide the Transaction Records. A copy of ATC's November 8th letter is attached as Appendix "F".

3. On November 8, 2019, Doig emailed the Receiver advising that he required until November 20, 2019 to consult with the Trust regarding the Receiver's request. A copy of Mr. Doig's email is attached as Appendix "G".

4. On November 8, 2019, the Receiver sent emails to ATC and Mr. Doig agreeing to the extension requests.

5. On November 20, 2019, McDonald sent a letter to the Receiver advising, *inter alia,* that:

    a) ATC is responding on behalf of both the Trust and BDT;

    b) the Trust and BDT are not subject to the jurisdiction of the Court or the receivership;

    c) the Trust and BDT are not necessarily adverse to cooperating with the information request provided they understand its purpose and scope. ATC requested a detailed, specific list of documents required by the Receiver; and

    d) BDT is prepared to subordinate to Margarita in respect of the full amount of the Judgement Debt to any recovery by BDT under the BDT Judgement.

    A copy of ATC's November 20th letter is attached as Appendix "H".

6. On November 20, 2019, Mr. Doig sent a letter to the Receiver advising that BDT concurs with ACT's November 20th letter and that Arven also needs to understand the purpose and scope of the Receiver's request. A copy of Mr. Doig's letter is attached as Appendix "I".

7. On December 3, 2019, the Receiver responded to McDonald and Doig:

   a) advising that the Receiver requires the Transaction Records so it can determine the validity and lawfulness of the Reviewable Transactions;

   b) providing a detailed list of the Transaction Records required and requesting that they be provided by December 6, 2019; and

   c) requesting that until the Receiver completes its investigation that BDT set aside a further $15 million for all stakeholders and creditors of the Company, if BDT recovers any funds under the BDT Judgement.

   A copy of the Receiver's December 3rd letter is attached as Appendix "J".

8. On December 6, 2019, McDonald sent a letter to the Receiver asking that ATC have until December 13, 2019 to respond to the Receiver's request. On December 6, 2019, the Receiver agreed to the extension request.

9. On December 13, 2019, McDonald sent a letter to the Receiver on behalf of the Trust, BDT and Arven advising, *inter alia*, that:

   a) as it relates to the EAI Transaction, any attempt by the Receiver to invalidate the transaction would be time barred under Barbados legislation[4] and that ATC would not be providing any of the information required under the Disclosure Order;

   b) as it related to the Assignment Transaction, BDT has made significant advances to Lisa and that evidence of the advances may be provided at some future time as part of a claims process in the receivership; and

   c) BDT is prepared to subordinate the BDT Judgement to the Judgement Debt, provided the Receiver consents to an extension of the operation of Paragraph 4 of the Receivership Order and that the Court approves such extension.

   A copy of ATC's December 13th letter is attached as Appendix "K".

10. On December 14, 2019, the Receiver emailed McDonald to advise that it would file a copy of her letter with the Court at the Receiver's next Court appearance.

11. As of the date of this Report, BDT, Arven and the Trust have not provided any of the information required by the Receiver under the Disclosure Order.

[4] EAI is a Barbados domiciled company.

2.2 Lisa

1. On October 31, 2019, the Receiver attended a conference call with Amsterdam & Partners LLP ("Amsterdam"), counsel to Lisa, Torys LLP ("Torys"), legal counsel to the Company until December 2019, Aird & Berlis LLP ("A&B"), the Receiver's Canadian legal counsel, and Juan Guillermo. During this call, Amsterdam advised the Receiver as follows:

    a) *that Juan Guillermo is the person directing and representing Lisa, despite not being an officer or director of Lisa;*

    b) to contact Lisa's Board of Directors to obtain the information required under the Disclosure Order; and

    c) that (i) Lisa obtained a judgement in 2012 in Panama against Villamorey in the amount of US$18 million, representing a portion of unpaid dividends owing by Villamorey to Lisa (the "Alleged Panamanian Judgement") and (ii) that the Alleged Panamanian Judgement now totals approximately US$25 million with interest and would be paid out imminently and that this judgment was backstopped by a bond issued by Villamorey to the Panamanian Court.

2. During the October 31st call, the Receiver requested that Amsterdam provide it with a copy of the Alleged Panamanian Judgement; however, Amsterdam has not done so.

3. On November 5, 2019, the Receiver retained the Hatstone Group ("Hatstone") as its Panamanian counsel. Hatstone's searches of Panamanian court proceedings involving Lisa revealed three proceedings where Villamorey or BDT are the opposing litigants, but did not reveal the Alleged Panamanian Judgement or any proceeding connected therewith.

4. On November 5, 2019, A&B sent a letter to Lisa's Board of Directors (the "Lisa Board") (Harald Johannessen Hals, Lester Hess Jr. and Calvin Kenneth Shield) requesting that the Lisa Board provide to the Receiver by no later than November 11, 2019 copies of all records related to the Assignment Transaction. The Receiver was mainly interested in obtaining proof of advances from BDT to Lisa totalling approximately US$47 million as of June 30, 2018. The Receiver also requested that the Lisa Board confirm by November 8, 2019 that if the final payment order in respect of the Alleged Panamanian Judgement is issued by the Panamanian Court, none of the funds be paid to BDT until the Receiver completes its investigation of the EAI Transaction and Assignment Transaction or further order of the Court. A copy of the November 5th letter is attached as Appendix "L".

5. On November 8, 2019, Amsterdam sent a letter to A&B attaching a copy of the assignment agreement[5], but no other records relating to the Assignment Transaction. The letter further advised that Amsterdam would consult with BDT regarding potentially subordinating its rights to the Alleged Panamanian Judgement to the "reasonable requirements of the receivership". A copy of the November 8 Letter is attached as Appendix "M".

6. On December 17, 2019, Amsterdam sent a further letter to the Receiver advising that Lisa was in the process of obtaining a loan to repay the Judgment Debt and requesting a summary of the amounts owing under the Judgement Debt. Amsterdam further advised that the Company intended to bring a motion to request an extension of the operation of Paragraph 4 of the Receivership Order (which was set to expire on December 31st) and requesting that the Receiver take no action until the Court hears the extension request. A copy of Amsterdam's December 17th letter is attached as Appendix "N".

7. On December 17, 2019, the Receiver emailed Amsterdam a summary of the amounts owing under the Judgement Debt. It also advised that it will continue to exercise its authority and powers under the Receivership Order. A copy of the Receiver's email is attached as Appendix "O".

8. On December 17, 2019, Torys sent a letter to Bennett Jones LLP ("Bennett Jones"), counsel to Margarita, requesting Margarita's consent to extend the operation of Paragraph 4 to April 30, 2020. A copy of Torys' December 17th Letter is attached as Appendix "P". On December 17, 2019, Bennett Jones emailed Torys that it would not consent to an extension.

9. On December 30, 2019, Cambridge LLP ("Cambridge") served a notice of change of lawyers advising that it was replacing Torys as the Company's counsel.

10. On December 31, 2019, Cambridge served a motion advising that the Company intends to fully satisfy the Judgement Debt during the week of January 13, 2020 and that the Company was seeking an extension of the operation of Paragraph 4 of the Receivership Order until that time (the "Extension Motion").

11. On January 7, 2020, Cambridge served the Affidavit of Mr. Hals sworn December 30, 2019 (the "Hals Affidavit") advising that Lisa had procured a third-party loan sufficient to repay the Judgement Debt (the "Loan"). However, the terms of the Loan were not provided. A copy of the Hals Affidavit is attached as Appendix "Q".

12. On January 8, 2020, A&B sent a letter to Cambridge advising, *inter alia*, that the Receiver needs to understand the terms of the Loan so that it can consider its effect on the Company's stakeholders. A copy of A&B's January 8th letter is attached as Appendix "R".

[5] A copy of this document was already provided to the Receiver and filed with the Court as Appendix E of the Receiver's First Report.

13. On January 9, 2020, the Receiver, Cambridge and Bennett Jones attended a Chambers' appointment before Justice McEwan in respect of the Extension Motion. The Receiver advised that:

    a) it has no information regarding the terms of the Loan notwithstanding its requests for this information;

    b) it has serious concerns regarding the conduct of Juan Guillermo, BDT, Arven and the Trust, including their refusal to provide any information as required under the Disclosure Order; and

    c) it did not believe that it was appropriate to extend the operation of Paragraph 4 of the Receivership Order.

14. Pursuant to an endorsement dated January 9, 2020, Justice McEwan advised the parties that the Court was not prepared to schedule the Extension Motion at that time but provided Cambridge with the ability to reschedule a 9:30 chambers appointment in respect of the Extension Motion on two days' notice. His Honour also refused to make any changes to the Receivership Order and, accordingly, Paragraph 4 of the Receivership Order expired and is no longer operative.

15. On January 9, 2020, A&B emailed Cambridge requesting that they and their client, Juan Guillermo, deliver to the Receiver any and all documentation relating to the Loan by January 10, 2020. A&B further advised that if the Receiver is not satisfied with the terms of the Loan, taking into account the interest of all stakeholders, the Receiver would take the steps it considers necessary, as permitted by the Receivership Order, to protect the Company's assets and business. A copy of A&B's email is attached as Appendix "S".

16. On January 10, 2020, Cambridge requested an extension until January 13, 2020 to provide the Loan documentation.

17. On January 13, 2020, Cambridge sent a letter to the Receiver which provided the following limited information:

    a) the Loan is from a third party;

    b) the amount of the Loan is adequate to satisfy the Judgement Debt; and

    c) Lisa intends to pledge some of its shares in Villamorey to obtain the Loan.

    A copy of the January 13th letter is attached as Appendix "T".

18. On January 14, 2020, A&B sent a further letter to Cambridge advising them that the information in the letter was insufficient for the Receiver to evaluate the terms of the Loan. The Receiver again requested a copy of the loan documentation. A copy of A&B's response is attached as Appendix "U".

19. On January 16, 2020, Amsterdam responded by alleging, without evidence, that Margarita is conspiring with the Cousins. Amsterdam further advised that it could not provide details of the Loan because Lisa had purportedly signed a confidentiality agreement with its third-party lender. A copy of Amsterdam's email is attached as Appendix "V".

20. On January 17, 2020, A&B sent a letter to Amsterdam advising:

    a) that the refusal to provide the documentation relating to the Loan is contrary to the spirit of the Chambers appointment before Justice McEwan on January 9, 2020;

    b) the Receivership Order requires Lisa to provide all information and records related to the Company and the terms of the Receivership Order trump the confidentiality agreement;

    c) the Receiver's duties are to the Court and it is not solely accountable to any one stakeholder, including Margarita, but that its duty is to all stakeholders; and

    d) if Juan Guillermo continues to refuse to comply with the Receiver's information request, the Receiver will take such steps as it deems appropriate to protect the integrity of the receivership and the interest of all of the Company's stakeholders. Such steps may include a motion to hold Juan Guillermo in contempt of the Court's orders.

    A copy of the January 17th letter is attached as Appendix "W".

21. No response has been received to A&B's January 17th letter.

22. As of the date of the Report, the Receiver has not received any additional information concerning the Loan. The Receiver has no information regarding the status of the Loan or whether the Loan has been advanced to Lisa.

3.0 Board of Directors of Lisa and Gabinvest

1. The Company is the sole shareholder of Gabinvest S.A. ("Gabinvest"), which in turn owns the shares of Lisa. Both Gabinvest and Lisa are incorporated under the laws of Panama. This information has been previously provided to the Court in the First Report and is also set out in Juan Guillermo's sworn affidavit filed by the Company in respect of its CCAA application, which was ultimately dismissed by the Court.

2. On January 16, 2020, at the direction of the Receiver, using its authority under the Receivership Order, the Company passed a resolution to remove Gabinvest's directors, namely Mr. Hals, Jose Eduardo San Juan and David Harry, and replace them with three members of Hatstone's law firm, namely Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos. The Minutes of the shareholder's meeting were registered with the Public Registry of Panama on January 17, 2020.

3. On January 22 and January 27, 2020, respectively, Gabinvest (as the sole shareholder of Lisa) resolved by way of a shareholder meeting to increase the number of Lisa directors from five to six, and to add three members of Hatstone to the Lisa Board, namely Mr. Almengor, Mr. Carrasquilla and Ms. Ramos. None of the three directors previously named to the Lisa Board (Mr. Hals, Mr. Hess Jr. and Mr. Shields) were removed. The minutes of the shareholder meetings were duly registered with the Public Registry of Panama.

4. Lisa's prior Board members have objected to the changes to the new Board on the basis that: (a) the current directors were not notified prior to the meetings; (b) Lisa's articles state that there can be no more than five board members; and (c) the meetings were not appropriately convened, as the shareholder was not present. The Receiver understands from Hatstone that there was no requirement to give notice of the shareholder meetings to the existing directors, that the articles of Lisa were duly amended at one of the shareholder meetings to allow for Lisa to have six directors and that the shareholder meetings were correctly convened provided Gabinvest is the shareholder of Lisa.

5. The first step that is intended to be taken by Lisa's new directors is to obtain copies of Lisa's books and records, including bank statements so that the amount advanced from each of BDT, Arven and/or PAICA to Lisa can be determined. (This would not have been necessary had Juan Guillermo instructed Lisa to cooperate with the Receiver.)

6. On January 30 and February 7, 2020, respectively, Hatstone advised the Receiver that the non-Hatstone directors of Lisa and the removed directors of Gabinvest threatened to commence criminal and civil litigation against the new members of the boards of each of Lisa and Gabinvest in relation to the recent changes to the boards.

7. The non-Hatstone directors of Lisa and the removed directors of Gabinvest have instructed a Panamanian lawyer, Joao Quiroz ("Quiroz"), to assist with their objections. On January 28, 2020, Quiroz submitted to the Public Registry of Panama (the "Public Registry") a letter of objection to the addition of the three new directors to the Lisa Board and included threats of criminal and civil action against them (the "Objection Letter").

8. On January 30, 2020, Quiroz submitted to the Public Registry separate minutes of a shareholder meeting purporting to remove the Hatstone directors from the Lisa Board. These minutes could not be recorded in the Public Registry because of the Objection Letter. A copy of these alleged minutes is attached as Appendix "X".

9. On January 31, 2020, by a handwritten letter, Quiroz withdrew the claims being made in the Objection Letter. A copy of this letter is attached as Appendix "Y".

10. Withdrawing the Objection Letter allowed the Public Registry to record Quiroz' alleged shareholder minutes. As a result, the number of the board members of Lisa has returned to the original three members with the Hatstone directors now being removed.

11. On February 4, 2020, Quiroz submitted another letter of objection in respect of the addition of the three new directors to the Lisa Board again threatening criminal and civil proceedings against them. This letter is attached as Appendix "Z".

12. On February 5, 2020, Quiroz submitted a further letter of objection to the Public Registry in relation to the changes made to the board of Gabinvest and again made threats of criminal and civil litigation against each of Gabinvest's new board members. This letter is attached as Appendix "AA".

13. On February 11, 2020, Quiroz submitted to the Public Registry further minutes of a shareholder meeting seeking to remove the Hatstone directors from the Gabinvest Board and reinstating two of the previously removed directors and appointing one new director. So far, the Public Registry has not allowed Quiroz to submit the resolution due to errors and inconsistencies.

14. Hatstone has made various attempts by email and telephone to contact Quiroz to discuss this matter, but he has refused to respond or engage. Hatstone has also been seeking to liaise with the other members of the Lisa Board and the current registered agent of Gabinvest and Lisa. The current registered agent for both companies is the Panama law firm, Alfaro, Ferrer y Ramirez ("AFRA").

15. Hatstone has arranged a meeting with Mr. Hals, a current director and officer of Lisa, which is currently scheduled to take place in Bogota, Colombia on February 21, 2020. In addition, Hatstone has been liaising with AFRA to obtain copies of all corporate documentation held by AFRA as the registered agent. To date, obtaining information from AFRA has been frustrated by steps taken by Lisa and Gabinvest.

16. On February 12, 2020, A&B provided a detailed letter to AFRA together with a copy of the certified Court Order dated July 5, 2019 and the corporate group structure chart in order to help AFRA update their records and, accordingly, release the corporate documentation it is holding in relation to each of Gabinvest and Lisa. To date, the information requested has not yet been delivered by AFRA. A copy of the A&B letter to AFRA is attached as Appendix "BB". The Receiver understands that AFRA recently filed letters of resignation as registered agent in the Public Registry in respect of Gabinvest and Lisa.

4.0 Legal Counsel for Xela

1. As discussed above, Cambridge replaced Torys as the legal counsel for the Company in December 2019. Cambridge further advised the Receiver that it is taking instructions from Juan Guillermo. Juan Guillermo has no authority over the Company as a result of the Receivership Order. Pursuant to the terms of the Receivership Order, where the Receiver takes actions on behalf of the Company it does so to the exclusion of any other person. The Receiver's Canadian counsel is A&B. Accordingly, the Receiver refutes that Cambridge is actively engaged by the Company.

2. Furthermore, the Company has significant unpaid legal fees, including, as set out below:

   a. on January 8, 2020, Torys sent a letter to the Receiver advising that the Company has a material debt owing to it on account of legal services rendered by it to the Company;

   b. on January 9, 2020, Juan Rodriguez, the Company's former Florida counsel, advised the Receiver that his current law firm and his prior firm are owed approximately US$870,000 for legal services provided to the Company; and

   c. the Company's creditor list also reflects that Groia & Company Professional Corporation is owed $170,000.

3. The Receiver has advised Cambridge that it has not authorized the Company to engage Cambridge and that it is not prepared to pay Cambridge's legal fees.

5.0 Juan Guillermo's Efforts to Frustrate the Receivership Proceedings

1. As of the date of this Report, Juan Guillermo, Lisa, BDT, Arven and the Trust have not provided any of the information requested by the Receiver or required to be disclosed to the Receiver under the Disclosure Order. As referenced in Section 2.2 (1)(a), according to Amsterdam, Juan Guillermo is the person directing and representing Lisa, notwithstanding that he is not an officer or director of Lisa. Juan Guillermo is also the person directing Cambridge and who was previously directing Torys when it was legal counsel to the Company.

2. It is clear that Juan Guillermo is conflicted and that he has been acting, or acted, on both sides of the Reviewable Transactions. His children are the beneficiaries of the Reviewable Transactions.

3. It is the Receiver's view and opinion that Juan Guillermo does not appear to be respecting the orders issued by the Court in these proceedings (including the Disclosure Order) or the directions given by the Court (including providing full information concerning the Loan). Juan Guillermo is taking actions or causing the Company's subsidiaries to take actions that undermine and frustrate the purpose of these proceedings, including the actions initiated by the Receiver to cause the changes to the Lisa and Gabinvest boards of directors.

4. Juan Guillermo also appears to be using the foreign jurisdictions of each of BDT, Arven, the Trust, Lisa and Gabinvest to frustrate the purposes of the receivership.

5. Juan Guillermo resides in Toronto. He is an active participant in the receivership proceedings, as he was in the legal proceedings that gave rise to the Receivership Order. The Receiver recommends that the Court issue an order directing Juan Guillermo to cause each of BDT, Arven, the Trust and, in particular, Lisa to cooperate with the Receiver and to respect the issued Orders and directions of this Court. Given the foreign jurisdiction of the business in these proceedings, should Juan Guillermo continue to frustrate the advancement of the receivership, the Receiver is at a loss as to relief other than finding Juan Guillermo in contempt, and that the Court should impose restrictions and/or punitive terms against Mr. Guillermo personally, including the potential for imprisonment, until he is prepared to respect these proceedings and act in accordance with the orders issued by this Court.

6.0 Professional Fees

1. The fees of the Receiver and A&B are summarized in the table below:

		($)			
Firm	Period	Fees	Disbursements	Total	Average Hourly Rate
KSV	Sept 1/19 – Dec 31/19	106,725.00	901.81	107,626.81	601.95
A&B	Sept 12/19 – Jan 28/19	107,889.50	893.59	108,783.09	478.70
Total		214,614.50	1,795.40	216,409.90	

2. Detailed invoices for the Receiver and A&B can be found in the affidavits sworn by their representatives in Appendices “CC” and “DD”, respectively.

3. The Receiver is of the view that the hourly rates charged by A&B are consistent with the rates charged by law firms practicing in the area of insolvency and restructuring in the Toronto market, and that the fees charged are reasonable in the circumstances.

7.0 Conclusion and Recommendation

1. Based on the foregoing, the Receiver respectfully recommends that this Court make an Order granting the relief detailed in Section 1.3(1)(d) of this Report.

* * *

All of which is respectfully submitted,

KSV Kofman Inc.

KSV KOFMAN INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF
XELA ENTERPRISES LTD. AND
NOT IN ITS PERSONAL OR CORPORATE CAPACITY

Supplement to the Second Report of KSV Kofman Inc., as Receiver and Manager of Xela Enterprises Ltd.

March 17, 2020

Contents

Appendices

COURT FILE NO.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

SUPPLMENT TO THE SECOND REPORT OF KSV KOFMAN INC.

MARCH 17, 2020

1.0 Introduction and Purpose

1. This report (the "Supplemental Report") supplements the Second Report of the Receiver dated February 18, 2020 (the "Second Report").

2. Capitalized terms used but not defined in this Supplemental Report shall have the meaning provided to them in the Second Report.

3. The purpose of the Supplemental Report is to:

   a) update the Court on events since the Receiver's last Court attendance on February 21, 2020; and

   b) recommend that the Court issue an order finding Juan Guillermo in contempt of the Court's Orders issued in these proceedings.

1.1 Restrictions

1. This Report is subject to the restrictions provided in the Second Report.

2.0 February 21 Court Appearance

1. On February 21, 2020, the Receiver scheduled a chambers appointment before Justice McEwen to, *inter alia*, schedule the Receiver's motion seeking certain relief, including approving the Receiver's activities and its fees and disbursements.

2. The chambers appointment was attended by the Receiver and its counsel, A&B, as well as Cambridge and Bennett Jones. At the appointment, the Receiver summarized its Second Report, including advising the Court that Juan Guillermo had been causing the Company's subsidiaries to take actions that are undermining and frustrating the purpose of these proceedings, including, but not limited to, interfering with the Receiver's changes to the boards of directors for each of Gabinvest and Lisa and failing to have Lisa, BDT, Arven, the Trust and ATC comply with the Disclosure Order.

3. The Receiver further advised the Court that if Juan Guillermo continued to frustrate the receivership proceedings, the Receiver intended to bring a motion to find Juan Guillermo in contempt of the Court's Orders.

4. During the chambers appointment, Mr. Justice McEwen advised Cambridge, legal counsel to Juan Guillermo, of the Court's concerns regarding Juan Guillermo's conduct described in the Second Report. Mr. Justice McEwen advised Cambridge to advise Juan Guillermo of the Court's concerns. The Court also scheduled the Receiver's motion to be heard on March 24, 2020. A copy of Mr. Justice McEwen's endorsement dated February 21, 2020 is attached as Appendix "A".

3.0 Events Since the Chambers Appointment

1. As referenced in the Second Report, a meeting was scheduled in Bogota, Columbia on February 21, 2020, the same day as the chambers appointment, between the Receiver's Panamanian counsel, Hatstone and, among others, Mr. Hals, a current director and officer of Lisa, and Juan Guillermo. This meeting was requested by the non-Hatstone members of the Gabinvest and Lisa boards, and agreed to by Hatstone (at the direction of the Receiver) in the hopes of resolving the problems caused by the non-Hatstone board members in response to the changes to those boards made at the direction of the Receiver. At this meeting, Juan Guillermo expressed an interest in settling the dispute with Margarita and requested a subsequent meeting to be held on February 28, 2020 with the Receiver, the Receiver's counsel and Margarita.

2. On February 24, 2020, at the direction of the Receiver, Hatstone emailed Mr. Hals advising that the Receiver was prepared to meet with Juan Guillermo once the Lisa and Gabinvest Boards have been reconstituted on the basis sought by the Receiver. The Receiver also advised that it spoke with Margarita's legal counsel and that she was not interested in meeting. A copy of Hatstone's email is attached as Appendix "B".

3. On February 24, 2020, Mr. Hals responded to Hatstone and alleged, among other things, that Margarita had already been repaid the Judgement Debt. A copy of Mr. Hals' email and a translation of the e-mail from Spanish to English is attached as Appendix "C".

4. On March 3, 2020, Juan Guillermo called Hatstone to advise, *inter alia*, that he, allegedly on behalf of Gabinvest, would not agree to the Gabinvest board changes made by the Receiver and instead proposed a split board comprised of an equal number of appointees by the Receiver and Juan Guillermo. Presently, the Board of Gabinvest is comprised of the Receiver's appointees; however, Hatstone has advised that representatives of the former Board intend to challenge the Receiver's changes.

5. As set out in the Second Report, Juan Guillermo refused to accept the changes made to the Board of Lisa. Between January 30, 2020 and February 4, 2020, Juan Guillermo instructed Panamanian counsel to file a shareholder resolution changing back the board to the prior board, comprised of Mr. Hals, Mr. Hess Jr. and Mr. Shields. These changes have been filed with the Public Registry in Panama and the Public Registry is refusing to recognize the Gabinvest appointees.

6. On March 4, 2020, the Receiver served a motion record seeking, *inter alia*, an order:

   a) declaring that, unless retained by the Receiver, no person or law firm shall act as counsel to the Company except for the limited and specific purpose of bringing a motion for discharge of the Receiver pursuant to paragraph 25 of the Receivership Order, and that neither the Company nor the Receiver shall be liable for the fees and disbursements of any counsel not retained by the Receiver, unless otherwise ordered by the Court; and

   b) approving and ratifying the shareholder resolution changing the composition of the board passed by Gabinvest's sole shareholder, being the Company.

7. On March 11, 2020, the Receiver was forwarded an email by Hatstone from Mr. Hals which states that Lisa's Board (comprised of the non-Hatstone members) intended to forthwith initiate new criminal proceedings in Panama against Margarita. A copy of the email translated from Spanish to English is attached as Appendix "D".

4.0 Contempt Order

1. For the reasons provided in the Second Report and in Section 3.0 above, Juan Guillermo appears to be directing and representing Lisa, and purporting to direct and represent Gabinvest, notwithstanding that he is not an officer or director of either. Juan Guillermo is also the person directing Cambridge.

2. The Receiver believes that a contempt order is appropriate in the circumstances for the following reasons:

   a) as of the date of this Report, Juan Guillermo, Lisa, BDT, Arven and the Trust have not provided the information requested by the Receiver under the Disclosure Order.

   b) Juan Guillermo appears to be closely associated with each of the entities listed in 2(a) above, as detailed in the First Report (provided in Appendix "E", without appendices) and the Second Report, and is communicating with and participating in meetings with Hatstone as the directing mind of both Lisa and Gabinvest;

c) despite Justice McEwen advising Cambridge at a chambers appointment on January 9, 2020 that he expected fulsome disclosure be provided to the Receiver, Juan Guillermo has refused to provide substantive disclosure concerning the purported Loan that is to be used to repay the Judgement Debt or pursuant to the Disclosure Order, as discussed in the Second Report; and

d) Juan Guillermo continues to instruct and direct the foreign subsidiaries to take steps that undermine these proceedings, including the steps taken by the Receiver and Gabinvest to reconstitute the boards of Gabinvest and Lisa.

3. Accordingly, the Receiver sees no option but to recommend that the Court find Juan Guillermo in contempt of Court and that he be appropriately sanctioned.

5.0 Conclusion and Recommendation

1. Based on the foregoing, the Receiver respectfully recommends that the Court make an order granting the relief detailed in Section 1.0 (3)(b) of this Report.

* * *

All of which is respectfully submitted,

KSV Kofman Inc.

KSV KOFMAN INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF
XELA ENTERPRISES LTD. AND
NOT IN ITS PERSONAL OR CORPORATE CAPACITY

Second Supplement to the Second Report of KSV Kofman Inc., as Receiver and Manager of Xela Enterprises Ltd.

March 23, 2020

Contents

Appendices

COURT FILE NO.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

SECOND SUPPLEMENT TO THE SECOND REPORT OF KSV KOFMAN INC.

MARCH 23, 2020

1.0 Introduction

1. This report (the "Second Supplemental Report") is the second supplement to the Second Report of the Receiver dated February 18, 2020 (the "Second Report").

2. Capitalized terms in this Second Supplemental Report have the meaning provided to them in the Second Report and the First Supplemental Report dated March 17, 2020 (the "First Supplemental Report").

3. This Report is subject to the restrictions provided in the Second Report.

2.0 Update to the Court since the First Supplemental Report

1. As set out in the Second Report, on January 16, 2020, the Receiver passed a resolution replacing the Board of Directors of Gabinvest.

2. As set out in the Second Report, on January 27, 2020, Gabinvest appointed three directors to the Board of Lisa (the "New Lisa Directors"). Lisa has six Directors, including the New Lisa Directors and the Board members who were appointed prior to the commencement of the receivership (the "Existing Board Members").

3. At 9:45 pm, on March 22, 2020, Cambridge served a responding motion record containing an affidavit of Juan Guillermo sworn March 22, 2020 (the "Guillermo Affidavit") and an affidavit of Harald Johannessen Hals (the "Johannessen Affidavit"), both sworn in Toronto. The Receiver understands that Mr. Johannessen is the brother-in-law of Juan Guillermo.

4. The Receiver understands that many of the issues raised by the affiants in each of the Guillermo Affidavit and the Johannessen Affidavit have already been adjudicated by this Court in 2017, as set out in Endorsement of Justice McEwen dated July 6, 2017. A copy of the Endorsement is attached hereto as Appendix "A".

3.0 Unlawful Transfer of Remaining Assets

1. The Guillermo Affidavit states at paragraph 30 that Lisa transferred its one-third interest in Avicola to BDT in full satisfaction of its indebtedness to BDT, including its interest in unclaimed dividends (the "Lisa Transfer"). The date of this transaction is not provided in the Guillermo Affidavit. BDT is owned by the Trust, the beneficiaries of which are Juan Guillermo's children.

2. As previously noted by the Receiver in its reports filed with the Court to date, the underlying debt purportedly owed by Lisa to BDT, and the terms related thereto, is currently the subject of the Receiver's review and the Disclosure Order.

3. The Johannessen Affidavit states at paragraph 21 that the Lisa Transfer occurred in February 2020. The specific date is not provided. The Lisa Transfer transaction documents are not provided.

4. The Lisa Transfer happened at the time that the changes to the Gabinvest and Lisa boards were being frustrated by Juan Guillermo, the prior Board of Gabinvest and the Existing Lisa Directors.

5. As set out in the First Supplemental Report, there has been a dialogue between Hatstone, Juan Guillermo and some or all of the Existing Lisa Directors for several weeks. None of these individuals disclosed the Lisa Transfer to Hatstone during their extensive discussions and communications.

6. The Receiver understands from Hatstone that the disposal of assets by a corporation requires shareholder approval under Panamanian law and is not simply a board decision. Lisa's shareholder is Gabinvest and approval of such decision has not been granted by the Receiver or the Gabinvest board.

7. The Lisa Transfer is the main asset in the receivership. The Lisa Transfer renders the receivership meaningless, if permitted.

* * *

All of which is respectfully submitted,

KSV Kofman Inc.

KSV KOFMAN INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF
XELA ENTERPRISES LTD. AND
NOT IN ITS PERSONAL OR CORPORATE CAPACITY

Third Report of
KSV Kofman Inc.
as Receiver and Manager of
Xela Enterprises Ltd.

July 24, 2020

Contents

Appendices

COURT FILE NO.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

THIRD REPORT OF KSV KOFMAN INC.

JULY 24, 2020

1.0 Introduction

1. On January 18, 2011, Margarita Castillo ("Margarita") commenced an application in the Ontario Superior Court of Justice (the "Court") seeking, among other things, relief against her now-deceased father, Juan Arturo Gutierrez ("Juan Arturo"), and her brother, Juan Guillermo Gutierrez ("Juan Guillermo").

2. Margarita's application was commenced in her capacity as a director of Tropic International Limited, a wholly-owned subsidiary of Xela Enterprises Ltd. (the "Company").

3. Margarita's application was successful. Pursuant to a judgement issued by the Court on October 28, 2015, the Company, Juan Guillermo and Juan Arturo became jointly obligated to pay Margarita approximately $5 million, plus interest and costs (the "Judgment Debt"). The Receiver understands that the present balance owing under the Judgment Debt is approximately $4.4 million, plus interest and costs which continue to accrue. Margarita, through an Alberta company, also owns preference shares in the Company in the face amount of approximately $14 million.

4. On January 15, 2019, Margarita made an application to the Court for, among other things, the appointment of KSV Kofman Inc. ("KSV") as receiver and manager of the Company (the "Receiver") pursuant to Section 101 of the *Court of Justices Act* (Ontario). The Receiver was ultimately appointed on July 5, 2019. A copy of the receivership order is attached as Appendix "A" (the "Receivership Order").

5. Pursuant to the terms of the Receivership Order, the Receiver was empowered to deal with all matters related to the Company; however, the Receiver's authority to deal with the Avicola Litigation (as defined below) did not become effective until January 1, 2020 in order to provide Juan Guillermo with a fixed period of time within which to satisfy the Judgement Debt.

6. As Juan Guillermo did not satisfy the Judgement Debt by that date, the Receiver is empowered and authorized to manage and deal with the property and assets of the Company, including the Avicola Litigation, and where the Receiver does so, the Receivership Order prohibits any other party from dealing with those matters.

7. As discussed in greater detail in this Report, the Receiver has requested on several occasions that Juan Guillermo provide information regarding the Company. These information requests remain, for the most part, outstanding. Juan Guillermo has not provided effective cooperation to the Receiver since the commencement of these proceedings. Parties with connections to Juan Guillermo have also refused to provide information requested by the Receiver. Certain of these outstanding information requests are discussed in this Report.

8. As discussed in this Report, the Receiver has become aware of Company records currently in the possession of third parties. Access to these records will be of assistance to the Receiver to manage and deal with the assets of the Company.

9. Further details regarding the background of these proceedings are set out in the Receiver's First Report to Court dated October 17, 2019 (the "First Report"). A copy of the First Report is attached as Appendix "B", without appendices.

1.1 Purposes of this Report

1. The purposes of this Report are to:

   a) provide background information concerning these proceedings;

   b) provide an update on the activities of the Receiver since the Second Report; and

   c) recommend that the Court grant an order:

      i. authorizing the Receiver to obtain from Arturo's Technical Services ("ATS") any of the Company's property or documents in the possession of ATS (the "ATS Documents") and directing ATS to provide the ATS Documents to the Receiver;

ii. requiring Juan Guillermo to disclose the location of the Company's current server (the "Server"), including assisting the Receiver to access, locate, decode, and decrypt any and all information on the Server;

iii. directing that Juan Guillermo, or any other person purportedly acting on behalf of the Company, cannot assert privilege against the Receiver in respect of any documentation related to the Company that may be in the possession of ATS, located on the Server or in the possession of Cambridge LLP ("Cambridge"), counsel retained by Juan Guillermo to purportedly act for the Company in these proceedings;

iv. requiring any person who intends to assert privilege with respect to the ATS Documents, the Server, or elsewhere deliver an affidavit attesting under oath as to the nature of such privilege, the documents to which it extends, and the basis for such assertion; and

v. requiring Cambridge or any counsel acting or purporting to act for the Company to deliver up access to their files in these proceedings for inspection by the Receiver.

1.2 Currency

1. All references to currency in this Report are in Canadian dollars unless otherwise stated.

1.3 Restrictions

1. In preparing this Report, the Receiver has relied upon the Company's unaudited financial information, the Company's books and records, materials filed in the Avicola Litigation, discussions with representatives of the Company, Hatstone Abogados ("Hatstone"), the Receiver's Panamanian legal counsel, and discussions with Margarita and Juan Guillermo.

2. The Receiver has not audited, or otherwise attempted to verify the accuracy or completeness of the financial information relied upon in preparing this Report in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the *Chartered Professional Accountants of Canada Handbook* and, accordingly, the Receiver expresses no opinion or other form of assurance contemplated under the CAS in respect of such information. Any party wishing to place reliance on the financial information should perform its own diligence.

1.4 Receivership Materials

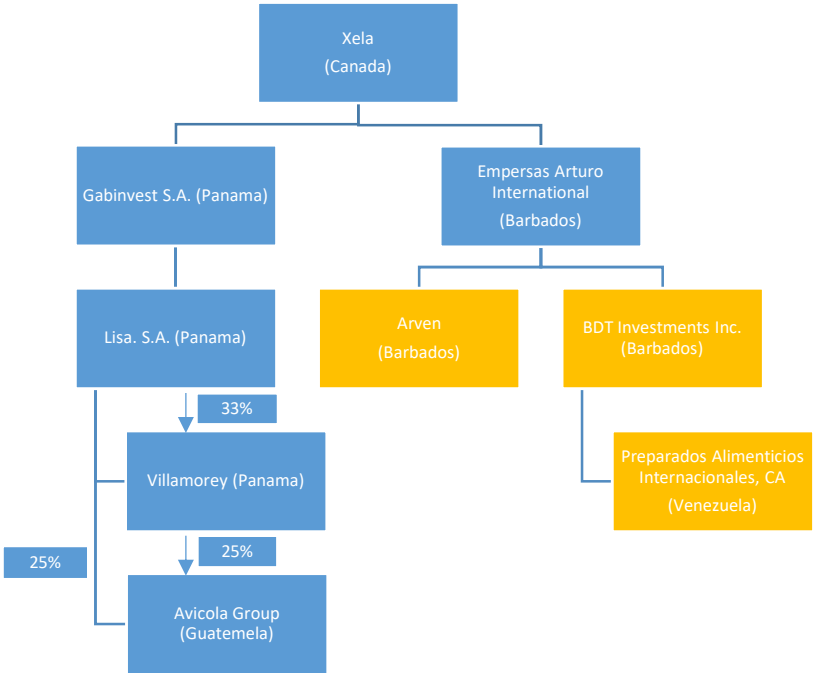
1. All materials filed in the receivership proceedings are available on the Receiver's website at: https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd.

2.0 Background

1. The Company is the parent of more than two dozen direct or indirect subsidiaries located predominantly in Central America that carry on, or carried on, businesses in the food and agricultural sectors.

2. Most of the Company's subsidiaries are no longer operating. To the extent that they continue to operate, they were conveyed to the ARTCARM Trust (the "Trust"), a Barbados domiciled trust. Juan Guillermo's children are the beneficiaries of the Trust.

3. A condensed Company organizational chart prior to April 2016 is presented below (entities shaded in yellow were transferred to the Trust in April 2016).



4. Attached as Appendix "C" is the Company's full corporate organizational chart prior to April 2016.

5. The Company's most significant asset is believed to be its indirect one-third interest in a group of purportedly successful, family-owned, and vertically-integrated poultry businesses operating in Central America known as the "Avicola Group". As reflected by the corporate chart, the Company's interest in the Avicola Group is believed to be held as follows (the "Avicola Interest"):

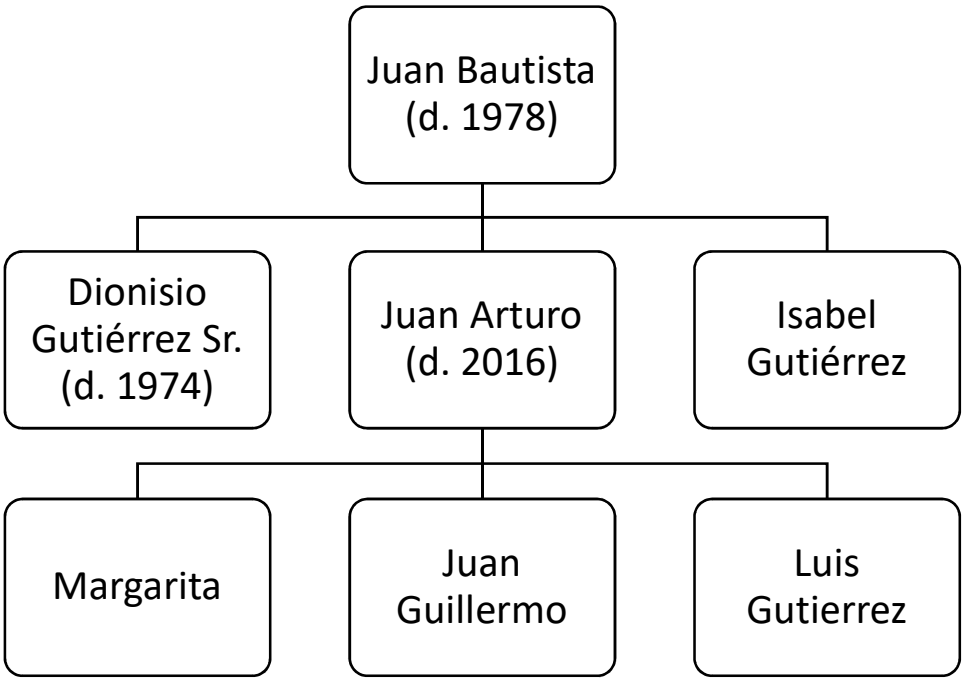
   a) 25% through its wholly owned indirect subsidiary, Lisa, S.A. ("Lisa"), a Panamanian holding company. Gabinvest S.A. ("Gabinvest") is believed to be the sole shareholder of Lisa; and

   b) 8.3% through Villamorey S.A. ("Villamorey"), a Panamanian holding company[1].

[1] Villamorey owns 25% of the Avicola Group, of which the Company has an indirect one-third ownership interest.

6. Dionisio Gutierrez Sr., Isabel Gutierrez de Bosch and their children (collectively, the "Cousins") are believed to own the remaining two-thirds of the Avicola Group through entities they own, including the remaining two-thirds of Villamorey.

7. Juan Bautista Gutierrez ("Juan Bautista") was the patriarch of the Gutierrez family and the founder of the Avicola Group. A condensed family tree is provided below:



8. Margarita, Juan Guillermo and the Cousins have been litigating for decades, primarily related to shareholder disputes involving the Avicola Group (the "Avicola Litigation").

2.1 EAI Transaction and Assignment Transaction

1. The First Report details the "Reviewable Transactions", as follows:

   a) the sale, conveyance or transfer in early 2016 by Empress Arturo International ("EAI") of the shares of BDT Investments Ltd. ("BDT") and Corporacion Arven, Limited ("Arven") to Juan Arturo, and then from Juan Arturo to the Trust (the "EAI Transaction); and

   b) the assignment in January 2018 by Lisa of the proceeds from the Avicola Litigation to BDT (the "Assignment Transaction").

2.2 EAI Transaction

1. Prior to April 2016, EAI, a wholly owned subsidiary of the Company, owned and operated the "Arturos" restaurant business in Venezuela through its wholly-owned subsidiaries, BDT and Arven.

2. Juan Guillermo has advised the Receiver that the Arturos restaurant chain has a history of profitability. The entities that carry on the Arturo's business, being BDT, Arven and Arven's subsidiary, Preparados Alimenticios Internacionales, CA ("PAICA"), are purported to have advanced approximately $$43 million to the Company and approximately US$57 million to Lisa to fund the Avicola Litigation, which amounts are purported to still be owing (the "Intercompany Receivables"). A summary of the purported Intercompany Receivables is provided below.

(unaudited; $000s)	Owing from the Company (CAD) (as at May 31, 2018)	Owing from Lisa (USD) (as at June 30, 2018)
Owed to:		
BDT	24,194	47,076
Arven	6,508	12,727
PAICA	11,835	(2,913)
	42,537	56,890

3. In 2012, a judgment was issued by the Panamanian Court in favour of BDT against Lisa in the amount of approximately $25,323,772 (the "BDT Judgement"). At the time of the BDT Judgement, Lisa and BDT were both indirectly owned by the Company.

4. In April 2016, EAI transferred the shares of BDT and Arven to Juan Arturo for US$6.5 million in partial satisfaction of a purported debt then owing to Juan Arturo by EAI. Juan Arturo subsequently transferred the shares of BDT and Arven to the Trust.

5. On its face, it appears that EAI received inadequate consideration for the shares of BDT and Arven. In this regard, it is unclear to the Receiver what value, if any, was ascribed to the Intercompany Receivables. The Receiver does not know the exact value of the Intercompany Receivables at the time of the EAI Transaction[3], but according to the Lisa's books and records, the amounts owing by Lisa to BDT, Arven and PAICA were approximately US$57 million as at June 30, 2018.

6. The Receiver has made numerous requests for evidence of the advances made by BDT and Arven to each of Lisa and the Company. These requests have been made to Juan Guillermo, representatives of BDT, Arven and PAICA and to Lisa's board of directors. None of these parties has provided any support for the advances.

2.3 Assignment Transaction

1. The Receiver was advised by Juan Guillermo that in January 2018, BDT agreed to fund Lisa's costs in the Avicola Litigation, provided Lisa assign its interest in the Avicola Litigation to BDT.

2. At the time of the Assignment Transaction, Juan Guillermo was the President of the Company and held preference shares in the Company.

[2] The BDT Judgement was issued in the amount of $19,184,680 Balboas, being the currency in Panama. The exchange rate as at January 31, 2020 for Balboas into Canadian currency was C$1.32/B$1.

[3] This is part of the Receiver's investigation.

3. The Receiver understands from Bennett Jones LLP, counsel to Margarita, that the Company's common shares are owned by a trust, the beneficiaries of which are Juan Guillermo's children. Juan Guillermo or his family members were therefore on both sides of the Assignment Transaction.

4. The Receiver has not uncovered any commercially reasonable basis for the Assignment Transaction other than to benefit Juan Guillermo and his family.

5. The Company's creditors and Margarita were, and are, prejudiced by this transaction.

6. Pursuant to the terms of the Assignment Transaction, BDT agreed to pay Lisa 30% of the net litigation proceeds, after deducting costs and the repayment by Lisa of any amounts it then owed to BDT. A copy of the Assignment Transaction agreement is attached as Appendix "D". As reflected in the table above in paragraph 2.2.2 above, at the time of the Assignment Transaction, Lisa allegedly owed BDT approximately US$47 million.

7. As a result of the Reviewable Transactions, the value of the Avicola Interest (which is indirectly held through Lisa) has been transferred outside of the Company to the Trust, the beneficiaries of which are Juan Guillermo's children.

8. The Reviewable Transactions and the BDT Judgment occurred at a time when Juan Guillermo was litigating with Margarita.

9. The Receiver has previously advised the Court that it required further information in order to come to final conclusions concerning the Reviewable Transactions; however, despite repeated efforts by the Receiver to obtain the information it requires to investigate these transactions (including from Juan Guillermo, BDT, Arven, PAICA and the Lisa board of directors), the information has not been provided.

2.4 Board Changes

1. The Company is the sole shareholder of Gabinvest, which in turn owns the shares of Lisa. Juan Guillermo has sworn an affidavit in these proceedings confirming this. Both Gabinvest and Lisa are incorporated under the laws of Panama.

2. The Receivership Order empowers and authorizes the Receiver to exercise the Company's shareholder rights, including the authority to change the Gabinvest board of directors.

3. On January 16, 2020, the Receiver passed a resolution replacing the directors of Gabinvest with three lawyers from the Receiver's Panamanian counsel, Hatstone (the "Gabinvest Resolution").

4. On January 22 and 27, 2020, at the direction of the Receiver, the new Gabinvest board caused Gabinvest to resolve, by way of shareholder meetings, to increase the maximum number of directors of Lisa from five to six and then to appoint the three Hatstone lawyers appointed to the Gabinvest board as new directors of Lisa, while leaving the existing three directors in place (collectively, the "Lisa Resolutions").

5. The Receiver further directed Gabinvest's new board to try to work cooperatively with Lisa's existing board members. As a sign of good faith and in the hoped-for spirit of cooperation, the Receiver preferred that Gabinvest not replace the entire Lisa board.

6. A purpose of the Gabinvest Resolution and the Lisa Resolutions was to provide the Receiver with access to the books and records of Lisa so that it could determine the extent of any advances received by Lisa from BDT, Arven and PAICA.

7. Lisa's non-Hatstone directors have refused to provide any corporate records in respect of either Lisa or Gabinvest or to instruct the recently resigned Panamanian registered corporate agent, Alfaro, Ferrer & Ramirez ("AFRA") to release any such documents. The Receiver understands that in Panama a registered agent maintains, or has access to, various key documents regarding a company, including the registers, minutes books, minutes of board of director meetings and certain financial information.

8. Among other things, Lisa's non-Hatstone directors have threatened to commence criminal and civil proceedings against the Hatstone board members and have filed competing minutes and resolutions with AFRA in order to remove the new Hatstone Board members from the boards of Lisa and Gabinvest. AFRA recently resigned as the registered corporate agent of Lisa and Gabinvest due to the issues discussed herein.

2.5 Lisa Transfer

1. On March 22, 2020, Juan Guillermo swore an affidavit (the "March 22 Guillermo Affidavit") in his capacity as the President of the Company, purporting to act on behalf of the Company, in opposition to the Motion of the Receiver seeking approval of the Receiver's Second Report.

2. The March 22 Guillermo Affidavit alleged, *inter alia*, that "BDT has extinguished its debt to Lisa in exchange for Lisa's full 1/3 stake in the Avicola Group" (the "Lisa Transfer"). A copy of the March 2020 Guillermo Affidavit is provided in Appendix "E".

3. The March 22 Guillermo Affidavit does not state how Juan Guillermo became aware of this information, when the transaction took place or who authorized the transaction.

4. The Lisa Transfer is of concern to the Receiver as:

   a) the Avicola Interest is the only asset of value owned by the Company and the only source of recovery for the Judgment Debt;

   b) the Receiver is attempting to investigate the Reviewable Transactions (as defined below), which directly relate to the entitlement in the Avicola Interest; and

   c) the Receiver had made changes to the board of directors of Gabinvest, and Gabinvest made changes to the board of directors of Lisa, a main purpose of which was to obtain the information required to investigate the Reviewable Transactions.

5. The Lisa Transfer allegedly occurred in February 2020,[4] during the pendency of these receivership proceedings, and at a time when the Receiver was trying to change the composition of the board of directors of Gabinvest, which in turn was trying to make changes to the board of directors of Lisa.

6. The Receiver understands from Hatstone that according to Panamanian law, in the absence of express powers in favour of the directors in the articles of a Panama corporation, the disposal of assets by a corporation requires shareholder approval under Article 68 of the Law 32 (Panama's Company Law) and Article 275 of the Panama's Commercial Code. The articles of Lisa do not include express powers in favour of the directors and, accordingly, Gabinvest's approval was required for the Lisa Transaction; however, Lisa never sought such approval from the directors of Gabinvest, which are Hatstone employees.

7. In the Receiver's view, the transfer of the Avicola Interest ***during the receivership*** is a breach of the Receivership Order and interferes with and defeats the purposes of the receivership.

8. The Receiver intends to investigate whether and how the Avicola Interest was transferred, including who authorized such transfer. The Receiver is concerned that Juan Guillermo authorized or directed such transfer in violation of the Orders of this Court.

2.6 Contempt Motion

1. Throughout these proceedings, the Receiver has made numerous information requests of Juan Guillermo and others apparently connected to him. Substantially all these information requests remain outstanding or the answers provided have been non-responsive.

2. As a result of the Receiver's inability to obtain information, on October 29, 2019, the Receiver brought a motion for an order requiring Lisa, BDT, Arven, the Trust and ATC to deliver information to the Receiver concerning the Reviewable Transactions.

3. On October 29, 2019, the Court issued an order requiring the disclosure sought by the Receiver (the "Disclosure Order"). A copy of the Disclosure Order is attached as Appendix "F".

4. The Disclosure Order requires EAI, Arven, the Trust, BDT and Lisa, and all of their respective current and former directors, trustees, officers, employees and shareholders to produce documents, records and information about the EAI and Assignment Transaction.

5. Juan Guillermo, BDT, Arven, Lisa and the Trust have failed and/or refused to provide the information required by the Receiver pursuant to the Disclosure Order.

[4] Affidavit of Harald Hals, President of Lisa, sworn March 22, 2020

6. On February 18, 2020, the Receiver brought a motion to, among other things, find Juan Guillermo in contempt of this Court by (i) failing to provide the information required under the various Court orders issued in these proceedings, including the Disclosure Order, and (ii) interfering with the Receiver's administration of the receivership proceedings.

7. On March 31, 2020, Juan Guillermo swore another affidavit in response to the contempt motion (the "Second March 2020 Guillermo Affidavit"). The Second Guillermo March 2020 Affidavit can be found at: https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd.

8. In the Second Guillermo Affidavit, Juan Guillermo claims he has complied with all information requests. The Receiver's experience is to the contrary.

9. Juan Guillermo has repeatedly stated that he does not have the facts available to him to respond and/or that he has no control or influence over the entities and individuals that do, including the Lisa board, BDT and Arven.

10. In the view of the Receiver, it is not credible that Juan Guillermo does not have the information given his relationship with the entities in question, including his role as President of the Company and his (or his family's) ownership interests in the Company.

11. There are multiple other statements in the Second Guillermo Affidavit with which the Receiver does not agree, including allegations that the Receiver is biased in favour of Margarita.

12. The Receiver was appointed by the Court, pursuant to a receivership order issued for the purpose of recovering the Judgment Debt. The Receiver has been and will continue to act as on officer of the Court in the best interests of the Company and its creditors.

13. In accordance with its mandate, the Receiver is prepared to pursue all sources of recovery for the Judgement Debt. If Juan Guillermo has information which is relevant to the Receiver's mandate, the Receiver respectfully requests that the information be provided rather than making bald and unsupported allegations in an affidavit.

14. On April 9, 2020, on agreement of the parties, the Court adjourned the contempt motion *sine die*.

15. To the extent it may be necessary to pursue recovery of the Judgment Debt, the Receiver will return to Court to address the contempt motion.

3.0 March 24 Endorsement

1. On March 26, 2020, the Court issued a consent endorsement (dated March 24, 2020) requiring Juan Guillermo to cause certain information relating to the Reviewable Transactions and other matters to be delivered to the Receiver to the extent the documentation and information is in his power, possession, and/or control (the "March 24 Endorsement").

2. The March 24 Endorsement also required that Mr. Hals, Lester Hess Jr., and Mr. Shields, as members of the Board of directors and officers of Lisa to deliver certain materials within 14 calendar days of the endorsement. A copy of the March 24 Endorsement is attached as Appendix "G".

3.1 Response by Juan Guillermo

1. On April 7, 2020, Cambridge provided a response to questions ordered to be answered pursuant to the March 24, 2020 Endorsement. The following response from Juan Guillermo is repeated throughout the letter:

> "I am not an officer or director of BDT or LISA. Although I own Xela[5] and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request."

2. A copy of Cambridge's letter is attached as Appendix "H".

3.2 Response by Former Directors

1. On March 31, 2020, the Receiver served a copy of the March 24 Endorsement by email to Mr. Hals, Mr. Hess Jr., and Mr. Shields requesting a response by April 7, 2020. A copy of the email sent by the Receiver is attached as Appendix "I".

2. On April 15, 2020, the Receiver received a copy of a letter from Juan Guillermo to Mr. Hals requesting that Lisa comply with the March 24, 2020 endorsement.

3. On April 27, 2020, Mr. Hals sent a letter to Juan Guillermo (but not to the Receiver). By his letter, Mr. Hals:

   a) refuses to recognize the Receiver's authority;

   b) misrepresents a meeting that took place in Colombia between representatives of Hatsone, Lisa and Juan Guillermo, including the authority of Hatstone to participate in that meeting;

   c) refuses to acknowledge the changes to Lisa's board of directors made by Gabinvest;

   d) makes unsupported allegations against one of Hatstone's lawyers representing the Receiver;

   e) states that the Covid-19 pandemic is impairing Lisa's ability to respond to information requests;

[5] The Receiver understands that Juan Guillermo owns preference shares in the Company and that a trust owns the common shares in the Company, of which his children are beneficiaries.

f) raises allegations without evidence about monies purportedly paid to Margarita from Villamorey; and

g) makes an offer to resolve the Receiver's request and this Court's March 24 Endorsement by agreeing to a "bilateral legal team" (English translation) for the purpose of recovering funds from unpaid dividends by Villamorey.

4.0 Server and Other Information

1. The Receiver was appointed as receiver of all of the assets, undertakings and properties of the Company (the "Property"). Paragraph 3 of the Receivership Order authorizes and empowers the Receiver "to take possession of and exercise control over the Property" and "to receive, preserve, and protect the Property".

2. Paragraph 6 of the Receivership Order requires all persons to "forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto to advise the Receiver of any property (including books and records) in their possession or control".

3. The Receiver understands that ATS has in its possession the Company's server and other documents owned by the Company. Attached as Appendix "J" is a corporate profile search of ATS which reflects that the directors of ATS are Thomas Gutierrez and Juan Andres Gutierrez, which are Juan Guillermo's children. On April 2, 2020, the Receiver wrote to ATS requesting production of any property or documents of the Company in ATS' possession. A copy of the letter to ATS is attached as Appendix "K".

4. On April 15, 2020, ATS agreed to cooperate with the Receiver and confirmed it is in possession of:

   a) eight wall-sized cabinets of documents belonging to the Company, "which can be made available"; and

   b) four decommissioned servers belonging to the Company in the possession of a third-party vendor.

5. As set out above, ATS has advised that the Company's servers were decommissioned; however, Juan Guillermo is on the service list in these proceedings at a "xela.com" email address. The e-mail address appears to be active as correspondence has been sent to Juan Guillermo at that address during these proceedings, including, for example, an email dated March 31, 2020 from the Receiver's counsel, a copy of which is attached as Appendix "L". This email appears to have been received as it was not returned as "undelivered".

6. On April 21, 2020, Aird & Berlis LLP, co-counsel to the Receiver, wrote to Greenspan Humphrey Weinstein LLP, counsel for Juan Guillermo, requesting the name of the present email host and the location of the Company's e-mail server. The Receiver also requested that Juan Guillermo provide: (i) information regarding the location of the Gabinvest share register and share certificates; (ii) and copies of all records of advances made by BDT to the Company.

7. On May 4, 2020, Cambridge responded in writing to the Receiver, purportedly on behalf of the ***Company*** and Juan Guillermo. The Cambridge letter:

   a) includes a response from Lisa that is non-responsive to the Receiver's requests;

   b) confirms and acknowledges that:

      i. ATS has documents and severs in its possession;

      ii. the Company has documents at ATS' office in Toronto; and

      iii. ATS controls four decommissioned servers belonging to the Company at a datacenter in North York;

   c) confirms that documents relevant to the Receiver's inquiries are likely among the records;

   d) purports to claim privilege over the Company's documents;

   e) indicates that, in order to provide documents evidencing BDT's litigation funding to Lisa, the Company will ask Lisa's counsel in the Villamorey garnishment cases to provide the Receiver with documents in the garnishment case, subject to a suitable non-disclosure agreement; and

   f) requests that the Receiver provide the Company with a "complete record of [the Receiver's] funding sources for the receivership" and communication by the Receiver with various parties.

   A copy of the May 4th letter is attached as Appendix "M".

8. As noted above, Cambridge purports to act on behalf of both the Company and Juan Guillermo[6]. That Cambridge believes it is acting for Company appears to be the basis for which it is asserting privilege. Cambridge asserts that:

   > The documents in all three of those locations are peppered with attorney/client communications and other confidential and protectable information, which must be reviewed under some satisfactory protocol before they can be delivered to the Receiver.

9. The Receiver is expressly empowered to take possession of the Property and to manage the business of the Company and to retain counsel.

[6] Cambridge writes "we emphasize that Xela and Mr. Gutierrez intend to continue cooperating with the Receiver."

10. At no time has the Receiver authorized Cambridge to act for the Company. Cambridge has no authority to do so.

11. If Cambridge has previously acted for the Company, third parties, including expressly "legal counsel" are required by the Receivership Order to cooperate with the Receiver and to grant immediate and continued access to the Property. Cambridge has not done so.

12. In the Receiver's view, it is entitled to gain access to all of the Company's records including any privileged documents for the purposes of carrying out its mandate.

13. The Receiver is concerned that Cambridge's purported claim of privilege is a tactic by Juan Guillermo intended to prevent the Receiver from getting access to the information necessary to advance the Receiver's mandate.

5.0 Conclusion

1. Based on the foregoing, the Receiver respectfully recommends that this Court make an Order granting the relief detailed in Section 1.1(1)(c) of this Report.

* * *

All of which is respectfully submitted,

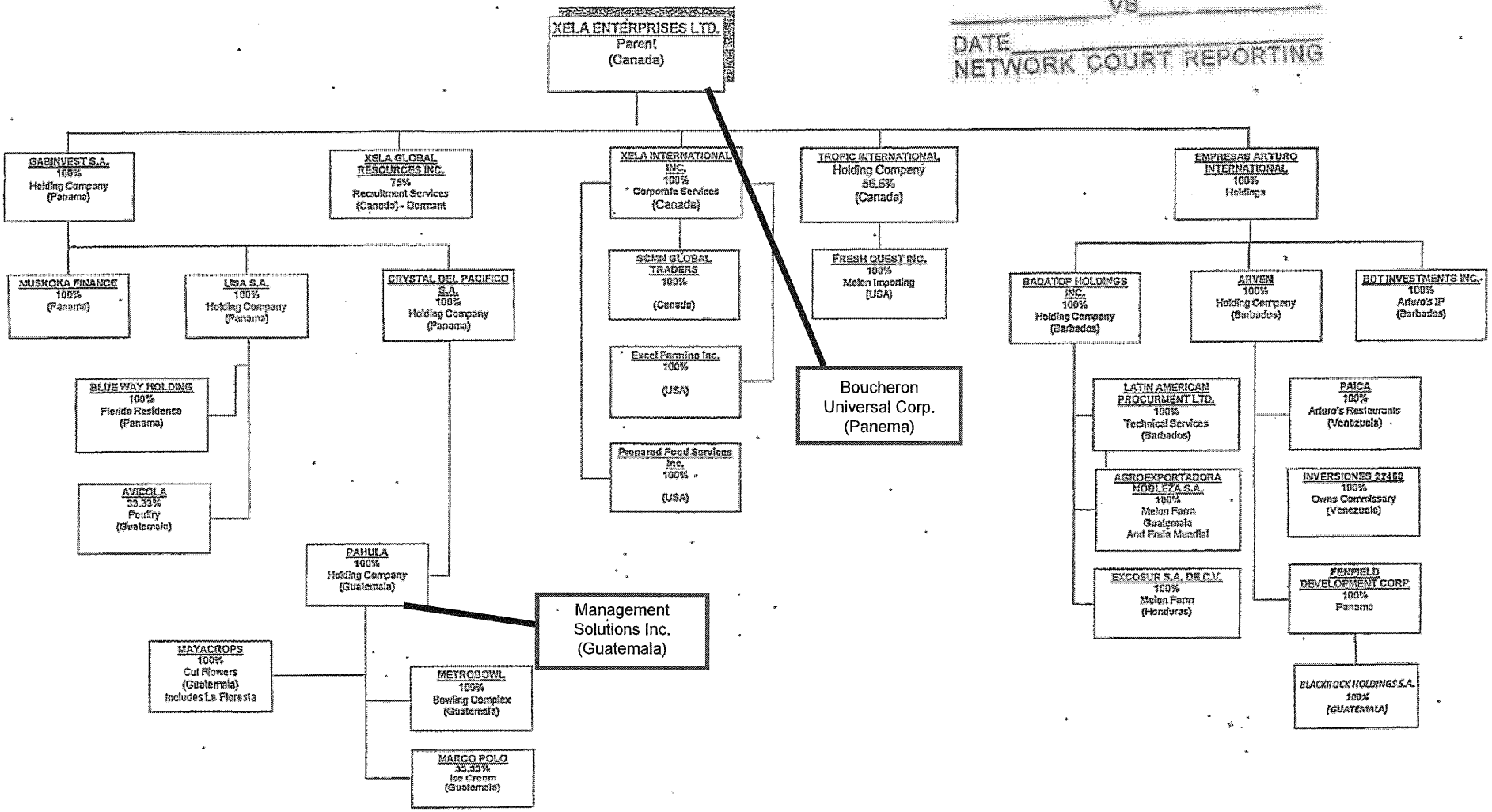
KSV Kofman Inc.

KSV KOFMAN INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF
XELA ENTERPRISES LTD. AND
NOT IN ITS PERSONAL OR CORPORATE CAPACITY

Appendix A - intentionally blank

Appendix B - intentionally blank

Appendix “C”



Appendix “D”

January 24, 2018

ASSIGNMENT OF CAUSATIVE ACTION

This Agreement is between the parties: BDT Investments LTD., domiciled in Barbados, referred to as (BDT) and Lisa S.A., referred to as (LISA), Xela Enterprises and Lisa S.A. are related parties.

BDT has monies outstanding from LISA of $46,786,171 and from Xela Enterprises Ltd. of $18,507,140.

Due to financial circumstances, BDT is concerned that LISA and Xela Enterprises Ltd. do not have the wherewithal to repay BDT amounts owed unless litigation involving the AVICOLA holdings, owned by LISA, is continued and funded.

As a result of negotiations between the parties, BDT agrees to fund the litigation going forward which could result in millions of dollars of expenses. In return, LISA will assign all causative actions of all current and future lawsuits involving the AVICOLA holdings.

Furthermore, BDT agrees to pay LISA 30% net of expenses of any settlement and/or collection of funds directly or indirectly relating to any related litigation. Expenses shall be comprised of all current monies owed by LISA, plus any statutory withholding taxes, plus any related contingency fees, bonuses, and commissions if applicable.

LISA agrees to fully co-operate with BDT on a reasonable basis.

For further clarity, BDT shall be reimbursed for past debts from both LISA and XELA and related future debts plus 70% of the net proceeds arising from an AVICOLA settlement or judgement that is successfully collected.

The parties are in agreement as evidenced below:

This Agreement is dated January 24, 2018.

Patrick Doig, President
BDT Investment Inc.

David Harry, Director and Treasurer
Lisa S.A.

Calvin K. Shields, Director
Xela Enterprises Ltd.

Appendix “E”

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

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

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

(Sworn March 22, 2020)

I, Juan Guillermo Gutierrez, resident of Toronto, Ontario, Canada, **MAKE OATH AND SAY:**

1. I am the President of Xela Enterprises Ltd., ("**Xela**"). I swear this Affidavit in support of the Debtor's Opposition to the Motion of the Receiver (returnable March 24, 2020) (the "**Motion**"), seeking approval of the Receiver's second report dated February 18, 2020 (the "**Second Report**").

2. The Second Report is erroneous and/or inaccurate in various material respects. Further, it omits relevant information that should properly be taken into consideration as the Court evaluates and guides the ongoing activities of the Receiver.

3. Significant questions remain concerning Xela's counterclaims against Applicant Margarita Castillo ("**Margarita**") – which are pending in the Court in Toronto – that have not yet been adjudicated. These pending claims, if sustained, would more than offset Margarita's judgment against Xela (the "**Castillo Judgment**"). Xela has emphasized these claims to the Receiver and their likely offset of the Castillo Judgment, but the Receiver has taken no discernible steps to pursue them.

4. Specifically, Xela has alleged that Margarita received an illegal US$4.35 million loan in 2010 from G&T Continental Bank ("**G&T**") in Guatemala (the "**Loan**"), funded by dividends improperly diverted from LISA, S.A. ("**LISA**"), an indirect subsidiary of Xela. The Loan was illegal because it was secured – without Xela's knowledge or consent – by a Certificate of Deposit in the sum of US$4,166,250, purchased with some of the improperly withheld dividends owed to one of Xela's subsidiaries. Xela asserts that Margarita was never required to repay the Loan, and that mere weeks after the Loan funded, the bank foreclosed the collateral, making itself whole and effectively laundering the misappropriated dividends by transferring them to Margarita. Xela further maintains that Margarita used some of the tainted Loan proceeds to fund the oppression action against Xela that eventually led to the Castillo Judgment.

5. Those allegations, which are supported below by specific references to evidence, have been asserted in separate counterclaims in a civil conspiracy lawsuit against Margarita that predate entry of the Castillo Judgment. If proved to be true, Xela would be entitled to a judgment of its own against Margarita that could more than offset the Castillo Judgment and the expenses of the receivership. Xela's claims against Margarita are both substantial and viable, and fairness suggests that any unresolved claims that might offset the Castillo Judgment should be resolved judiciously as part of the receivership process.

The Avicola Group

6. Arturo Gutierrez ("**Arturo**") laid the corporate foundation in 1965 for what is now a lucrative poultry conglomerate of 29 companies in Guatemala (collectively the "**Avicola Group**"). He gave a one-third ownership to each of his two siblings, keeping a 1/3 stake for himself. In 1974, his brother and brother-in-law were tragically killed in a small aircraft accident, and their interests passed to their respective heirs (referred to collectively here as the "**Nephews.**") Arturo remained President of the company and the single largest shareholder.

7. Beginning in 1982, Arturo began a transition to relocate his immediate family to Toronto. He resigned as President of the Avicola Group, leaving operations in the hands of the Nephews. He also formed LISA, S.A. ("**LISA**"), a Panama company, to which he transferred all of his shares in the Avicola Group. (LISA is wholly owned by Gabinvest, S.A., a Panama company ("**Gabinvest**"), which is in turn wholly owned by Xela.) By 1984, the transition was complete.

Initial Fraud by the Nephews

8. After the Nephews assumed operational control of the Avicola Group, Arturo and I gradually began to notice a decline in the growth rate of the business. We were unable to establish any definitive wrongdoing until the Nephews inadvertently gave Arturo a copy of an accurate Avicola Group financial statement in August 1997 containing information inconsistent with what had previously been reported. Eventually, the parties entered into a series of discussions over a potential acquisition by the Nephews. As a condition of the discussions, Arturo demanded an explanation about the apparent discrepancies in financial reporting. In response to that inquiry, at two separate meetings convened in Toronto in 1998 to discuss the value of Arturo's stake, two high-level corporate executives of the Avicola Group disclosed the details of the alleged fraudulent scheme to me. I lawfully videotaped the second meeting with the assistance of the Royal Canadian Mounted Police but without the knowledge of the executives.

9. The Avicola Group executives confessed on videotape that the Nephews had implemented a scheme to defraud the Guatemala tax authorities – as well as Arturo – by concealing the cash sales of up to 40% of the Avicola Group's chicken output. They explained that the scheme included under-reporting the revenues by concealing cash sales of live chickens, illegally laundering the unreported profits, and maintaining false accounting records to conceal the fraud. They told me that the Nephews had concealed the entire scheme from Arturo and the government by maintaining two sets of accounting records and two sets of financial statements, all of which resulted in the significant underpayment of Avicola Group dividends to LISA – which had been ranging between US$2 million and US$4 million per year – during the period 1985 through 2000.

Ongoing Theft of Dividends and Laundering of Illicit Proceeds

10. In 1999, the buy-out discussions having failed, Arturo began efforts to recover his unpaid dividends by commencing legal action in Florida and Bermuda, followed by a lawsuit in Panama against a company in which he held a 1/3 stake, Villamorey, S.A. ("**Villamorey**") – which owns 25% of the Avicola Group shares – and multiple lawsuits in Guatemala. In response, the Nephews suspended all Avicola Group dividend payments to LISA, while continuing to declare and pay dividends to themselves. Although the full amount has never been documented owing to the Nephews' failure to share financial reporting or data with LISA, LISA estimates the total sum of unpaid dividends from 1999 to the present to approach $400 million with interest (the "**Unpaid Dividends**").

11. Although the Nephews have successfully stalled legal proceedings and evaded judgment in most jurisdictions, the fraudulent scheme documented on videotape eventually became the subject of a three-week trial in Bermuda in 2008. There, the Court found that the Nephews had misappropriated LISA's dividends and converted them to their own use, laundering illicit cash receipts through the sale of bogus insurance policies at an inflated premium by a Bermuda-based reinsurance company that they owned. Judgment was entered in favor of LISA on September 5, 2008 (the "**Leamington Judgment**"), from

which the Nephews did not appeal. A true and correct copy of the Leamington Judgment is attached hereto as Exhibit A. Among other things, the Leamington Judgment establishes the following irrefutable facts:

a. That LISA was a victim of a conspiracy to defraud by the Nephews;[1]

b. That the Avicola Group used accounting records that recorded only a portion of its true income;[2]

c. That a substantial portion of the income generated by the Avicola Group was kept off the books and used to fund distributions to the Nephews but not to LISA;[3]

d. That the re-insurance policies at issue were not genuine;[4]

e. That some of the "black" money was being "whitened" by paying the insurance premiums that were then distributed as purportedly legitimate corporate profits, and that the Nephews intended to deprive LISA of its rightful share of the profits generated by the Avicola Group;[5]

f. That the Nephews used cash-only operations to conceal the Avicola Group's true earning from the Guatemalan tax authorities;[6]

g. That the Nephews intended to injure LISA through a fraudulent conspiracy;[7]

h. That LISA had been excluded from participating in the distributions made to the Nephews;[8]and

i. That the members, officers and directors of the various Avicola Group companies

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[1] Leamington Judgment, at ¶91.

[2] Leamington Judgment, at ¶55.

[3] Leamington Judgment, at ¶57.

[4] Leamington Judgment, at ¶63.

[5] Leamington Judgment, at ¶82.

[6] Leamington Judgment, at ¶62.

[7] Leamington Judgment, at ¶106.

[8] Leamington Judgment, at ¶109.

had "actual knowledge of all of the facts which made the conspiracy unlawful."[9]

12. Thus, the Nephews have systematically stolen LISA's dividends and laundered them through a series of false transactions benefitting the Nephews. In the Leamington case, those transactions were fake insurance contracts sold for excessive premiums by a company the Nephews owned.

Margarita's Breach of Fiduciary Duty and Theft of Xela Assets

13. After the Leamington case was decided, beginning in February 2009, the parties met through representatives more than a dozen times to discuss potential settlement of the dispute. The negotiations were tense and complex, owing to the extreme animosity and distrust that had developed between the branches of the family. It was during this extended period of negotiations that Margarita secretly joined forces with the Nephews, and conspired with them and others to attack Xela and its subsidiaries, in breach of her fiduciary duties as a Director of Xela.

14. Although Margarita's ensuing misconduct had multiple facets, perhaps her single most egregious act – and the transaction that is particularly relevant to this receivership – was her acceptance of what appears to be a tainted bank loan for US$4.35 million, funded by the Nephews through G&T Continental Bank in Guatemala ("**G&T Bank**") using LISA's unpaid 2010 Villamorey dividends as collateral (the "**Castillo Loan**"). As detailed below, the Castillo Loan appears to have been transacted through Margarita's nephew, Roberto Barillas ("**Roberto**") – who acted as her legal representative – and repaid through foreclosure of the collateral.

15. Specifically, G&T Bank and other records indicate the following:

    a. Villamorey declared in LISA's favor (but did not pay) dividends of US$4,166,250 in 2010. A true and correct copy of Villamorey's audited financial statements for 2009/2010 is attached hereto as Exhibit B.

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[9] Leamington Judgment, at ¶115.

b. On May 6, 2010, Juan Luis Bosch, one of the Nephews, used those dividends, without LISA's knowledge or consent, to open an account in Villamorey's name with G&T Bank. A true and correct copy of the opening statement for G&T Bank account No. 900051264, showing the initial deposit of US$4,166,250, is attached hereto as Exhibit C; and

c. On May 25, 2010, the initial deposit to Account No. 900051264 (*i.e.* LISA's dividends) was used to purchase Certificate of Deposit #010152676 in the amount of $4,166,250 (the "**CD**"). A true and correct copy of the CD is attached hereto as Exhibit D; see also Exhibit B, referencing CD #010152676.

16. Further, during meetings in September 2012 and November 2012, Mr. Jorge Porras – at the time an attorney for one of Xela's subsidiaries – provided information to Xela, of which he had personal knowledge, regarding an ongoing conspiracy between the Nephews and Margarita to injure Xela. During those meetings, Mr. Porras told Xela, among other things, that:

a. Roberto had executed the Castillo Loan documents on Margarita's behalf, under a power of attorney signed and delivered to Roberto by Margarita in Miami in March 2010;

b. The Castillo Loan was for a total of $4.35 million;

c. A portion of the Castillo Loan was to finance Margarita's oppression application in Toronto against Xela, our father and me; and

d. He (Mr. Porras) had attended meetings in Toronto with Margarita and her lawyers, Jeffery Leon and Jason Woycheshyn (Bennet Jones). Katherine Kay (Stikeman Elliot), who represents the Nephews in various legal matters, was also present during at least one of those meetings. The subject of the meetings was Margarita's oppression action against Xela, during which Margarita disclosed to her lawyers that the action would be financed through the Nephews.

17. Under cross-examination on April 17, 2012 in Toronto, Margarita admitted receiving the Castillo Loan and testified that G&T Bank had given her the Castillo Loan solely on the basis of her "net worth," as she had no assets in Guatemala and had not lived there in decades. A true and correct copy of an excerpt from Margarita's cross-examination is attached hereto as Exhibit E. However, in an affidavit dated September 9, 2011, Margarita testified that she had been struggling financially, and that she had asked the Nephews for "help" securing the Castillo Loan. A true and correct copy of that Affidavit is attached hereto as Exhibit F. In any case, Margarita confirmed in cross-examination that she used at least some of the Castillo Loan proceeds to pursue her oppression claims in Toronto against Xela, Arturo and Juan. (See Exhibit E hereto.)

18. In 2016, I participated in at least four meetings in Guatemala with high-level representatives of G&T Bank about the Castillo Loan. Initially, I spoke with Mr. Estuardo Cuestas, a member of the Board of Directors of G&T Bank and a close advisor to the President. I told him that I believed G&T Bank had given a loan to Margarita that was collateralized with LISA's Villamorey 2010 dividends, which she had used to fund litigation against me in Canada. Mr. Cuestas promised to look into the situation. During our second meeting, Mr. Cuestas confirmed that the Castillo Loan had indeed been collateralized with CD #010152676, and he seemed to recognize the seriousness of the situation. He arranged a meeting for me with Mr. Mario Granai, the President of G&T Bank. I shared my concerns with Mr. Granai, who provided no substantive commitment, although he seemed genuinely concerned about the bank's exposure.

19. Some weeks passed, after which Mr. Cuestas contacted me by telephone and informed me that G&T Bank would not be able to assist me, and that the Castillo Loan was "no longer an issue" for the Bank, as it had been "collapsed." I understood Mr. Cuestas' comments to signify that G&T Bank had satisfied the Castillo Loan by foreclosing the collateral (*i.e.*, using the CD purchased with LISA's 2010 Villamorey dividends), without Margarita being required to repay any part of the Castillo Loan.

20. At the time of the Loan, Margarita was sitting on the Board of Directors of Xela. Further, Margarita's oppression case was only one facet of a broader attack strategy, which included false criminal complaints against me in Guatemala. Those have all been dismissed with prejudice, but only at great expense and after significant damage to my reputation as well as to Xela's banking relationships.

21. This coordinated attack has benefitted the Nephews by depleting LISA's resources to pursue Unpaid Dividends. Further, I understand that lawyers for the Nephews have attended recent hearings in this receivership, obviously looking for an opportunity to close the loop on the conspiracy by purchasing LISA's claims for Unpaid Dividends at fire sale prices in exchange for satisfying the Castillo Judgment.

22. Although these facts should yield a judgment in Xela's favor that would likely more than offset the Castillo Judgment, they have yet to be adjudicated. I believe that in these circumstances, it would be unfair and inequitable to bar Xela from pursuing these outstanding questions to resolution. Indeed, the issue of Margarita's alleged wrongdoing should be addressed in a fair and equitable manner, under the Court's supervision, and within the confines of this receivership.

BDT Investments Ltd.

23. Beginning in 2005, LISA's efforts to collect the Unpaid Dividends, including litigating the Leamington action, were funded by BDT Investments Ltd., a Barbados corporation ("**BDT**"), which at the time was wholly owned by Xela. On January 5, 2009, LISA and BDT documented LISA's then-cumulative debt to BDT with a promissory note for US$16,910,000, secured by LISA's 1/3 stake in Villamorey. BDT eventually sued LISA in Panama on the promissory note, and in December 2012, it obtained a judgment against LISA in the amount of US$19,184,680, together with a lien against all of LISA's assets (collectively the "**BDT Judgment**").

24. In April 2016, as part of his estate planning, Arturo formed The ArtCarm Trust, a Barbados Trust (the "**Trust**"), to which he irrevocably transferred various assets, including BDT, for the benefit of certain family members, but excluding me. Meanwhile, BDT continued to fund LISA's claims to recover Unpaid Dividends, and LISA's debt to BDT grew to approximately US$50 million (the "**BDT Claim**"). Thus, at the time the Receiver was appointed, BDT was LISA's single largest creditor, with a claim approximately ten times the size of Margarita's Judgment. Still, BDT has consistently said that if LISA were to collect Unpaid Dividends, BDT would consider subordinating its rights under the BDT Judgment to the reasonable requirements of the receivership.

25. After the Receiver was appointed, I understand that LISA began to inquire into potential third-party loans sufficient to satisfy, among other things, the Judgment and the expenses of the Receivership. In December 2019, I was told that LISA had received a verbal commitment for such a third-party loan on terms acceptable to LISA (the "**Loan**"). All of the Loan details were managed and approved by LISA without my instigation, involvement or approval. I was told only the basic terms of the Loan, including that it was sufficient to satisfy the Castillo Judgment and the expenses of the receivership.

26. Upon learning of the lender's commitment to make the Loan, I understand that LISA informed the Receiver, stating specifically that the Loan was adequate to satisfy the Castillo Judgment and all reasonable expenses of the Receivership. The Receiver asked me for more details about the Loan, but I was unable to provide more information because I had not been told.

27. I understand that the Receiver has taken action in Panama to try to alter the composition of LISA's board of directors. I also understand that the Receiver's lawyers in Panama did not follow the required steps to make those changes, nor did they notify me of their plans. I also understand that when LISA's counsel in Panama observed that an unidentified person was trying to alter LISA's corporate structure, LISA quickly contested the

changes, which were officially rejected by the Corporate Registrar for failure to comply with applicable procedures.

28. I have offered multiple times to meet face-to-face with the Receiver to discuss the focus of his collection efforts as well as Xela's own counterclaims against Margarita. Most recently, those offers have been conveyed to the Receiver through LISA's lawyers in Panama. The Receiver initially implied that he would attend a meeting in Panama, but he later placed a precondition on any meeting with me, namely that LISA consent to the changes requested by the Receiver to LISA's Board of Directors.

29. Meanwhile, the Loan has not funded, for reasons that are unclear to me. What I understand, however, is that the failure to fund is related to the Receiver's attempts to intervene in the transaction.

30. I further understand that BDT has extinguished its debt to LISA in exchange for LISA's full 1/3 stake in the Avicola Group, including its claims for Unpaid Dividends. That proposal was not given to Xela or to me in advance, and neither Xela nor I consented to or approved of it. As I understand it, the decision to assign its remaining assets to BDT in exchange for cancellation of the debt was made solely and entirely by LISA.

31. Contrary to what the Second Report suggests, Xela has not withheld any information from the Receiver. Indeed, the only documents the Receiver claims Xela has not provided are records evidencing BDT's funding of LISA's litigation efforts. Although I believe that Xela's counsel has supplied records of this type to the Receiver, the request is moot in light of the U.S. District Court's finding that the BDT Judgment does not represent a fraud. Otherwise, to the best of Xela's knowledge, it has supplied all information in its possession requested by the Receiver.

32. From the outset of the receivership, I have repeatedly asked for face-to-face meetings with the Receiver to discuss how best to collect Unpaid Dividends from Villamorey and/ or the Avicola Group companies, and to discuss the validity of Xela's own civil

conspiracy claims against Margarita. Aside from one introductory meeting and one working meeting, the Receiver has rejected my requests, which I made directly to the Receiver during two separate teleconferences and also through Tory's, Xela's previous counsel. Lately, my requests have gone through LISA's President in Guatemala to the Receiver's counsel in Panama, during which LISA's counsel provided documentation to the Receiver's counsel concerning the fraudulent nature of the Nephews' Loan to Margarita, Xela's entitlement to a judgment that would probably more than offset the Castillo Judgment and the expenses of the receivership, along the Receiver's request to modify LISA's Board of Directors. Despite the evidence, the Receiver has consistently refused to meet. Recently, the Receiver has suggested through his

Panama lawyer that a meeting might be possible, but only on the condition that LISA first voluntarily consent to the Receiver's proposed changes to its Board of Directors.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on March 22, 2020.

Commissioner for Taking Affidavits
(or as may be)

N. Joan Kasozi
(LSO# 70332Q)

JUAN GUILLERMO GUTIERREZ

Appendix “F”

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR	)	TUESDAY, THE 29th
	)	
JUSTICE MCEWEN	)	DAY OF OCTOBER, 2019

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 first report of the Receiver dated October 17, 2019 (the "**First Report**") and the activities of the Receiver set out therein; (ii) approving the fees and disbursements of the Receiver and its legal counsel; (iii) ordering and directing that any party with information and/or documentation in its possession or control in relation to, and evidencing, the sale, conveyance or transfer of the shares and/or assets of each Corporacion Arven, Limited

("**Arven**") and BTD Investments Inc. ("**BDT**") to Juan Arturo Gutierrez ("**Juan Arturo**"), as purchaser or transferee, and Empresas Arturo International ("**EAI**"), as vendor or transferor, which were ultimately sold, conveyed or transferred by Juan Arturo to The ARTCARM Trust, in and around early 2016 (the "**EAI Transaction**") deliver all such information and/or documentation to the Receiver; (iv) ordering and directing that any party with information and/or documentation in its possession or control in relation to, and evidencing, the assignment by Lisa S.A. ("**Lisa**") of the proceeds from the Avicola Litigation to BDT in January 2018 (the "**Assignment Transaction**") deliver all such information and/or documentation to the Receiver; and (v) sealing the Confidential Appendices 1 and 2 of the First Report, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Receiver, including the First Report and the appendices thereto, the fee affidavit of Steven Graff sworn October 10, 2019 and the fee affidavit of Noah Goldstein sworn October 17, 2019, 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 the affidavit of Kyle Plunkett sworn October 18, 2019, and the affidavit of Michael Anderson Beckles sworn October 25, 2019, filed.

SERVICE

1. **THIS COURT ORDERS AND DECLARES** that the time for service of this Motion and the Motion Record herein are properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF THE FIRST REPORT

2. **THIS COURT ORDERS** that First Report and the conduct and activities of the Receiver described therein be and are hereby approved; provided, however, that only the Receiver, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

APPROVAL OF FEES AND DISBURSEMENTS

3. **THIS COURT ORDERS** that the fees and disbursements of the Receiver, being fees and disbursements totalling $36,763.75 (excluding HST) as set out in Appendix "F" to the First Report, are hereby approved.

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver's legal counsel, Aird & Berlis LLP, being fees and disbursements totalling $43,520.07 plus HST of $6,393.10, totalling $49,177.68 as set out in Appendix "G" to the First Report, are hereby approved.

PRODUCTION OF RECORDS RE EAI TRANSACTION AND ASSIGNMENT TRANSACTION

5. **THIS COURT ORDERS** that (i) EAI and (ii) all of its current and former directors and officers, employees, agents, accountants and all other persons acting on their instructions or behalf, be and are hereby directed to produce forthwith to the Receiver any and all information and records, including its minute books and any board resolutions, in their possession or control of in relation to the EAI Transaction.

6. **THIS COURT ORDERS** that (i) The ARTCARM Trust and (ii) all of its current and former trustees, including Alexandria Trust Corporation, and employees, agents, accountants and beneficiaries, and all other persons acting on their instructions or behalf, be and is hereby directed to produce forthwith to the Receiver any and all information to their knowledge and any documentation and records in their possession or control in relation to the EAI Transaction and the Assignment Transaction.

7. **THIS COURT ORDERS** that (i) Arven and (ii) all of its current and former directors, officers, employees, agents, accountants and shareholders, and all other persons acting on their instructions or behalf, be and is hereby directed to produce forthwith to the Receiver any and all information to their knowledge and any documentation and records in their possession or control in relation to the EAI Transaction.

8. **THIS COURT ORDERS** that (i) BDT and (ii) all of its current and former directors, officers, employees, agents, accountants and shareholders, and all other persons acting on their instructions or behalf, be and is hereby directed to produce forthwith to the Receiver any and all information to their knowledge and any documentation and records in their possession or control in relation to the EAI Transaction and the Assignment Transaction.

9. **THIS COURT ORDERS** that (i) Lisa and (ii) all of its current and former directors, officers, employees, agents, accountants and shareholders, and all other persons acting on their instructions or behalf, be and is hereby directed to produce forthwith to the Receiver any and all information to their knowledge and any documentation and records in their possession or control in relation to the Assignment Transaction.

10. **THIS COURT ORDERS** that any party having notice of this Order be and is hereby directed to produce forthwith to the Receiver any and all information and records in their possession or control of in relation to the EAI Transaction and the Assignment Transaction.

SEALING OF CONFIDENTIAL INFORMATION

11. **THIS COURT ORDERS** that the Confidential Appendices 1 and 2 of the First Report be and are hereby sealed until further Order of this Court.

RECOGNITION BY FOREIGN JURISDICTIONS

12. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States of America, Republic of Panama, Republic of Guatemala, Barbados or Bolivarian Republic of Venezuela 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.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

OCT 29 2019

PER / PAR:

MARGARITA CASTILLO

Applicant

-and-

XELA ENTERPRISES LTD. *et al.*

Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

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

Appendix “G”

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:
(as per counsel slip)		

☑ 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

Judge's Signature

☐ Additional Pages_____

Schedule One

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

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 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*.

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	)	TUESDAY, THE 24TH
	)	
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 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.

ARGARITA plicant	**CASTILLO** -and-	**XELA ENTERPRISES LTD.** ***et al.*** Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

AIRD & BERLIS LLP
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Sam Babe (LSO # 49498B)
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Email: sbabe@airdberlis.com

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

SCHEDULE C

Litigation Timetable re Contempt Motion

Step to be taken	Delivered by:
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 20th 2020
6. Cross-Examination of the Respondent's affiants	Week of April 20th 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
10. **Hearing Date**:	**May 14, 2020**

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR	)	TUESDAY, THE 24TH
	)	
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

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SERVICE

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ARGARITA
pplica

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CASTILLO -and- XELA ENTERPRISES LTD. *et al.*

Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, 181 Bay Street
Toronto, ON M5J 2T9

Kyle Plunkett (LSO # 61044N)
Tel: (416) 865-3406
Fax: (416) 863-1515
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Lawyers for KSV Kofman Inc., in its capacity as the court-appointed Receiver of Xela Enterprises Ltd.

Appendix “H”

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

April 7, 2020

SENT VIA EMAIL TO KPLUNKETT@AIRDBERLIS.COM; SBABE@AIRDBERLIS.COM; SGRAFF@AIRDBERLIS.COM

Chris Macleod
416.477.7007 ext. 303
cmacleod@cambridgellp.com

Mr. Kyle Plunkett
Mr. Steve Graff
Mr. Sam Babe
AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Dear Mr. Plunkett:

Re: MARGARITA CASTILLO and XELA ENTERPRISES LTD. et al.

In fulfillment of the Endorsement of Justice McEwen dated March 24, 2020, please see below, the responses to the questions found at Schedule A of the Endorsement.

1. Please provide of advances from BDT to Lisa Totalling US 47.0 million as of June 30, 2018, including any canceled cheques payable to Lisa, wire transfers from BDT to Lisa and bank statements.

Response to Question No. 1: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond.

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).

Response to Question No. 2: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond.

3. What specific date did BDT propose to satisfy LISA's debt?

Response to Question No. 3: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond.

4. Who on behalf of BDT made that communication?

Response to Question No. 4: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond.

5. Who on behalf of LISA received that communication and in what was the form of communication? Produce copies.

Response to Question No. 5: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

6. Was the BDT proposal or any similar offer reduced to writing? Produce copies.

Response to Question No. 6: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

7. When did LISA's board meet to consider the BDT proposal? Was the meeting in person or through technology?

Response to Question No. 7: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

8. Who attended the board meeting?

Response to Question No. 8: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

9. What documents or records did the Board review in considering the BDT proposal. Produce copies.

Response to Question No. 9: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

10. Produce minutes and/or notes of board meeting.

Response to Question No. 10: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

11. Produce board resolution approving the transaction.

Response to Question No. 11: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was

not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

12. What documents were signed once the board approved the BDT proposal. Produce copies.

Response to Question No. 12: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

13. Why did LISA's directors not consult with Gabinvest?

Response to Question No. 13: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, a I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

14. Why did LISA's directors not consult with Xela and/or the Receiver?

Response to Question No. 14: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

15. What was the form of assurance provided by BDT as referenced in paragraph 22 of Harald's affidavit? Produce any written assurance.

Response to Question No. 15: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

16. When did Juan learn of this February 2020 transaction?

Response to Question No. 16: In one of my recent affidavits, I described a meeting in Bogota on February 21, 2020, attended by LISA, its counsel, and the Receiver's Panamanian

lawyers. I was also in attendance, flying to Colombia a few days earlier. Shortly after I arrived, Harald Johannessen Hals, the President of LISA, reported to me that LISA had satisfied its debt to BDT. I believe therefore that I learned about the transaction sometime between February 19 and February 20, 2020.

17. Who advised him of it? Produce a copy of any written communication.

Response to Question No. 17: Mr. Johannessen informed me orally about the transaction, and neither he nor I took notes. I have searched my records for any written communications informing me of the transaction, but I have not located any.

18. Produce any written communication regarding the transaction as between any of BDT, LISA, Gabinvest, Xela and all respective directors and officers

Response to Question No. 18: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

Yours very truly,

CAMBRIDGE LLP
Per:

CHRIS MACLEOD

Cc: Brian Greenspan, email: bhg@15bedford.com

Michelle M. Biddulph, email: mmb@15bedford.com

Appendix “I”

From: Kyle Plunkett <kplunkett@airdberlis.com>
Sent: March 31, 2020 9:10 AM
To: 'harald.johannessen1951@gmail.com' <harald.johannessen1951@gmail.com>
Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Noah Goldstein <ngoldstein@ksvadvisory.com>; Steve Graff <sgraff@airdberlis.com>; Sam Babe <sbabe@airdberlis.com>; 'Chris Macleod' <cmacleod@cambridgellp.com>; 'jkasozi@cambridgellp.com' <jkasozi@cambridgellp.com>; 'jgutierrez@xela.com' <jgutierrez@xela.com>; 'jgutierrez@arturos.com' <jgutierrez@arturos.com>; 'carl.oshea@hatstone.com' <carl.oshea@hatstone.com>; 'alvaro.almengor@hatstone.com' <alvaro.almengor@hatstone.com>
Subject: Re: Receivership of Xela Enterprises Ltd. - Court File No. CV-11-9062-00CL

Dear Mr. Hals,

Please find attached hereto a letter of today's date that requires your attention. We would ask that you please forward a copy of this letter to the balance of the addressees. A hardcopy of the attached will follow via courier.

Regards,

Kyle

Kyle Plunkett

T 416.865.3406
F 416.863.1515
E kplunkett@airdberlis.com

Aird & Berlis LLP | Lawyers
Brookfield Place, 181 Bay Street, Suite 1800
Toronto, Canada M5J 2T9 | airdberlis.com

AIRD BERLIS

Kyle B. Plunkett
Direct: 416.865.3406
Email: kplunkett@airdberlis.com

March 31, 2020

BY EMAIL

Mr. Harald Johannessen Hals
6 Avenida "A" 8-00, Zona 9
Edificio Centro Operativo
Penthouse "B"
Ciudad de Guatemala
Guatemala

Mr. Lester C. Hess Jr.
1234 Deerbrook Drive
Sugar Land
Texas, 77479-4283
United States of America

Mr. Calvin Kenneth Shields
4118 Oakmount Court
Vero Beach
Florida, 32967
United States of America

Attention: Board of Directors of Lisa S.A.

Dear Sirs:

Re: Receivership of Xela Enterprises Ltd. ("Xela")
(Ontario Court File No. CV-11-9062-00CL)

And Re: Notice to Board of Directors and Officers of Lisa S.A. ("Lisa")

As you are aware, we are the lawyers for KSV Kofman Inc. ("**KSV**"), in its capacity as the court-appointed receiver and manager (in such capacity, the "**Receiver**") of Xela. KSV was appointed Receiver pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") issued and entered on July 5, 2019 (the "**Appointment Order**"). A copy of the Appointment Order is attached. All court materials filed in the receivership proceedings can be found on the Receiver's website: https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd.

We refer to our letter dated November 5, 2019, wherein you were each notified of your obligations, as officers and/or directors of Lisa, pursuant to an Order of the Ontario Court made October 29, 2019 (the "**Disclosure Order**"), to disclose certain information and/or documentation to the Receiver. We have received no response from any of you to that letter.

On March 26, 2020, Justice McEwen of the Ontario Court made an endorsement on consent of all parties, including Juan Guillermo Gutierrez through his counsel Brian Greenspan and Cambridge LLP (the "**March 24 Endorsement**"). Pursuant to paragraph 3 of Schedule 1 to the March 24 Endorsement, you each are required to deliver, or cause to be delivered, the following to the Receiver by not later than **April 7, 2020**:

(a) 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;

(b) any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT Investments Ltd. ("**BDT**") to Lisa and copies of bank statements evidencing such advances, as previously requested by the Receiver; 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 including, without limitation, answers to requests and questions set out on Schedule A to Schedule 1 of the March 24 Endorsement.

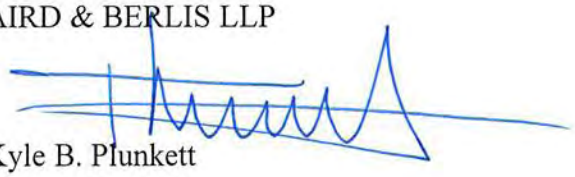
A copy of the March 24 Endorsement is enclosed with this letter.

We also enclose a copy of an Order also made by Justice McEwen on March 24, 2019 again on consent of all parties including Mr. Gutierrez through his counsel and Cambridge LLP (the "**March 24 Order**"). We draw your attention to paragraph 3 of the March 24 Order, where it is ordered and declared that the resolution of the shareholder of Gabinvest S.A ("**Gabinvest**"), dated January 16, 2020, replacing the directors of Gabinvest (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 Xela's shareholder rights. To the extent any of you are former directors of Gabinvest, or purport to remain directors of Gabinvest, we trust that your future conduct in respect of Gabinvest will be informed by, and be consistent with, this March 24 Order and the Gabinvest Resolution and that you will recognize and respect the authority of, and give your full cooperation to, the newly constituted board of Gabinvest.

We look forward to your cooperation and appreciate your immediate attention to this matter. Should you have any questions, please contact the undersigned.

Yours truly,

AIRD & BERLIS LLP



Kyle B. Plunkett

cc by Email: *Juan Guillermo Gutierrez*
Christopher Macleod and N. Joan Kasozi, Cambridge LLP
Bobby Kofman and Noah Goldstein, KSV Kofman Inc.
Steven Graff and Sam Babe, Aird & Berlis LLP
Carl O'Shea and Alvaro Almengor, Hatstone Group

Encls.

39413472.3

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:
(as per counsel slip)		

☑ 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.

26 March 20
Date

Judge's Signature

☐ Additional Pages_____

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

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 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*.

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	)	TUESDAY, THE 24TH
	)	
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 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.

_____

ARGARITA **CASTILLO** -and- **XELA ENTERPRISES LTD.** ***et al.***
›plicant
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, 181 Bay Street
Toronto, ON M5J 2T9

Kyle Plunkett (LSO # 61044N)
Tel: (416) 865-3406
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Sam Babe (LSO # 49498B)
Tel: (416) 865-7718
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Email: sbabe@airdberlis.com

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

SCHEDULE C

Litigation Timetable re Contempt Motion

Step to be taken	**Delivered by:**
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 20th 2020
6. Cross-Examination of the Respondent's affiants	Week of April 20th 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
10. **Hearing Date**:	**May 14, 2020**

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR	)	TUESDAY, THE 24TH
	)	
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 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.

ARGARITA
plicant

CASTILLO -and- **XELA ENTERPRISES LTD.** ***et al.***

Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, 181 Bay Street
Toronto, ON M5J 2T9

Kyle Plunkett (LSO # 61044N)
Tel: (416) 865-3406
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Sam Babe (LSO # 49498B)
Tel: (416) 865-7718
Fax: (416) 863-1515
Email: sbabe@airdberlis.com

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

Appendix “J”

Government of Canada | Gouvernement du Canada

Home ➜ Innovation, Science and Economic Development Canada ➜ Corporations Canada ➜ Search for a Federal Corporation

Federal Corporation Information - 996927-6

Buy copies of corporate documents

Note

This information is available to the public in accordance with legislation (see Public disclosure of corporate information).

Corporation Number
996927-6

Business Number (BN)
744418690RC0001

Corporate Name
Arturo's Technical Services Ltd.

Status
Active

Governing Legislation
Canada Business Corporations Act - 2016-11-01

Registered Office Address

100 Leek Crescent
Unit 3
Richmond Hill ON L4B 3E6
Canada

Note

Active CBCA corporations are required to update this information within 15 days of any change. A corporation key is required. If you are not authorized to update this information, you can either contact the corporation or contact Corporations Canada. We will inform the corporation of its reporting obligations.

Directors

Minimum 1
Maximum 5

Juan Andres Gutierrez
70 Distillery Lane
Suite 3707
Toronto ON M5A 0E3
Canada

Thomas Gutierrez
120 Bayview Ave.
Suite S1008
Toronto ON M5A 0G4
Canada

Note

Active CBCA corporations are required to update director information (names, addresses, etc.) within 15 days of any change. A corporation key is required. If you are not authorized to update this information, you can either contact the corporation or contact Corporations Canada. We will inform the corporation of its reporting obligations.

Annual Filings

Anniversary Date (MM-DD)
11-01

Date of Last Annual Meeting
2019-03-13

Annual Filing Period (MM-DD)
11-01 to 12-31

Type of Corporation

Non-distributing corporation with 50 or fewer shareholders

Status of Annual Filings
2020 - Not due
2019 - Filed
2018 - Filed

Corporate History

Corporate Name History

2016-11-01 to Present	Arturo's Technical Services Ltd.

Certificates and Filings

Certificate of Incorporation
2016-11-01

Buy copies of corporate documents

Start New Search | Return to Search Results

Date Modified:
2020-02-14

Appendix “K”

AIRD BERLIS

Kyle B. Plunkett
Direct: 416.865.3406
Email: kplunkett@airdberlis.com

April 2, 2020

BY COURIER

Arturo's Technical Services Ltd.
3-100 Leek Crescent
Richmond Hill, Ontario
L4B 3E6

Dear Sirs,

Re: Receivership of Xela Enterprises Ltd. (Court File No. CV-11-9062-00CL)

We are lawyers for KSV Kofman Inc. ("**KSV**"), in its capacity as the court-appointed receiver and manager (in such capacity, the "**Receiver**") of Xela Enterprises Ltd. ("**Xela**"). KSV was appointed Receiver pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") made on July 5, 2019 (the "**Appointment Order**"). A copy of the Appointment Order is enclosed with this letter. All court materials filed in the receivership proceedings can be found on the Receiver's website: https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd.

The Receiver has learned that you provide information technology and other services to Xela and have related property of Xela in your possession. Pursuant to paragraph 3 of the Appointment Order, the Receiver is authorized and empowered to take possession and control of any and all assets or property of Xela. Pursuant paragraphs 5 and 6 of the Appointment Order, you are required to immediately advise the Receiver of any Xela property, assets or records in your possession or control and to deliver the same to the Receiver upon the Receiver's request. Paragraph 7 of the Appointment Order specifically requires you, as a service provider, to grant the Receiver immediate and unfettered access to any Xela records stored in or otherwise contained on a computer or other electronic information storage system in your possession and control.

On behalf of the Receiver, we hereby request that Arturo's Technical Services Ltd. immediately:

(a) advise the Receiver of any assets or property of Xela in its possession or control, including any books or records, whether in electronic form or otherwise;

(b) deliver all such property of Xela to the Receiver; and

(c) allow the Receiver continued and unfettered access to such assets, property and records including, without limitation, for the purpose of copying electronic records of Xela.

Without limiting the forgoing, please advise the Receiver of the existence of any computer hard drives, servers or other storage devices or equipment in your possession containing books and records of Xela.

The Receiver's representative, Noah Goldstein, will communicate directly with you in order to make arrangements.

We look forward to your cooperation and appreciate your immediate attention to this matter. Should you have any questions, please contact the undersigned or Mr. Goldstein at telephone number (416) 844-4842 or email ngoldstein@ksvadvisory.com.

Yours truly,

AIRD & BERLIS LLP

Kyle Plunkett

Kyle B. Plunkett

cc by Email: *Bobby Kofman and Noah Goldstein, KSV Kofman Inc.*
Steven Graff and Sam Babe, Aird & Berlis LLP

encl.

39450548.1

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE	)	FRIDAY, THE 5th
JUSTICE MCEWEN	)	DAY OF July, 2019
	)	

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
(appointing Receiver)

THIS MOTION made by the Applicant for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing KSV Kofman Inc. as receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of Xela Enterprises Ltd. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Margarita Castillo sworn January 14, 2019 and the Exhibits thereto and on hearing the submissions of counsel for Margarita Castillo and Xela Enterprises Ltd., and on reading the consent of KSV Kofman Inc. to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 101 of the CJA, KSV Kofman Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $1,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

(l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and

on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(q) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

(r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

4. THIS COURT ORDERS that, notwithstanding any other provision in this Order, the Receiver shall not take any steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between the Debtor and its subsidiaries and/or affiliates and any third party, including the litigation involving or related to the Avicola companies (as defined and further set out in the affidavit of Juan Guillermo Gutierrez ("Juan"), sworn June 17, 2019). Such steps shall include but not be limited to:

a) selling or publicly marketing the shares of Lisa S.A., Gabinvest S.A., or any shares owned by these entities;

b) publicly disclosing any information about the above-mentioned litigation and/or the Receiver's conclusions or intentions, provided that the Receiver may disclose such information to Juan and Margarita Castillo ("Margarita") and their counsel upon Juan and Margarita each executing a non-disclosure agreement in a form reasonably acceptable to the Receiver, and if the Receiver does disclose such information, conclusions or intentions, the Receiver shall disclose equally to Juan and Margarita;

c) replacing counsel in the above mentioned litigations; and

d) engaging in settlement negotiations or contacting opposing parties in the above-mentioned litigation.

This paragraph applies only until December 31, 2019 or such other date as this Court may order.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

5. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request. The Receiver shall treat as confidential all information received relating to litigation involving or related to the Avicola companies.

6. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

7. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service

provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

8. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

9. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Receiver are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as

amended (the "BIA"), and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be

opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or

collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory

or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The amount of such borrowing shall not, subject to further order of this Court, exceed $500,000 before December 31, 2019. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

24. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

TERMINATION OF RECEIVERSHIP

25. THIS COURT ORDERS that the Debtor may make a motion to this Court for the termination of the receivership upon receipt by Margarita of the judgment debt owing to her by the Debtor, plus receivership fees and expenses, and that upon such motion the burden shall be on Margarita to justify that it remains just and equitable to continue the receivership.

SERVICE AND NOTICE

26. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'http://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises'.

27. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as

last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

28. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. 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.

31. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. THIS COURT ORDERS that the Applicant shall have its costs of this motion, up to and including entry and service of this Order, in the amount of $40,000, all inclusive, to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUL 05 2019

PER / PAR:

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that KSV Kofman Inc., the receiver (the "Receiver") of the assets, undertakings and properties Xela Enterprises Ltd. acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of _____, 20__ (the "Order") made in an action having Court file number CV-11-9062-00CL, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

KSV Kofman Inc., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

MARGARITA CASTILLO Moving Party	-and-	**XELA ENTERPRISES LTD. et al.** Respondents Superior Court File No.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

ORDER

BENNETT JONES LLP
3400 One First Canadian Place
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Telephone: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the moving party, Margarita Castillo

Appendix “L”

From: Kyle Plunkett <kplunkett@airdberlis.com>
Sent: March 31, 2020 9:10 AM
To: 'harald.johannessen1951@gmail.com' <harald.johannessen1951@gmail.com>
Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Noah Goldstein <ngoldstein@ksvadvisory.com>; Steve Graff <sgraff@airdberlis.com>; Sam Babe <sbabe@airdberlis.com>; 'Chris Macleod' <cmacleod@cambridgellp.com>; 'jkasozi@cambridgellp.com' <jkasozi@cambridgellp.com>; 'jgutierrez@xela.com' <jgutierrez@xela.com>; 'jgutierrez@arturos.com' <jgutierrez@arturos.com>; 'carl.oshea@hatstone.com' <carl.oshea@hatstone.com>; 'alvaro.almengor@hatstone.com' <alvaro.almengor@hatstone.com>
Subject: Re: Receivership of Xela Enterprises Ltd. - Court File No. CV-11-9062-00CL

Dear Mr. Hals,

Please find attached hereto a letter of today's date that requires your attention. We would ask that you please forward a copy of this letter to the balance of the addressees. A hardcopy of the attached will follow via courier.

Regards,

Kyle

Kyle Plunkett

T 416.865.3406
F 416.863.1515
E kplunkett@airdberlis.com

Aird & Berlis LLP | Lawyers
Brookfield Place, 181 Bay Street, Suite 1800
Toronto, Canada M5J 2T9 | airdberlis.com

Appendix “M”

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

May 4, 2020

SENT VIA EMAIL TO KPLUNKETT@AIRDBERLIS.COM

Christopher MacLeod,
647.346.6696 (Direct Line)
cmacleod@cambridgellp.com

Kyle B. Plunkett
Aird & Berlis LLP
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Dear Mr. Plunkett:

Re: Receivership of Xela Enterprises Ltd. ("Xela")
Ontario Court File No. CV-11-9062-00CL

In connection with the referenced receivership, and in the spirit of cooperation, we write to address what we understand are the outstanding issues. We appreciate the recent assurances concerning the Receiver's focus, and we trust that we can now advance smoothly toward looking after all of LISA's creditors and, ultimately, protecting the stakeholders.

Collection by Xela

Reports from Panama are promising concerning collection of at least part of LISA's unpaid dividends. To repeat, as you know, LISA has a final judgment in Panama requiring Villamorey to disgorge all unpaid Villamorey dividends of LISA (the "LISA Judgment"). Although the LISA Judgment does not quantify those unpaid dividends, LISA prevailed in 2019 in a Constitutional appeal that required the Court of first instance to make the calculation. Accordingly, LISA submitted the limited Villamorey financial information it had in 2019, which shows more than US$23 million in unpaid Villamorey dividends, including interest, is due to LISA. No contradicting evidence was submitted by Villamorey.

Naturally, like everywhere else, Panama has been effected by the Coronavirus, and the courts were closed until recently. However, we are optimistic that the Court will issue its final payment order in an amount exceeding US$23 million in relatively short order.

Separately, we understand that a new action for damages has been commenced in Panama's Court No. 6 against Villamorey, relating to the non-payment of LISA dividends. A copy of the Complaint is attached as Annex A. We hope that the Receiver is amenable to helping develop these claims and assisting in the enforcement of the anticipated LISA Judgement payment order referenced above.

BDT

This, of course, brings up the subject of BDT. As you know, BDT held a Panamanian judgment for US$19,184,680 against LISA, stemming from an unpaid promissory note from LISA to BDT for litigation financing disbursements during the 2005-2008 timeframe. BDT also held a related judgment lien against all of LISA's assets. In its capacity as creditor, BDT had been willing to subordinate its claim to "the reasonable requirements of the receivership," which we understand signified BDT's willingness to allow the Castillo Judgment and reasonable receivership expenses to be paid out of sums received from enforcement of the LISA Judgment.

While Xela cannot speak for BDT, we understand that BDT has its own interest in satisfying the Castillo Judgment. We might suggest, therefore, as a first course of action, that the Receiver request BDT's future cooperation in connection with the LISA Judgment, as a more efficient, reliable and less costly alternative to challenging the validity of the transfer through some form of adversarial process.

Cooperation by Xela

In any event, we emphasize that Xela and Mr. Gutierrez intend to continue cooperating with the Receiver. In that regard, Mr. Gutierrez wrote to LISA on April 15, 2020, and again on April 22, 2020, formally requesting LISA's assistance with the Receiver's requests. LISA's response is attached as Annex B. Unfortunately, it may not fully address the Receiver's requests, and we are prepared to discuss next steps.[1]

[1] As an aside, Annex B contains some disturbing information causing us to question the appropriateness of the Receiver's choice of counsel in Panama. Among other things, we understand that false documents were submitted to the Public Registry in Panama City in an effort to alter the corporate structure of LISA and/or Gabinvest. More recently, one of LISA's lawyers swore out an affidavit claiming that Mr. Almengor – formerly with the Mossack Fonseca law firm that featured so prominently in the Panama Papers – offered him an illicit payment to disregard the instructions of LISA's management and instead assist the Receiver's efforts to take control of LISA. Attached as Annex C is a copy of that affidavit. We are confident that the Receiver had no prior knowledge, but it now seems wholly inappropriate for the Hatstone firm to have any role in either LISA or Gabinvest. Indeed, we understand that a criminal complaint has been filed against Mr. Almengor in Panama as a consequence of these developments.

Separately, we refer to your letter dated April 3, 2020, directed to Arturo's Technical Services Ltd. ("ATS"), requesting production of any property or documents of Xela in ATS' possession. We also refer to your letter dated April 21, 2020, to Mr. Greenspan, asking for the whereabouts of the Gabinvest share register and share certificates. As these requests may be related, we address them together.

In Canada, Xela has one full storage unit of documents at a rental facility in Barrie. Separately, there are documents housed at ATS's offices in Toronto, and ATS also controls four decommissioned servers belonging to Xela at a datacenter in North York. The documents in all three of those locations are peppered with attorney/client communications and other confidential and protectable information, which must be reviewed under some satisfactory protocol before they can be delivered to the Receiver. Mr. Gutierrez does not presently know the location of the Gabinvest shares and certificates, but he believes that they are likely amongst the records in Barrie.

You have also asked for documents evidencing BDT's litigation funding to LISA. That same request was made in the garnishment case by Villamorey, in support of its assertion that BDT's judgment against LISA in Panama was fraudulent. Xela will ask LISA's counsel in the garnishment case to provide the Receiver with a full set of the documents produced in the garnishment case, subject to a suitable non-disclosure agreement. Incidentally, we note that the Court in the garnishment case concluded that, although the financial records were incomplete, Villamorey had not shown that BDT had defrauded the Court by presenting the BDT Judgment.

G&T Bank Loan to Margarita Castillo

We emphasize the importance of resolving whether Ms. Castillo in fact received LISA dividends in the form of a loan from G&T Bank in Guatemala in 2010, with which she funded the oppression action that led to the Castillo Judgment and, ultimately, to this receivership. In this regard, we would ask that the Receiver request from Ms. Castillo a copy of the loan documents, along with copies of all payment records and communications with G&T Bank. This may require Judge McEwen's involvement, and we would request the Receiver's support in that regard. We also request the Receiver's assistance to bring the issue to adjudication in Canada as soon as possible.

Housekeeping

Lastly, as matter of housekeeping, we would request that the Receiver provide Xela with two categories of information. First, we respectfully request that the Receiver produce to us a complete record of his funding sources for this receivership, showing at least the payor names, dates and amounts of payment. Second, we ask that the Receiver identify any and all communications between KSV (including its partners, associates and other personnel) and

any person acting on behalf of Villamorey and/or the Avicola Group and/or any of their affiliates regarding this receivership, and provide copies of any such communications as are in writing.

Once again, we appreciate and hope to advance the new spirit of cooperation, and we look forward to discussing these issues in the near future.

Yours very truly,

CAMBRIDGE LLP
Per:

CHRISTOPHER MACLEOD
CRM/tr
Signed Electronically on behalf of Mr. Macleod

Encl: Annex A - Complaint

cc: Via Email

Mr. Adam Slavens

Mr. Bobby Kofman

Mr. Noah Goldstein

Mr. Brian Greenspan

CORRECCIÓN DE DEMANDA **Proceso ordinario de mayor cuantía interpuesto por LISA, S.A. contra VILLAMOREY, S.A.**

EXP. 89620-19

SEÑOR JUEZ SEXTO DE CIRCUITO CIVIL DEL PRIMER DISTRITO JUDICIAL DE PANAMÁ.:

La Firma Forense **Quiroz Govea & Asociados**, sociedad civil debidamente inscrita a la Ficha 27201, de la Sección Mercantil del Registro Público de Panamá, con oficinas ubicadas en Altos de Bethania, Calle Nombre de Dios, Casa No. 44D, correo electrónico quirozgovealegal@gmail.com, teléfonos 6666-4225 y 6676-5382, lugar donde recibimos notificaciones profesionales, representada en este acto por los abogados **JOAO JAVIER QUIRÓZ GOVEA**, varón, panameño, mayor de edad, soltero, con cédula 8-800-1947 e idoneidad 15450 y **JAVIER ALEXIS QUIRÓZ MURILLO**, varón, panameño, mayor de edad, casado, portador de la cédula No. 8-220-986 y la idoneidad 1193, actuando en nuestra calidad de apoderados especiales de **LISA, S.A.,** sociedad anónima, debidamente registrada en la Sección Mercantil del Registro Público de Panamá, al Folio 117512 (S), Ficha 117512, Imagen 186, Rollo 11750, con domicilio en Panamá, Ciudad de Panamá Altos de Bethania, Calle Nombre de Dios, Casa No. 44D, cuyo representante legal es el señor **HARALD JOHANNESSEN HALS,** varón, soltero, mayor de edad, ciudadano guatemalteco, con pasaporte 242086470, quien puede ser ubicado en el mismo domicilio de la empresa **LISA, S.A.** concurrimos ante Usted, con el fin de presentar corrección de demanda ordinaria de mayor cuantía por daños y perjuicios, lucro cesante, daño emergente y daño moral, contra **VILLAMOREY, S.A.,** sociedad anónima, debidamente registrada en la Sección Mercantil del Registro Público de Panamá, al Folio 9146 (S), Tomo 814, Asiento 133501, Rollo 367, Imagen 298, Ficha 9146, con domicilio en Panamá, Ciudad de Panamá, Corregimiento de Bella Vista, Avenida Federico Boyd con calle 51, Scotia Plaza, Piso 11, apto 11, cuyo representante legal es el señor **RAMIRO LOPEZ NIMATUJ**, varón, guatemalteco, mayor de edad, cuyo pasaporte se desconoce, quien puede ser ubicado en el mismo domicilio de la sociedad **VILLAMOREY, S.A.** lugar en donde recibe notificaciones, causados por la retención y no pago de los dividendos correspondientes a mi poderdante, desde el periodo 2010 hasta la fecha, por lo que la cuantía de la presente demanda asciende a un monto de **VEINTITRÉS MILLONES**

NOVECIENTOS CINCUENTA Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE CURSO LEGAL (USD$23,959,114.00).

Fundamentamos la presente demanda en las siguientes consideraciones de hecho y de derecho:

Primero.- Nuestra mandante, la sociedad **LISA, S.A.**, es legítima accionista de la entidad **VILLAMOREY, S.A.**, toda vez que es poseedora del certificado de acción número uno (1), que certifica que **LISA, S.A.** es propietaria de tres mil trescientas treinta y tres (3,333) acciones de la sociedad aquí demandada, tal como consta en la copia autenticada del certificado de acciones que en su momento aportaremos al proceso en curso y en el hecho primero del Acta de fecha 30 de noviembre de 2018, que también aportamos en la etapa correspondiente.

Segundo.- El informe de los Estados Financieros del año 2017 de la sociedad **VILLAMOREY, S.A.**, mostrado en el Acta de fecha 30 de noviembre de 2018, reflejan claramente que existen dividendos retenidos hasta dicho periodo, por la suma de **TRECE MILLONES QUINIENTOS SETENTA MIL TRESCIENTOS TREINTA Y CUATRO DÓLARES AMERICANOS EN MONEDA DE CURSO LEGAL (USD$13,570,334.00).**

Tercero.-Se menciona en el *Párrafo de énfasis* contenido en la página 12 del Informe de Auditoría Independiente al 31 de diciembre de 2015 y 2014 de nuestra contraparte, que: *"Villamorey, S.A. es miembro de un grupo de compañías relacionadas y como se menciona en la nota 7 a los estados financieros, su principal relación con estas compañías, es la inversión que tiene en ellas y el pago de los dividendos que se decretan"*.

Cuarto.- Según el antedicho informe de auditoría, para el año 2015, **VILLAMOREY, S.A.** tenía una cuenta por pagar a favor de **LISA, S.A.** en concepto de dividendos e intereses acumulados, por la suma de **NOVENTA Y NUEVE MILLONES NOVECIENTOS DOS MIL OCHOCIENTOS QUINCE QUETZALES (Q$99,902,815.00),** que equivalen a **TRECE MILLONES DIECIOCHO MIL**

DOSCIENTOS OCHO DÓLARES AMERICANOS CON SETENTA Y CINCO CENTAVOS EN MONEDA DE CURSO LEGAL (USD$13.018.208,75), aproximadamente; y para el periodo 2014, por el mismo concepto, la suma de **CINCUENTA Y CUATRO MILLONES QUINIENTOS OCHENTA Y NUEVE MIL QUETZALES (Q$54,589,077.00),** que equivalen a **SIETE MILLONES CIENTO TRECE MIL CUATROCIENTOS VEINTINUEVE DÓLARES AMERICANOS CON CINCUENTA Y OCHO CENTAVOS EN MONEDA DE CURSO LEGAL (USD$7,113,429.58),** aproximadamente.

Quinto.- Por su parte, Informe del Auditor Independiente al 31 de diciembre de 2010 y 2009, de **VILLAMOREY, S.A.**, refleja un saldo de dividendos por pagar a accionistas, por un monto de **TREINTA Y TRES MILLONES OCHOCIENTOS SETENTA Y DOS MIL CUATROCIENTOS SETENTA Y OCHO QUETZALES (Q$33,872,478.00),** que equivalen a **CUATRO MILLONES CUATROCIENTOS TRECE MIL OCHOCIENTOS OCHENTA DÓLARES AMERICANOS CON TRES CENTAVOS EN MONEDA DE CURSO LEGAL (USD$4,413,880.03),** aproximadamente.

Sexto.- En este orden, es preciso resaltar el contenido del Artículo 37 de nuestra Ley No. 32 de 1927, a saber:

> *"**Artículo 37.** A los accionistas podrá pagarse los dividendos de las utilidades netas de la compañía o del exceso de su activo sobre su pasivo, pero no de otra manera. La compañía podrá declarar y pagar dividendos sobre la base de la cantidad actualmente pagada por acciones que han sido parcialmente pagadas."*

Séptimo.- Al respecto, el jurista Juan Pablo Fábrega Pollieri en su Tratado sobre la Ley de Sociedades Anónimas Panameñas (2018, pp. 257-269), nos provee el siguiente análisis:

> *"En la mayoría de las jurisdicciones los dividendos son concebidos como los beneficios económicos declarados a favor de los accionistas, derivados de las utilidades obtenidas por la sociedad durante un ejercicio fiscal o retenidas en periodos fiscales anteriores.*
> *Nuestra legislación no define el concepto. El presente artículo establece como fuente de pago de dividendos no solo las*

"utilidades netas", es decir, las ganancias obtenidas tras deducir gastos e impuestos y reservas legales que establezcan las normas que regulen una actividad particular, sino también bienes que formen parte del exceso de sus activos sobre su pasivo.

(...)

Dividendo no es lo mismo que utilidad, aun cuando en nuestro medio se utilizan ambos vocablos como sinónimos, Manuel Osorio define el dividendo como "Cuota que corresponde a cada acción, proporcional a su monto, al dividir sus ganancias una sociedad comercial (cita del autor). En sentido comercial y empresarial, el dividendo es el "Cuociente que en las sociedades resulta de dividir el total de la utilidad líquida obtenida durante el ejercicio societario, por el número de las acciones que integran el capital social. (cita del autor).

El citado Diccionario de Derecho Comercial y de la Empresa define la utilidad, en el contexto contable, como "...el beneficio que arroja el ejercicio empresarial".

Tratándose de sociedades, ese beneficio, exigible en toda organización empresarial comercial para evitar maniobras perjudiciales al derecho de los socios y al deber de mantener incólume el capital social, es la parte del activo consumible, sin que deteriore la parte de capital necesaria para compensar el pasivo y garantizar la integridad del capital societario."

Así, la utilidad es la ganancia neta que obtiene la sociedad durante su ejercicio económico, tras deducir gastos e impuestos, y el dividendo es la cuota-parte de esa ganancia que corresponde a cada accionista en atención a la cantidad de acciones de que sea propietario, luego de que el órgano corporativo respectivo declare su pago.

Respecto a los dividendos, Primer Tribunal Superior de Justicia del Primer Distrito Judicial ha comentado:

"La norma citada permite inferir que el pago de dividendos, a quienes hayan invertido en acciones de una sociedad anónima, deriva de la posibilidad de que hayan producido utilidades o exceso de su activo sobre su pasivo. Por lo tanto, no existiendo en el pago social de RADIO SOBERANA, S.A. alguna otra fórmula que admitiera la repartición de dividendos, debía el actor demostrar que la aludida sociedad anónima se ubicaba en alguno de los dos presupuestos que contempla el artículo 37 citado , a efectos de estimar que, en efecto, a dicho actor debió repartírsele dividendos, conforme las utilidades percibidas y el porcentaje accionario que posee." (Sentencia de 16 de diciembre de 1999)

(...)

Al emplear la norma el verbo auxiliar "podrá", está haciendo referencia a una potestad y no a un deber, potestad esta que se materializaría efectuándose el pago de la manera que preceptúa el artículo 37. Por ello, el dividendo como tal no se origina sino hasta cuando es declarado, tras la aprobación de los resultados de la sociedad al concluir su año fiscal; de ahí que constituya una mera expectativa de derecho para los accionistas. Mientras no se declare, la utilidad se mantendrá retenida por la sociedad en una cuenta de superávit hasta que se decida su reparto.

(...)

Si la sociedad se debe a los accionistas y la inversión en la compra de acciones persigue una finalidad mercantil, el pago de dividendos constituye la esencia del derecho societario. (...)

Sobra decir que para recibir dividendos se requiere tener la calidad de accionista o, como se vio al tratar la disposición de

las acciones, ser usufructuario o beneficiario de este derecho, conferido por un accionistas en virtud de una relación contractual.
(...)
Una vez declarado el dividendo por el órgano corporativo que corresponda, nace la obligación de pagarlo en la fecha establecida, convirtiéndose los accionistas, en acreedores de la sociedad. Es usual que se apruebe el pago de utilidades en partidas a lo largo del año, en vez de que se haga de un solo contado. Los accionistas contarán con legitimación para demandar a la sociedad en caso de morosidad.
En atención a lo dispuesto en el numeral 2 del artículo 1652 del Código de Comercio, prescribirá en el plazo de tres años el derecho de los accionistas a demandar judicialmente a la sociedad por la mora en el pago de los dividendos que hubieran sido declarados, por tratarse de una pretensión derivada de la relación societaria en lo que se refiere a los derechos y obligaciones de la sociedad para con los socios.
(...)
La recepción del dividendo corresponderá a las personas registradas como propietarias de las acciones, al usufructuario o beneficiario del referido derecho (...), a la fecha en que se declare el pago respectivo. Como los dividendos se pueden pagar en forma diferida, en varias partidas, será necesario que las partes definan en el contrato a quién corresponderá recibir los mismos, de darse la venta o el usufructo de las acciones antes de hacerse el pago de los dividendos declarados."

Octavo.- Sobre el particular Artículo 37 y su interpretación, salta a la vista que los dividendos tienen que ser declarados y su pago autorizado por la sociedad para con sus accionistas, y que el no pago en la fecha determinada es el que genera una falta o mora que tiene consecuencias de índole judicial. Y es que, nuestra apoderada se encuentra en un limbo jurídico respecto a cuantificar el periodo a partir del cual la no recepción de sus dividendos ha entrado en mora, puesto que **VILLAMOREY, S.A.**, no ha otorgado información respecto a saber si durante todos estos años que han pasado ha declarado dividendos y fijado una fecha de pago de los mismos. Los estados financieros, que aquí adjuntamos, no proveen claridad en cuanto a saber en qué cuenta se encuentran los dividendos por pagar, si es en una cuenta de superávit, o si han sido declarados y se encuentran retenidos.

Noveno.- Lo que sí es cierto, es que el patrimonio de nuestra poderdante se ha visto altamente perjudicado por la omisión de **VILLAMOREY, S.A.** en cuanto al pago de los dividendos que corresponden a **LISA, S.A.** Es oportuno manifestarnos frente a la flexibilidad que nuestro régimen societario y comercial otorga a las entidades

mercantiles respecto a sus relaciones con los accionistas, en este caso, la declaración y pago de dividendos, y que todavía con ello, incorpora una excepción de prescripción para el reclamo judicial por mora en el pago de los dividendos, cuyo tratamiento ya ha sido *ut supra* explicado. Empero, lo anterior no significa que los dividendos prescriban –es un derecho inalienable e inalterable–, y tampoco es óbice para que nuestro sistema judicial se vea impedido de combatir las arbitrariedades que una sociedad pueda manipular accionariamente en contra de sus inversionistas, más específicamente, sus dueños. Por ende, es preciso, y eso hemos hecho, centrarnos en los daños y perjuicios que tal omisión ha causado en la sociedad demandante.

Décimo.- En este sentido, queremos dejar por sentado que el objeto de la acción aquí interpuesta no es el mero reclamo de los dividendos dejados de percibir desde el año 2010, en perjuicio de nuestra apoderada, sino: a) acreditar el nexo existente entre **LISA, S.A.**, como titular del 33% de las acciones de **VILLAMOREY, S.A.**; b) evidenciar las obligaciones resultantes de la relación contractual y estatutaria que tiene **LISA, S.A.** dentro de su participación en **VILLAMOREY, S.A.**, es decir: recibir dividendos de su capital invertido y pagado; c) probar que como resultado de la falta de pago de los dividendos de **VILLAMOREY, S.A.**, en detrimento de los derechos societarios que **LISA, S.A.** tiene sobre esa otra sociedad, deviene el incumplimiento de una obligación contractual al accionista resultante de su inversión en la entidad demandada; y d) que como tal comportamiento de omisión sistemática data de un periodo de casi 10 años, **LISA, S.A.**, se ha visto lesionada en su patrimonio al tener una cuenta por cobrar que le afecta sus estados financieros, así como la rentabilidad, solvencia y liquidez con la que ha de afrontar sus costos y gastos operativos y como sociedad inversionista que es.

Undécimo.- A tales efectos, el monto tasado al cual ascienden los daños y perjuicios, así como el lucro cesante y daño emergente ocasionado por el no pago de los dividendos a que tiene derecho **LISA, S.A.** dentro de su participación en **VILLAMOREY, S.A.**, es de **VEINTITRÉS MILLONES NOVECIENTOS CINCUENTA**

Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE CURSO LEGAL (USD$23,959,114.00), los cuales se desglosan a continuación:

Daños y perjuicios por dividendos dejados de pagar	$14,894,472
Intereses	$8,698,900
Gastos legales	$365,742
Total	$23,959,114

Duodécimo.- Sobre la consagración normativa de "daños y perjuicios", el Código Civil dicta lo siguiente:

> *"**Artículo 991.** La indemnización de daños y perjuicios comprende, no sólo el valor de la pérdida que haya sufrido, sino también el de la ganancia que haya dejado de obtener el acreedor, salvas las disposiciones contenidas en los artículos anteriores.*
>
> ***Artículo 992.** Los daños y perjuicios de que responde el deudor de buena fe son los previstos o que se hayan podido prever al tiempo de constituirse la obligación y que sean consecuencia necesaria de su falta de cumplimiento. En caso de dolo, responderá el deudor de todos los que conocidamente se deriven de la falta de cumplimiento de la obligación."*

Decimotercero.- Es así como los registros contables y estados financieros de **LISA, S.A.** arrojan la cantidad de **VEINTITRÉS MILLONES NOVECIENTOS CINCUENTA Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE CURSO LEGAL (USD$23,959,114.00)**, relacionados directamente al flujo de capital dejado de percibir en cuanto a los montos que le debe **VILLAMOREY, S.A.** en dividendos no pagados.

Decimocuarto.- Nuestra jurisprudencia patria ya se ha manifestado en cuanto a que conductas como la que nos ocupa se transforman en una indemnización por daños y perjuicios:

> *"El demandante considera que la Autoridad Marítima de Panamá, le causo daño y perjuicios económicos, al no haber adoptado las medidas administrativas requeridas para que la empresa PANAMA PORTS COMPANY, S.A. pagara la suma de DOS MILLONES DIECINUEVE MIL SEISCIENTOS TREINTA Y TRES BALBOAS CON DIECIOCHO CENTÉSIMOS (B/2,019,633.18), en concepto de indemnización por utilidades no percibidas, en el término señalado, por lo que a su juicio, la Autoridad Marítima de Panamá, está obligada a pagar a K.M.R.G.,S.A., la suma de TRES MILLONES QUINIENTOS MIL BALBOAS (B/.3,500,000,00), en concepto de intereses generados desde que existía la*

> *obligación del pago de la indemnización por las utilidades no percibidas, más otros perjuicios ocasionados (lucro cesante).*
>
> *Efectivamente consta en autos que el pago de la indemnización que les correspondía a la empresa K.M.R.G.S.A., producto de la rescisión de los contratos de concesión y arrendamiento que tenía con la Autoridad Portuaria Nacional, que debían hacerse el 15 de septiembre de 1999, no se hizo efectivo hasta noviembre de 2008, o sea nueve (9) años después, lo que implica la existencia de un daño pecuniario a la empresa , por tanto se encuentra el daño probado."*
>
> Sentencia de 16 de marzo de 2011. Caso: K.M.R.G., S.A. c/ Autoridad Marítima de Panamá.

Decimoquinto.- Si bien, son esos dividendos dejados de pagar en concepto de dividendos, el daño y perjuicio directo ocasionado a **LISA, S.A.**, tal ausencia ocasiona un vacío en la contabilidad financiera y fiscal de nuestra apoderada, que genera al igual que dicta la jurisprudencia, un daño pecuniario a la compañía, como se desarrolla en los hechos anteriores y se acreditará a través de las pruebas periciales, testimoniales y de informe, que han de ser practicadas en el curso del presente proceso ordinario de mayor cuantía.

Decimosexto.- Como bien se ha expresado al inicio del libelo, la cuantía de la demanda se basa en los daños y perjuicios, así como el lucro cesante, el daño emergente y el daño moral, dimanantes del no pago de tales dividendos, que por sus intereses y tasación, asciende a un monto de **VEINTITRÉS MILLONES NOVECIENTOS CINCUENTA Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE CURSO LEGAL (USD$23,959,114.00)**. Al respecto y por su importancia para el caso, procedemos a resaltar el siguiente concepto jurisprudencial:

> *"La Sala estima necesario citar al jurista Gilberto Martínez Rave, quien describe como daño emergente y el lucro cesante, en su obra "Responsabilidad Civil Extracontractual", estableciendo que estos implican daños patrimoniales o materiales. El autor en mención señala que:*
> *El daño emergente es: "el empobrecimiento directo del patrimonio del perjudicado...lo conforma lo que sale del patrimonio del perjudicado para atender el daño y sus efectos o consecuencias. Por su parte, considera que lucro cesante es "la frustración o privación de un aumento patrimonial. La falta de rendimiento, de productividad, originada por los hechos dañosos. " (Gilberto Martínez Rave, Responsabilidad Civil*

Extracontractual, 8'edición, Biblioteca Jurídica Diké, 1995, págs.. 194 y 195)."

Sentencia de 2 de febrero de 2017. Proceso: Indemnización. Caso: Maybeth Coronado c/ Caja de Seguro Social. Magistrado: Abel Augusto Zamorano.

Decimoséptimo.- Así las cosas, no cabe ninguna duda sobre la pertinencia y juridicidad que acompañan la pretensión de la demandante, **LISA, S.A.,** sobre la búsqueda judicial de indemnización sobre el daño, perjuicio y lucro sufrido a raíz de las dolosas conductas de **VILLAMOREY, S.A.,** en el manejo de los dividendos y su retención. En cuanto al derecho de resarcimiento, nuestra más alta corporación de justicia se ha manifestado en este sentido:

"En reiteradas ocasiones la Sala ha dejado expuesto que tradicionalmente la doctrina y la jurisprudencia conceptúan el daño resarcible como el menoscabo que se experimenta en el patrimonio de los valores económicos que lo componen (daño patrimonial o material) conformado por el daño emergente y lucro cesante, y, también la lesión a los sentimientos, al honor o las afecciones (daño moral)."

Auto de 13 de mayo de 2016. Proceso: indemnización. Caso: Cecilia Sanjur y Paola Patiño c/ Caja de Seguro Social. Magistrado sustanciador: Victor Benavides

Decimoctavo.- Por consiguiente, además de ser un derecho de **LISA, S.A.,** es un deber y obligación de **VILLAMOREY, S.A.**, indemnizarle por los daños y perjuicios, el lucro cesante, daño material y daño moral –tal cual se han detallado en este escrito–, causados por el no pago de los dividendos que en estricta legalidad le corresponden a mi poderdante, desde el año 2010.

PRETENSIÓN:

Solicitamos a este Honorable Tribunal, previo al agotamiento de las fases procesales propias de los procesos ordinarios de mayor cuantía, que **VILLAMOREY, S.A.,** sociedad anónima, debidamente registrada en la Sección Mercantil del Registro Público de Panamá, al Folio 9146 (S), Tomo 814, Asiento 133501, Rollo 367, Imagen 298, Ficha 9146, con domicilio en la Provincia de Panamá, República de Panamá, sea condenada al pago de **VEINTITRÉS MILLONES NOVECIENTOS CINCUENTA Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE CURSO**

LEGAL (USD$23,959,114.00), más intereses, costas y gastos del proceso, en virtud de los daños y perjuicios, lucro cesante, daño emergente y daño moral que ha ocasionado con la retención y no pago de los dividendos correspondientes, desde el periodo 2010 hasta la fecha, a nuestra apoderada, **LISA, S.A.**, sociedad anónima, debidamente registrada en la Sección Mercantil del Registro Público de Panamá, al Folio 117512 (S), Ficha 117512, Imagen 186, Rollo 11750, con domicilio en la Provincia de Panamá, República de Panamá.

PRUEBAS:

Las presentadas con la demanda primigenia.

Se anuncia la aportación y práctica de otras pruebas dentro del periodo probatorio.

FUNDAMENTO DE DERECHO

Código Judicial artículos 1228 - 1280.

Panamá, a la fecha de su presentación.

DE LA HONORABLE JUEZ,

JAVIER ALEXIS QUIRÓZ MURILLO **JOAO QUIRÓZ GOVEA**

Quiroz Govea & Asociados

REPÚBLICA DE PANAMÁ
Juzgado Sexto Circuito de lo Civil, del 1er Circuito Judicial
Panamá
ÓRGANO JUDICIAL

2019 NOV 29 11:53AM

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

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

- 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 Guiterrez

Defendants

--- This is the Examination in Aid of Execution of CALVIN SHIELDS, via videoconference, taken at the offices of Neeson Court Reporting Inc., Suite 2020, 77 King Street West, Toronto, Ontario, on July 27, 2017.

Page 26

A. Mark.
113 Q. Can you ask Mark, please?
U/A A. Got a lot of questions for Mark. Okay.
114 Q. And I should say, there will be a list that madam reporter is preparing here that we can send to you after, and my colleague here is also taking notes.
A. Okay. Well, we're taking notes here, too.
115 Q. Can you also ask Mr. Korol what his salary is with Xela? No?
A. Well -- no, I was just thinking, but I know they all were taking less money from what I understood than what they -- their salaries were, and they were delaying them. So the question is is it what they're making today, or what they made before everything went south?
116 Q. It's making today is what I'm interested in.
U/A A. Okay.
117 Q. Xela has a number of wholly-owned subsidiaries, right?
A. Yes.
118 Q. Are you involved in the business

Page 27

of any of those subsidiaries?
A. Not really. I'm the president of Lisa.
119 Q. All right.
A. And I don't know that I'm involved in any of the others. I may be out of order on or two of them. I don't remember.
120 Q. Okay. Can you make inquiries and see if you are on the board or an officer of any other Xela wholly-owned subsidiary other than Lisa SA?
U/A A. Okay.
121 Q. And when I say wholly-owned, I mean directly or indirectly, and just to explain what I mean, because Xela wholly owns Gabinvest. Gabinvest wholly owns Lisa, right?
A. Right.
122 Q. So that's a situation where Xela is the indirect hundred percent owner of Lisa?
A. That's correct.
123 Q. Because we have an undertaking on the request to look for the documents -- or to look for his role in that subsidiary? I think he said yes.
MR. RODRIGUEZ: You did.

Page 28

BY MR. WOYCHESHYN:
124 Q. Yeah, okay. So last time, you mentioned that you were the president of Lisa SA. So that -- you've maintained that presidency again for just shy of 20 years, is that right?
A. Basically. There hasn't been much happening.
125 Q. And that's because Lisa is a holding company as well, right?
A. Yes, that's correct. It holds --
126 Q. Is that -- sorry, go ahead.
A. It holds the shares of Villalobos, and that's basically its only function.
127 Q. All right, and when you say Villalobos, that is a group of companies known as Avicola Villalobos?
A. Mm-hmm.
128 Q. Yes?
MR. RODRIGUEZ: You have to say yes.
THE DEPONENT: Yes.
BY MR. WOYCHESHYN:
129 Q. And that group of companies, Avicola Villalobos, that's a group of poultry companies?
A. Yes.

Page 29

130 Q. I typically refer to that as the Avicola Group. Is it more convenient for your nomenclature if I call it Villalobos, or can I call it Avicola?
A. Avicola Group is fine by me.
131 Q. And Lisa owns a one-third share in the Avicola Group; right?
A. That's correct.
132 Q. And for over -- definitely over 10 years, Xela, Arturo while he was still alive, and Juan have been involved in litigation with Gutierrez family members in Guatemala over Lisa's interest in the Avicola Group; right?
A. Yes.
133 Q. And when I refer to the Gutierrez family members, I'm referring to principally Juan Luis Bosch, Dionisio Mayorga, Juan Jose Mayorga and Felipe Bosch, and those individuals are commonly refer to as The Boys?
A. Correct.
134 Q. That litigation hasn't just been one litigation. There have been many, many pieces of litigation, right?
A. That's correct, yes.
135 Q. In multiple jurisdictions?

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

- 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

Defendants

This is the Continued Examination in Aid of Execution of CALVIN SHIELDS, via videoconference, personally herein, taken at the offices of Network Reporting & Mediation, 100 King Street West, Suite 3600, Toronto, Ontario, on the 27th day of November, 2018.

A P P E A R A N C E S:

WILLIAM A. BORTOLIN — Solicitor for the Plaintiff

JUAN J. RODRIGUEZ (via videoconference) — Solicitor for Calvin Shields

A. I suppose so. We're dating back now a long ways, but we reviewed financial things at the meetings and we're always on the dockets.

370. Q. And was Xela at least at the time exercising some oversight over the subsidiary companies?

A. Yes.

371. Q. And so, is it your understanding that that oversight has stopped?

A. Yes -- well, I assume so. Juan is still involved; Juan Gutierrez is still involved with them. So, what is taking place I can't answer that. But Xela basically is defunct. The companies I think are mostly running pretty much on their own.

372. Q. And so, if anyone knew whether Xela was exercising any oversight over the subsidiaries it would be Juan Gutierrez?

A. Yes, I think so yeah.

373. Q. Can I ask you to follow up and ask Juan whether he's exercising, as president of Xela, whether he's exercising any oversight over any of the direct or indirect subsidiaries?

MR. RODRIGUEZ: Why can't you ask him yourself, since he's in Toronto?

MR. BORTOLIN: I would like to. I examined

gained or, I don't have any responsibility of what's going on now.

375. Q. Well, I suppose you haven't seen the documents, but I'll represent to you that some of the documents we've seen show that some of these companies, like Latin American Procurement and Impresas Arturo International have many employees and significant assets and significant liabilities, and that they're continuing operating businesses with a lot going on in them.

And so, my questions are not just directed at Xela, they're also directed at the assets that it owns, which includes these subsidiaries that still have a lot going on in them. And I understand you're saying that you're not involved in that -- the best I can tell you is that ---

A. I can't respond as to what's going on in that if I don't know. If they're going on independently on their own, more power to them, I guess. But I don't know where it all leads to.

376. Q. And just to explain why I'm asking these questions of you, and I mentioned this, but I'm only entitled to examine one representative on behalf of Xela. I had suggested that that representative be Juan Gutierrez, but I was told that I should examine

you instead by Xela's counsel.

And so, on that basis I can’t ask anyone else these questions. If when I asked them of Juan he refused to answer them, even when I touched generally on Xela. So you're the only person I can ask these questions of.

And if you’ll refuse the question that's your prerogative. In my view they’re proper questions and I'll at least put them on the record.

MR. RODRIGUEZ: But for the record and I don't mean to be argumentative, but you know Mr. Shields lives in Florida. Juan Guillermo Gutierrez lives in Toronto. Xela is a Toronto company, and this is a Toronto case. The Toronto Court should have jurisdiction over Juan Guillermo.

If he is not answering your questions, I assume that you have the ability to compel him to answer questions and obtain a contempt. Why you would expect that a Florida resident living in the United States has to somehow, I don't know, undertake to ask questions of a witness who’s in your jurisdiction, just doesn't make any sense to me.

MR. BORTOLIN: Well, and this is getting into argument but I don't know that it’s useful for our purposes. But, if it helps eliminate roadblocks

for the remainder of my questions we may as well get into it.

But I can only examine one person on behalf of Xela and the person that the company counsel has put up for that is Mr. Shields. Mr. Gutierrez would not put himself up to be examined on behalf of Xela, and I examined him on a personal capacity, but he refused questions that were not directed to him in his personal capacity.

And so, my questions directed at Xela I can only ask of you because you're the person that Xela's put up to answer those questions.

MR. RODRIGUEZ: All right, well then I guess to the extent he knows he'll tell you. If Mr. Shields does not know then his answer will be that he does not know and then we'll have to see what happens after that.

MR. BORTOLIN: And I'll ask for undertakings to make inquiries, and again you may have reasons for refusing those. And my position on it will be that they're proper questions and even if you refuse them I'll just put them on the record.

MR. RODRIGUEZ: Okay.

BY MR. BORTOLIN:

377. Q. I don't recall the question that I

390. Q. The document also listed you as the president of Lisa, S.A. Is that correct?

A. Yes.

391. Q. And is Lisa, S.A. a company that has met within the past two years?

A. Well, not really, not that was done lately.

THE DEPONENT: Are you aware of anything?

MR. RODRIGUEZ: No.

THE DEPONENT: I don't think so.

BY MR. BORTOLIN:

392. Q. And that document also listed David Harry as another director and officer. Are you familiar with him?

A. Yes.

393. Q. And are you -- if Lisa were to hold a meeting would you coordinate that with him and what would you do to have a meeting?

A. Well, I'm not here for Lisa; are we?

394. Q. What we're here for is Xela, and I don't know if you're familiar with the background on this.

A. Xela -- I mean, Lisa under Gavinvest?

395. Q. Yes.

THE DEPONENT: Are we supposed to be

holds a share certificate or share certificates in Avicola?

MR. RODRIGUEZ: Well, I'm going to object to the form of the question, because there is no company called Avicola. There's a group of companies in Guatemala that is called The Avicola Group and that's comprised of last we heard somewhere around 22 companies.

--- REFUSAL

BY MR. BORTOLIN:

398. Q. And what is the name of the entity in which Lisa has a share certificate?

MR. RODRIGUEZ: Anyway, I'm going to object to the form of the question. I just told you that it's not one company, it's 22 different companies.

--- REFUSAL

MR. BORTOLIN: And I understand what you're saying and I appreciate the clarification. Let me ask the question more generally then.

BY MR. BORTOLIN:

399. Q. Am I correct in my understanding that Lisa holds a share certificate in at least one of those 22 companies?

A. Yes.

400. Q. You said yes, sorry?

A. Yes.

401. Q. Can you tell me which one or ones of the Avicola entities that is?

A. No. I have no idea.

402. Q. And are there paper copies of the share certificates?

A. I don't know. I suppose, though I don't know.

403. Q. And if you as a president and director of Lisa don't know the answer to that question; who would?

A. Probably Mark, either Mark or Juan -- probably Juan.

404. Q. And so, do I understand from that answer that even though, and by Mark you mean Mark Korol?

A. Yes.

405. Q. And by Juan you mean Juan Gutierrez?

A. Yes.

406. Q. And so, if I understand what you're saying is that even though they're not officers or directors of Lisa, they have some understanding of what's going on inside that company?

A. Yes.

MR. BORTOLIN: And could I ask you to

But more than that, that's about the extent of what I know.

450. Q. And do you have any current information on the status of that litigation, and whether it has any prospect of being resolved?

A. Actually no. It's been on the verge of being resolved for many years, but it never has been.

451. Q. And would the person who does have knowledge of the status of that litigation again be Juan Gutierrez?

A. Yes.

MR. BORTOLIN: Okay, subject to the refusals and undertakings, although I don't think you gave me any, but subject to refusals and undertakings those are my questions. Thank you for your time.

THE DEPONENT: Thank you.

MR. RODRIGUEZ: Have a good day.

MR. BORTOLIN: You too.

--- WHEREUPON THE EXAMINATION WAS ADJOURNED AT 12:19 P.M.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

- 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

Defendants

This is the Continued Examination in Aid of Execution of JUAN GUILLERMO GUTIERREZ, personally and on behalf of the corporate Defendants herein, taken at the offices of Network Reporting & Mediation, 100 King Street West, Suite 3600, Toronto, Ontario, on the 30th day of August, 2018.

A P P E A R A N C E S:

WILLIAM BORTOLIN Solicitor for the Plaintiff

only bank account was a joint account with your wife at TD Bank. Is that still correct?

A. Yes, it is.

669. Q. And is that an account to which you still have access to funds?

A. No, it's actually drawn on a line when you froze it about a year ago.

670. Q. Can you explain what you mean by that?

A. That bank account had a line of credit as part of it, like an overdraft facility, and I was drawing on that one when you froze it last year. So, there's no availability of funds at all, besides its frozen.

671. Q. And so, there are no other bank accounts of which you have access to funds from?

A. I told you already no. I told you that last year; I don't have another bank account; I never had a different bank account. I only had one bank account because I didn't need another one. I just ran my affairs through one bank account. I don't know how many times I have to explain it to you for you to understand it. There's none -- no other ones.

672. Q. And that will not be the last question that you hear me ask today that you've been asked before, and the reason I'm asking them is because you

answered them last year and I'm asking them today and things could change.

You had RRSPs, which you provided us with account statements for. My question is have you drawn any money out of the RSPs since last July?

A. No. You froze all my bank accounts. I'm not like your side of the equation that I don't play by the rules, I respect the rules. I'm doing what I've been instructed to do, so I'm not touching any of my assets at all. I don't have any assets, by the way because you already took them all away.

673. Q. Well the RSP's that's not true; is it?

A. No, the RSP is the only thing is there and is untouched.

674. Q. So, I have your evidence then that you haven't created any new RSP's in the last year?

A. How would I, if you froze all my assets and took all my money away from me? I can't put anything anywhere, so the answer is no. No change from last year on any of the questions you asked me, with the exception of all the assets I had at that time that you took from me.

That's the only answer. The only change has been you took my cars away, you forced my house to be sold and you forced me to forfeit or sell my half of

buy anything? I haven't bought absolutely anything.

704. Q. So no shares of a corporation, no securities or investments of any kind?

A. I already told you, you took all my money away. You froze my bank account, the only one I had. How would I buy anything, and I didn't buy anything. I didn't buy stuff like that before anyway, so the answer I told you already.

705. Q. Since last July have you become a shareholder in any new corporations?

A. How would I be able to do that if I don't have any money? The answer is absolutely no. I already told you I didn't buy shares, I didn't buy cars, I didn't buy -- not even clothing I bought. So, you want to ask the question again? The answer is no, I didn't buy nothing like that, so get over that -- it's true.

706. Q. Have you become the beneficiary of a trust since last July?

A. Absolutely not.

707. Q. Have you become the trustee of a trust since last July?

A. No.

708. Q. We don't have your name on the record. You're Juan Guillermo Gutierrez?

security. No bank in the world will give somebody who is not a resident, doesn't have any assets, doesn't have a bank account, and had no relationship with that bank in her whole life, and hasn't lived in the country for 30 years wouldn't get a four million dollar loan on her signature. And she did.

How did they get it? They took money that belonged to our company that was being withheld illegally by one of the companies that is part of the litigation in Central America. They took that money, put it in a bank account, get a GIC and gave it as a back-to-back for the four million dollar loan, which was used to pay fees to Bennett Jones. And that was agreed on your office.

740. Q. My question was what you learned between November 2016 and today to convince you that the Xela shares or that Xela was worth nothing. And I didn't hear you tell me anything that you learned between November 2016 and today to convince you that Xela was worth nothing. Did I miss something?

A. Yeah, the company no longer exists. November 2016 we were still in the office. We still were hoping to be able to get things resolved. We were still trying to rescue our business from the crisis it was in, but it was not possible.

tell you what I don't know.

765. Q. Okay, I will not use the word undertaking if that makes it more difficult. I'm asking if you will make inquiries about how this number on this chart reconciles with the evidence you gave previously and to advise me of what you learned from those inquiries.

A. I will attempt to find out.

MR. BORTOLIN: Thank you.

--- UNDERTAKING

BY MR. BORTOLIN:

766. Q. Do you still have the job title of being president and CEO of Xela?

A. Yes.

767. Q. But I take it from your evidence that you're not doing any work in that capacity?

A. Sorry, I was taking a note.

768. Q. I take it from your evidence that you're not doing any work in the capacity of president and CEO of Xela?

A. There's no activity -- I'm just there.

769. Q. Did you say you're just there?

A. Well the company is not liquidated, so the company has to have a president -- somebody there, so the company is still alive but it's not

operational; is totally lacking operations, hoping that we can resolve the case down south one day. And then that might bring life back. But there's no operations. We're not buying, we're not selling anything, we're not producing anything.

770. Q. And you're describing Xela or the entire Xela family of companies?

A. I'm describing Xela and its companies.

771. Q. And just to give that some context ---

A. I'm describing what I know, because by the way I just want to state on the record that I'm not here to answer any questions about the company, because I'm here to answer questions about myself.

772. Q. Understood.

A. And that was the only thing you summoned me here for.

773. Q. Right.

A. And I'm here to answer your questions about myself. If you're going to ask questions about the company, I'm not going to answer anything.

774. Q. I'm going to ask questions and they were asked last time and they were answered; there was no refusal to these questions last time about your role within those companies and your employment status -- that is what those questions are directed towards;

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AFFIDAVIT OF JUAN GUILLERMO GUITIERREZ

I, Juan Guillermo Gutierrez, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I Juan Guillermo Gutierrez am the President of Xela Enterprises Ltd. ("**Xela**") and as such, have knowledge of the matters contained in this affidavit. Where the statements made herein are based on information and/or belief, I state the source of the information and/or belief, and verily believe it to be true.

I. BACKGROUND

2. The Motion that has been brought by the Receiver, which is returnable August 28, 2020 is a surprise to Xela. When the parties were last before the Court, the Receiver had asked that sanctions be ordered against me, Xela's sole shareholder, asserting, among other things, non-cooperation with the Receiver's

attempt to take control of the board of directors of LISA, S.A. (**"LISA"**), an indirect subsidiary of Xela in Panama, as described in the Receiver's Second Report and related supplements (collectively the "**Second Report**").

3. The Second Report, however, was incomplete and/or inaccurate in various material respects and was based almost entirely on hearsay. In response, I submitted a sworn affidavit to correct the record, and my counsel insisted upon cross-examining the Receiver before the Court rendered any decision.

4. Rather than continuing on that course, however, the Receiver agreed to adjourn the Motion for Sanctions *sine die,* and the parties expressed a desire to cooperate going forward on all issues, including those of concern to Xela's management and ownership. To address the Receiver's stated concerns, the Court issued its Endorsement dated March 24, 2020 (the "March 24 Endorsement"), requiring me to provide any documents I had not previously supplied to the Receiver: (a) regarding LISA's efforts in December 2019 to borrow sums sufficient to terminate the receivership; (b) that were described in the Court's October 29, 2019 Disclosure Order, including documents relating to BDT's loan advances to LISA and/or Xela; and (c) regarding the transfer in February 2020 of LISA's interest in the Avicola Group to BDT in satisfaction of the more than US$50 million in litigation funding given to LISA by BDT since 2005 (the "BDT Assignment"). The March 24, 2020 Endorsement also included an Annex A containing a list of specific questions for me to answer concerning my knowledge of the BDT Assignment.

5. I responded in a timely and truthful manner to the questions in Annex A, although I had scant information myself, and I had no additional documents responsive to

the March 24 Endorsement.[1] However, it is in my own interest to work with the Receiver with the ultimate goal of discharging the receivership, and my expressed desire to cooperate was genuine. Accordingly, I requested assistance from LISA in correspondence dated April 15, 2020, as follows:

Nevertheless, As the owner of Xela, which indirectly owns LISA, I urge LISA and its management to cooperate with the Receiver in every respect and to the fullest extent possible. This instruction applies, without limitation, to the Receiver's request that LISA add certain additional Directors, that LISA supply answers to certain written questions referenced in the Toronto Court's Endorsement dated 24 March 2020, and that LISA supply any documents and information in its possession or control requested by the Receiver.

Attached hereto and marked as **Exhibit "A"** is a true copy of my letter dated April 15, 2020.

6. I sent a second, similar letter to LISA on April 22, 2020, urging its cooperation:

I refer to my letter dated April 15th, 2020. Having not received a response, and anticipating the possibility that you may not have received a copy of the Court's endorsement dated March 24, 2020, I am attaching a copy. As you can see, Paragraph 3 of the Court's Endorsement asks LISA to respond to certain questions, and I would urge compliance.

7. Attached hereto and marked as **Exhibit "B"** is a true copy of my letter dated April 22, 2020.

---

[1] At my request, LISA and BDT are prepared – subject to an agreement to preserve the confidentiality of their respective private financial information – to give the Receiver a copy of a set of documents evidencing more than US$50 million in advances made by BDT to LISA dating to 2005. Those documents were produced in the Miami garnishment case in response to Villamorey's false allegation that BDT's Panama judgment was unsupported by actual funding from BDT.

8. Despite Xela's requests, LISA resisted and asked the Receiver to consider the various issues LISA had previously raised, including the yet-unresolved question of whether more than USD 4 million of LISA's Villamorey dividends had already been paid to Margarita Castillo by the majority shareholders in the form of a sham loan granted to Margarita Castillo by a Panamanian entity, Villamorey, through the G&T Bank in Guatemala.

9. On May 4, 2020, Cambridge LLP wrote to Aird & Berlis LLP (the "**May 4 Letter**") and provided a copy of LISA's response. Attached hereto and marked as **Exhibit "C**" is a true copy of the May 4, 2020 letter.

10. Recognizing that it might not satisfy the Receiver, Cambridge LLP suggested that the parties discuss the issue:

In any event, we emphasize that Xela and Mr. Gutierrez intend to continue cooperating with the Receiver. In that regard, Mr. Gutierrez wrote to LISA on April 15, 2020, and again on April 22, 2020, formally requesting LISA's assistance with the Receiver's requests. LISA's response is attached as Annex B. Unfortunately, it may not fully address the Receiver's requests, and <u>we are prepared to discuss next steps</u>. (Emphasis added.)

11. The May 4 Letter also set out the position regarding what Xela understood the remaining outstanding issues to be. In addition, the May 4 Letter asks the Receiver to report any contact with my cousins or their lawyers – who are monitoring these proceedings in hopes of benefiting from the receivership – and to provide a spreadsheet of payments received by the Receiver and/or its counsel to fund these proceedings. Without exception, the May 4 Letter was

cooperative and constructive in response to the Receiver's request and shows good faith on Xela's part (and my own) in trying to resolve all remaining issues.

12. What followed, however, was a period of almost three months of complete silence from the Receiver and its counsel. The Receiver made no effort to contact Cambridge LLP to discuss the remaining Xela documents requested by the Receiver as discussed in the May 4 Letter (many of which are duplicative of the thousands of pages of documents I already supplied to the Receiver), or any of the other issues in the May 4 Letter. Most surprisingly, after three months of silence, the Receiver made no effort to discuss delivery of the Xela documents demanded from Arturos Technical Services, Ltd. ("**ATS**"), electing instead to file the Motion and involve the Court in matters that counsel might resolve amicably in the exercise of good faith.

13. Further, the current motion – coming, as it does, on the heels of a request for sanctions against me – might be taken to imply non-cooperation on my part. Nothing could be further from the truth. The Receiver's requests for information have often been duplicative, and I have admittedly been confused by the Receiver's continuing focus on activities that seem ill-suited to collecting Xela's receivables, but I have done everything in my power to respond to his requests.

14. Conversely, the Receiver has ignored Xela's request for information concerning his contacts (if any) with my cousins and/or their lawyers, nor has he provided information about his source(s) of income for these proceedings.

Collection of Xela Assets

15. Regarding the Receiver's primary focus – the collection of assets held by Xela – the May 4 Letter provided the following update and invited the Receiver to participate:

[W]e understand that a new action for damages has been commenced in Panama's Court No. 6 against Villamorey, relating to the non-payment of LISA dividends. A copy of the Complaint is attached as Annex A. We hope that the Receiver is amenable to helping develop these claims and assisting in the enforcement of the anticipated LISA Judgement payment order referenced above.

16. Again, the Receiver has not responded to this invitation, but has elected to file this Motion instead, after three months of silence.

A. <u>Transfer of LISA's Avicola Group Interest to BDT</u>

17. Regarding the Receiver's concerns over the transfer of LISA's Avicola Group interest to BDT in satisfaction of LISA's longstanding debt, Xela suggested a cost-saving approach:

This, of course, brings up the subject of BDT. As you know, BDT held a Panamanian judgment for US$19,184,680 against LISA, stemming from an unpaid promissory note from LISA to BDT for litigation financing disbursements during the 2005-2008 timeframe. BDT also held a related judgment lien against all of LISA's assets. In its capacity as creditor, BDT had been willing to subordinate its claim to "the reasonable requirements of the receivership," which we understand signified BDT's willingness to allow the Castillo Judgment and

reasonable receivership expenses to be paid out of sums received from enforcement of the LISA Judgment.

While Xela cannot speak for BDT, we understand that BDT has its own interest in satisfying the Castillo Judgment. We might suggest, therefore, as a first course of action, that the Receiver request BDT's future cooperation in connection with the LISA Judgment, as a more efficient, reliable and less costly alternative to challenging the validity of the transfer through some form of adversarial process.

B. Arturo's Technical Services/Gabinvest Share Register and Share Certificates

18. Regarding the primary subject of the Motion – the Receiver's request for property/documents maintained by ATS and for the Gabinvest share register and share certificates – the May 4 Letter states as follows:

Separately, we refer to your letter dated April 3, 2020, directed to Arturo's Technical Services Ltd. ("ATS"), requesting production of any property or documents of Xela in ATS' possession. We also refer to your letter dated April 21, 2020, to Mr. Greenspan, asking for the whereabouts of the Gabinvest share register and share certificates. As these requests may be related, we address them together.

In Canada, Xela has one full storage unit of documents at a rental facility in Barrie. Separately, there are documents housed at ATS's offices in Toronto, and ATS also controls four decommissioned servers belonging to Xela at a datacenter in North York. The documents in all three of those locations are

peppered with attorney/client communications and other confidential and protectable information, which must be reviewed under some satisfactory protocol before they can be delivered to the Receiver. Mr. Gutierrez does not presently know the location of the Gabinvest shares and certificates, but he believes that they are likely amongst the records in Barrie. (Emphasis added.)

II. THE MOTION SHOULD NOT BE GRANTED WITHOUT A DOCUMENT REVIEW PROTOCOL THAT RELIABLY PROTECTS AGAINST THE POTENTIAL IMPROPER DISCLOSURE OF PRIVILEGED MATERIAL

19. Accompanying this Opposition is my Affidavit dated March 22, 2020 (the "**Gutierrez Affidavit**"). As stated above, Xela has documents in three separate places:

(a) in a storage unit at a rental facility in Barrie;

(b) at ATS's offices in Toronto; and

(c) on four decommissioned servers at a datacenter in North York.

I stated that I do not believe that any documents relevant to LISA's (now BDT's) collection efforts, or to any of the concerns raised by the Receiver, are located at any of the three locations, and that the cost associated with reactivating the servers and reviewing the documents and data would outweigh the potential benefit to the stakeholders.

20. However, if it is appropriate for the Receiver to proceed in this fashion, Xela is prepared to work with the receiver to resolve issues relating to document disclosure. As stated above, Xela has documents in three separate locations in Ontario. First, Xela maintains a storage unit at a third-party facility in Barrie that

contains documents belonging to Xela. To my knowledge, those documents are not subject to privilege or any other concerns that might limit the Receiver's access. Accordingly, Xela's counsel is prepared to provide contact information and any consent necessary to give the Receiver unimpeded access to the storage unit in Barrie, subject only to a potential lien by the storage facility, stemming from Xela's inability to stay current on its rental payments for the unit.

21. Second, ATS holds some documents belonging to Xela at the ATS offices in Toronto. To my knowledge, those documents are not subject to privilege or any other concerns that might limit the Receiver's access, and Xela will consent to providing the Receiver with unimpeded access to those documents.

22. Third, ATS controls four decommissioned servers belonging to Xela, which are in the possession of a third-party vendor located at the Cogent datacenter in North York, Ontario. As ATS told the Receiver's counsel in writing in April 2020, those servers have been offline and unused for at least two years, during which time no software upgrades or other forms of maintenance have been performed. As a result, there is some cost associated with properly starting and accessing the servers. ATS offered to provide the Receiver with a quote, although I do not believe the Receiver responded.

23. I am informed by ATS and I verily believe that the servers have been unused since approximately 2017. The servers used the Windows 2008 operating system, which is no longer supported by Microsoft. Consequently, even if the necessary security patches are available to prevent viruses and other intrusions when the servers are restarted, there is no guarantee against data corruption.

24. Separately, while the servers do contain data owned by Xela, they also contain data owned by various other persons and entities. Once the servers are restarted, I am informed by ATS that ATS' IT personnel will be able to isolate the data owned by Xela. However, within Xela's own data, there are unquestionably some documents containing information subject to privilege(s) held by third parties, although I cannot identify those third parties without accessing and reviewing the data.

25. Xela and I object to the notion that Xela may not assert its own privileges as against the Receiver in these circumstances. Xela has a pending complaint for conspiracy in the Toronto courts against Ms. Castillo and the Avicola Group majority shareholders, which remains unresolved. At the same time, Paragraph 4(b) of the Receiver's Appointment Order might be construed as giving the Receiver the right to share Xela's privileged materials with Ms. Castillo under nothing more than the thin protection of a non-disclosure agreement.

26. Accordingly, while Xela believes the Receiver's desire to retrieve Xela's documents from ATS is counterproductive to the ultimate cause, any Order requiring production should also implement a protocol under which: (a) third parties are given a reasonable opportunity to assert privileges; (b) Xela and/or I retain the right to assert privilege as against the Receiver, subject to this Court's review; and (c) the Receiver is barred from sharing privileged Xela information with Ms. Castillo or any other person or entity.

III. CAMBRIDGE LLP SHOULD NOT BE REQUIRED TO DELIVER UP THEIR FILES

27. The Motion requests for an Order requiring Cambridge LLP to deliver up access to their files in these proceedings for inspection by the Receiver. The request is unduly burdensome and oppressive, and there is no valid rationale for it. Cambridge LLP acts for me. Solicitor-client privilege is one of the most important tenets of the legal system. The receiver has no right to review Cambridge LLP's files, especially in light of some of the claims that may be advanced against the Applicants in this proceeding.

IV. THE RECEIVER SHOULD BE COMPELLED TO DISCLOSE ITS FUNDING SOURCE(S) AND ANY COMMUNICATIONS WITH ANY PERSON PURPORTING TO ACT FOR THE MAJORITY SHAREHOLDERS OF THE AVICOLA GROUP

28. From the outset of these proceedings, the Receiver's attitude toward Xela and me has been hostile and dismissive. The Receiver has depleted resource on matters unlikely to yield any income for Xela's creditors, while showing little interest in Xela's most promising asset, the unpaid dividends wrongfully withheld by the Avicola Group. Counsel for Banco Santander International conceded on the record in the Miami garnishment case that he had received private, confidential LISA documents from the Receivership.[2] Similarly, the Receiver's reaction to LISA's loan commitment in December 2019 is difficult to understand, as it in effect prevented a discharge. Indeed, the Receiver's strategy to date – unnecessarily perpetuating the receivership, taxing the resources of Xela and its affiliates, while adding to the stable of lawyers addressing issues unrelated to the collection of LISA's unpaid dividends – is precisely aligned with the 20-year litigation strategy of the Avicola Group.

---

[2] In fairness, the document in question had already been produced to counsel for Santander in discovery in the garnishment case. However, counsel elected to use as a deposition exhibit a version of the document that had not been produced in discovery, and when questioned about it, he admitted that he had obtained the document from the receivership.

29. It was on the basis of these concerns that Cambridge LLP requested, in the May 4 Letter, the following information from the Receiver:

> *Lastly, as matter of housekeeping, we would request that the Receiver provide Xela with two categories of information. First, we respectfully request that the Receiver produce to us a complete record of his funding sources for this receivership, showing at least the payor names, dates and amounts of payment. Second, we ask that the Receiver identify any and all communications between KSV (including its partners, associates and other personnel) and any person acting on behalf of Villamorey and/or the Avicola Group and/or any of their affiliates regarding this receivership, and provide copies of any such communications as are in writing.*

30. The requested information is both reasonable and appropriate as a check against inappropriate conduct in receivership matters. To date, however, the Receiver has provided none of the requested information, and the Court should require him to comply.

V. THE RECEIVER'S THIRD REPORT IS INACCURATE AND/OR INCOMPLETE

31. The Receiver's Third Report is inaccurate and incomplete in various material respects, as set out in the Gutierrez Affidavit.

32. I swear this Affidavit in response to the Receiver's motion to compel disclosure and for no other or improper purpose.

SWORN BEFORE ME via video conference at the City of Toronto, in the Province of Ontario on August 21, 2020.

Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO# 70332Q)

JUAN GUILLERMO GUTIERREZ

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondent

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

251

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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Dear Counsel:

Re: Margarita Castillo v Xela Enterprises Ltd. et al.
Court File No.: CV-11-9062-00CL

We have been retained by the Respondent, Xela Enterprises Ltd., in the aforementioned matter. Please be advised that we will be requisitioning a 9:30 case conference for January 7, 2020 to seek directions and request an order varying and/or suspending the operation of paragraph 4 of Justice McEwen's Order dated July 5, 2020.

Yours very truly,

CAMBRIDGE LLP
Per:

CHRISTOPHER MACLEOD
CRM/am
Signed electronically on behalf of Christopher Macleod

Xela Enterprises Ltd.'s Answers Provided in Response to Questions
Received from KSV Kofman Inc., in its Capacity as Court-Appointed Receiver of Xela, on August 22, 2019

No.	Question	Answer
Part I: Questions Regarding Xela and its Affiliates		
1.	LISA S.A.: Please provide us with the supporting documentation for the accounts receivable and accounts payable reflected on Lisa S.A.'s June 2018 balance sheet (~$31.4 million and ~$70 million, respectively).	Records in support of these amounts are not readily available to Xela. Xela is continuing to conduct inquiries to retrieve relevant documents.
2.	CRYSTAL DEL PACIFICO: We note that you have advised us that Crystal del Pacifico is inactive, with no operations of its own. However, a review of its financial statements reflect book equity of ~$30 million, including approximately $29 million of accounts receivable. From whom/which entity was this amount owing? Has it been collected? If not, why not?	To the best of Xela's knowledge, these receivables originated approximately 20 years ago. As such, the requested information is not readily available. Xela is continuing to make inquiries in relation to this request and will advise if it learns of any additional information.
3.	METROBOWL: Who was this entity sold to and for how much?	The entities to which Metrobowl was sold were Tenutri, S.A. and Rhino Enterprises, S.A. Xela is continuing to conduct inquiries to determine the sale amounts.
4.	GRENADA VALLEY: What administrative services are provided by Grenada Valley? Please provide a list of the names of all employees? Which entities receive these services and what is their source of revenue?	To the best of Xela's knowledge, the employees of Grenada Valley are as follows: • Oscar Barillas (accountant); • Clara Paz (administrative assistant); • Cecilio Joge (delivery services); and • Amarilis (cleaning services).

No.	Question	Answer
		Grenada Valley provides administrative services to Lisa by processing the payment of Lisa's legal fees in Guatemala. For reasons that Xela has already provided in these proceedings, Lisa has no current source of revenue.
5.	EAI: Please provide us with the names of corporate counsel in Barbados and Panama for each of EAI and Gabinvest, respectively.	To the best of Xela's knowledge neither entity has corporate counsel in Barbados or Panama.
6.	XELA SUBSIDIARIES: Please provide us with a complete list of current directors and officers for those entities that were not included in your original response.	In addition to Xela's previous answer, Xela can advise of the following current directors and officers at this time: • Badatop Holdings Inc.: Patrick Doig, Gilles Gosselin, and Ryan Highland (directors). • Latin American Procurement Ltd.: Patrick Doig, Gilles Gosselin, and Ryan Highland (directors). • Lisa S.A.: Harald Johannessen, Calvin Shields, and Lester C. Hess Jr. (directors). • Pahlua S.A.: Bayron Alejandro Mejia (director). With respect to Metrobowl S.A., Xela previously advised that this entity was sold. As such, Xela is unaware of its current directors and officers, if any. With respect to Greenhill Investments, Xela previously advised that this entity has no current operations. In fact, Greenhill Investments was previously sold. As such, Xela is unaware of Greenhill Investments' current directors and officers, if any, and whether Greenhill Investments is presently operating. Xela is continuing to make inquiries regarding the current directors and officers of its remaining subsidiaries. Because many of these entities are

No.	Question	Answer
		inactive, this information is not readily available. Xela will advise when it learns of more information.
7.	XELA LITIGATION: Please confirm who is providing instructions to Lisa S.A.'s lawyers with respect to its ongoing litigation. To the extent it is Mr. Juan Gutierrez, please advise how conflicts of interest are addressed re BDT. In particular, how does Mr. Gutierrez address any conflicts of interest where the interest of Lisa/Xela may not align with BDT?	Lisa's President provides instruction to Lisa's lawyers.
	a) Can you please provide us with the name of Ms. Reyes's law firm in Guatemala?	Ms. Reyes is a sole practitioner. She is not part of a firm.
8.	PRESIDENT OF XELA: Please describe Mr. Juan Gutierrez's role and responsibility acting as President of Xela. Please list all officers and directors who report to Mr. Gutierrez.	Xela has already described Mr. Gutierrez's role as President in its answers to the Receiver's previous questions. With respect to Xela's directors and officers, Calvin Shields and Mr. Gutierrez are the only directors. Besides Mr. Gutierrez, there are no other officers.
9.	AVICOLA SHARES: a) Does Mr. Gutierrez know the exact location of the share certificates?	No.
	b) Mr. Gutierrez previously advised the Receiver that a law firm was in possession of the share certificates rather than the Court. What law firm previously "controlled" the share certificates?	The share certificates were previously in the custody of Lisa's counsel in Guatemala, Ms. Reyes, who deposited them with the Guatemalan courts as required by the ongoing litigation.

No.	Question	Answer
	c) With which court or courts has/have the share certificates been deposited and by whom?	As stated above, Lisa's counsel deposited the share certificates with the Guatemalan courts. Xela has not yet been able to obtain the deposit certificates and therefore does not know the specific courts with which the share certificates are deposited.
	d) What efforts are being taken by Xela to obtain these certificates? Please advise of status.	As Xela previously advised, it is continuing to conduct inquiries in order to obtain copies of the deposit certificates. These are not readily available to Xela. To the extent that Xela is able to obtain copies, they will be provided.
10.	BADATOP: a) Badatop's balance sheet reflects an intercompany receivable in the amount of ~$2.8 million. From whom is this owed?	Xela can advise that the approximately $2.8 million receivable consists of the following: • $1,030,753 owing from BDT Investments Inc. • $493,034 owing from Arven. • 1,295,800 owing from Mayacrops S.A.
	b) Badatop's income statement reflects revenue of ~$559,000 in 2018 and ~$8.119 million in 2017. What was the source of that revenue?	Xela is conducting inquiries in order to provide further detail on these figures.
	c) Please provide details concerning the sales of the Badatop subsidiaries.	The assets of Badatop's subsidiaries were sold to Fyffes, an unrelated produce company. As stated, this occurred in 2015. At that time, Badatop's subsidiaries were involved in melon farming. As such, the assets sold included farming equipment, farming supplies, seeds, vehicles, tools, office equipment, land, intellectual property, etc. As part of the transaction, a non-compete agreement was entered into with Fyffes.
	d) Were any of the proceeds used to pay obligations owing to PAICA? If so, how	No.

No.	Question	Answer
	much?	
11.	PAICA: While PAICA is no longer a subsidiary, Xela should be able to explain the transactions giving rise to its obligations to PAICA. Who at Xela authorized these loans and what was the purpose of such loans?	Xela is reviewing its records in order to provide further details on the amount owing to PAICA.

No.	Question	Answer
	Part II: Questions Regarding BDT Investments Inc.	
1.	We require further information regarding the transaction whereby Empresas Arturo International agreed to sell its subsidiaries to the Trust/Mr. Arturo Gutierrez: a) When was the transaction completed and what is meant by "at the time of the transaction"?	Xela understands that the transaction was completed in approximately April 2016.
	b) What gave rise to the indebtedness owing to Arturo Gutierrez that led to the transaction?	Arturo funded subsidiaries of Xela from time to time with personal loans. The indebtedness of Empresas Arturo International (EAI) that led to the transaction was the result of one such loan. To the best of Xela's knowledge, this indebtedness originated approximately 20 years ago. As such, Xela does not have access to any further information about the applicable loan.
	c) How did Arturo make a shareholder loan when Xela is the sole shareholder of EAI? Was the loan actually from EAI? If so, the loan is not reflected on the EAI statements provided.	No, the loan was provided by Arturo to EAI. It was termed a "shareholder loan" because, at the time the loan was made, Arturo controlled Xela, which in turn controlled EAI.

No.	Question	Answer
	d) Please provide a summary/breakdown of the debt. If the transaction happened prior to 2016, please provide the last audited or externally verified financial statement reflecting the debt to Arturo/EAI.	As stated above, to the best of Xela's knowledge, the indebtedness that led to the transaction originated approximately 20 years ago. As such, a summary/breakdown of the debt is not readily available to Xela. Xela is conducting inquiries to find any audited or externally verified financial statements that might reflect the debt. To the extent that any such statement is located, it will be provided.
	e) Please provide us with a copy of the valuations in the possession of Xela.	Xela previously provided a copy of the valuation conducted by Deloitte in relation to BDT. Xela has since located another valuation conducted by Deloitte's Venezuelan office in respect of PAICA. Xela similarly requires the consent of Deloitte's Venezuelan office before this valuation can be shared. Efforts are being made to obtain this consent and the valuation will be provided as soon as Xela receives this consent.
	f) Additionally, the Receiver sees no reason that the Deloitte valuation cannot be provided as it was prepared for BDT and/or Arven and, as such, both should have a copy.	This has been provided.
	g) How was the receivable owing from Lisa S.A. valued in the transaction and what was the amount and form of the consideration that was paid for it?	Xela is conducting further inquiries regarding the details of the transaction in order to find information about the Lisa receivable.
2.	Please provide copies of all invoices or evidence of debt provided by BDT and Arven to Lisa S.A. (~$47 million and $12.7 million, respectively).	This debt has been accumulating for approximately 15 years. As such, copies of all invoices in relation to the debt are not readily available. Xela is continuing to make inquiries to provide documents in relation to the debt that are reasonably accessible.
3.	Who were the directors of Lisa S.A. at the time it executed the promissory note in the amount of	To the best of Xela's knowledge, Calvin Shields, David Harry, and Larry Budd were the directors of Lisa at the time the promissory note

No.	Question	Answer
	~$16.685 million payable to BDT? Who was directing BDT at the time? Please provide evidence supporting the amounts owing under the promissory note.	was executed. Xela is conducting inquiries to confirm the names of the directors of BDT at the time. With respect to evidence supporting the amounts owing under the promissory note, Xela refers to its response for question 2, immediately above.
4.	You previously advised the Receiver during our meeting at Torys that the Arturos business is suffering, that it lacks capital and is generating nominal income. Please confirm how it is able to fund the significant legal costs (including over $1 million in 2019) noted in your response in light of its lack of capital.	As Xela previously advised, the Arturo's chain forms no part of the Xela organization. Xela has no further information regarding the specifics of Arturo's operations than what has already been provided.
5.	Please explain why copies of the pleadings are not available to Lisa. The Receiver does not understand why Mr. Gutierrez does not have the pleadings given his role as President of the group.	The pleadings relate to a Panamanian lawsuit that is several years old, the judgment and writ of garnishment having been rendered in 2012. Xela was not a party to this lawsuit. For these reasons, Xela does not have copies of the pleadings in its records, nor are copies reasonably accessible to Xela.
6.	Please confirm who is/are the Trustee/Trustees under the trust that owns BDT?	As Xela previously advised, the trustee for the trust is Alexandria Bancorp. Ltd./Alexandria Trust Corporation. Inquiries should be directed to Robert Madden (robert.madden@alexandriabancorp.com).
7.	FAMILY TRUST: The Receiver does not accept that this information is unavailable to Mr. Gutierrez and believes it is central to the issues in the receivership. What is the status of your follow-up inquiries? Please provide an update.	As Xela previously advised, further inquiries about the trust should be directed to Mr. Madden.

No.	Question	Answer
Part III: Questions Regarding the Assignment of Causative Action Involving Lisa S.A.		
1.	Pursuant to the assignment agreement, is Lisa obligated for the debts of Xela? It is unclear. If so, on what basis? Who negotiated the terms of this assignment agreement?	Xela does not understand Lisa to be obligated for the debts of Xela. On behalf of Xela, Calvin Shields was the person involved in concluding the agreement.
2.	What role did Mr. Gutierrez have in the negotiation of this assignment agreement?	Mr. Gutierrez did not participate in the negotiation of the assignment agreement.
3.	How were conflicts of interest addressed between Mr. Gutierrez and his sons?	Xela is unaware of any such conflicts of interest.
4.	Did Messrs. Doig, Harry and Shields report on the negotiations to Mr. Gutierrez? If not, provide evidence re same, including any instructions provided by Mr. Gutierrez.	None of these individuals provided "reports" of negotiations to Mr. Gutierrez. However, Mr. Shields discussed the terms of the agreement with Mr. Gutierrez around the time the agreement was signed.
5.	What is the relationship as between Messrs. Doig, Harry, Shields and Mr. Gutierrez? Put another way, how did Messrs. Doig, Harry and Shields get on to the board?	Messrs. Doig, Harry, and Shields were appointed to the respective boards by the shareholders.

Court File No. CV-19-622852-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF XELA ENTERPRISES LTD.

Applicant

* * * * *

ANSWER CHART OF THE APPLICANT

Undertakings/Advisements/Refusals from the Cross-Examination of Juan Guillermo Gutierrez Held in Toronto on June 26, 2019

No.	Q. #	P. #	U/A/R	Question	Answer
1.	62-64	17	U	To provide the minutes from Xela's most recent board meeting, which occurred a week or two weeks ago, subject to any claims of privilege.	Upon further inquiry, Mr. Gutierrez understands that no minutes were recorded during this board meeting. This is a correction to the answer Mr. Gutierrez provided in response to question 64 of his cross-examination.
2.	78-81	20	A	To advise when Juan Jose Rodriguez ceased being an officer of Xela.	April 1, 2016.

No.	Q. #	P. #	U/A/R	Question	Answer
17.	332	78	A	To ask Mr. Doig whether BDT has any security in support of its loans to Lisa other than the security described at paragraphs 20 and 21 of the Gutierrez Affidavit.	There is no such other security.
18.	335	78-79	A	To ask Mr. Doig whether interest is being charged on the BDT loan to Lisa and, if so, what amount.	No interest is being charged on amounts owed by Lisa except in respect of the sum of US $16,685,000 secured under the promissory note and stock pledge agreement dated January 5, 2009 and attached as Exhibit "F" to Mr. Gutierrez's affidavit. Interest on this amount accrues in accordance with the terms of the promissory note and stock pledge agreement, which specifies a rate of 8.5% per annum, except in the event of default, in which case interest accrues at a rate of 10% per annum.
19.	343	80	U	To either ask Calvin Shields or review Xela's records to determine when Mr. Shields ceased being president of Lisa.	Mr. Shields ceased being president of Lisa as a result of a shareholder meeting in January 2019, where a new board was elected. This change was entered in the Panamanian registry in March 2019.
20.	344-345	80-81	A	To ask Mr. Doig who was on the board of directors of BDT as of January 24, 2018, the date of the assignment of causative action attached as Exhibit "G" to the Gutierrez Affidavit.	Mr. Doig has advised Mr. Gutierrez that the following individuals were on the board at the time: Patrick Doig, Gilles Gosselin, Ryan Highland, Eduardo San Juan, and Andres Gutierrez.

DIRECTORS XELA AND SUBSIDIARIES

Xela Enterprises Ltd. (Canada)

Directors: Juan G. Gutierrez, Calvin Shields,
Officers:
Juan G. Gutierrez – President and CEO

Xela International Inc. (Canada)

Directors:
Juan G. Gutierrez, Calvin Shields
Officers:
Juan G. Gutierrez – President

Tropic International Ltd (Canada)

Directors:
Juan G. Gutierrez, Calvin Shields
Officers:
Juan G. Gutierrez – President
Juan G. Gutierrez – Secretary

Global Food Traders (Canada) (dormant)

Directors:
Juan Gutierrez
Officers:
Juan G. Gutierrez – President

Gabinvest S.A. (Panama):

Directors:
Jose Eduardo San Juan, David Harry, Harald Johannessen
Officers:
Jose Eduardo San Juan – President
David Harry – Secretary
Harald Johannessen – Treasurer

Lisa S.A. (Panama):

Directors:
Calvin Shields, David Harry
Officers:
Calvin Shields – President
David Harry – Treasurer

Crystal del Pacifico S.A (Panama):

Directors:
Eduardo San Juan, David Harry, Harald Johannessen
Officers:
Eduardo San Juan – President
Harald Johannessen – Treasurer
David Harry – Secretary

Badatop Holdings Inc. (Barbados)

Directors:
J. Eduardo San Juan, Patrick A. Doig, Gilles Gosselin, Ryan Highland
Officers:
Patrick A. Doig – President
J. Eduardo San Juan – VP Finance
Karen Thornhill – Secretary

Empresas Arturos International (Barbados)

Directors: Gilles Gosselin, J. Eduardo San Juan, Patrick Doig
Officers: J. Eduardo San Juan – President
Juan G. Gutierrez – VP Finance.

Latin American Procurement Ltd. (Barbados)

Directors:
Eduardo San Juan, Patrick A. Doig, Gilles Gosselin, Ryan Highland
Officers:
Patrick A. Doig – President
Eduardo San Juan – VP Finance
Karen Thornhill – Secretary

Agroexportadora Mundial S.A. (Guatamala)

Directors:
Eduardo San Juan, Juan Carlos Olivares, Harald Johannessen
Officers:
Harald Johannessen – President
Eduardo San Juan – Vice President
Juan Carlos Olivares – Secretary

Pahula S.A. (Guatemala)

Directors:
Bayron Alejaudro Mejia
Officers:
Bayron Alejaudro Mejia

Mayacrops S.A (Guatemala)

Directors:
Harald Johannessen, Eduardo San Juan, Juan Carlos Olivares
Officers:
Harald Johannessen – President
Eduardo San Juan – Vice President
Juan Carlos Olivares – Secretary

Metrobowl S.A. (Guatemala)

Directors:
Harald Johannessen, Eduardo San Juan, Juan Carlos Olivares
Officers:
Harald Johannessen- President
Eduardo San Juan – Vice President
Juan Carlos Olivares – General Manager

Blue Way Holdings Corp. (Panama) (Inactive)

Directors:
David Harry, Eduardo San Juan, Harald Johannessen
Officers:
Eduardo San Juan – President
David Harry – Treasurer
Harald Johannessen – Secretary

Arpol Investments Corporation (Panama) (inactive)

Directors:
Peter Smetana, David Harry, Raul Rivas
Officers:
Peter Smetana – President
David Harry – Vice President
Raul Rivas – Secretary

Granada Valley S.A. (Panama)

Directors:
Juan Carlos Olivares, Jose Eduardo San Juan, Bayron Alejandro Mejia
Officers:
Jose Eduardo San Juan – President
Bayron Alejandro Mejia – Treasurer
Juan Carlos Olivares – Secretary

Marco Polo (Guatemala)

Directors:
Eduardo San Juan, Juan Carlos Olivares
Officers:
Eduardo San Juan –President
Juan Carlos Olivares – Secretary

Supreme Court of British Columbia
Russell & DuMoulin, Re
Date: 1986-12-29

W. S. Martin, for Russell & DuMoulin.

D. O'Leary, for Victoria Mortgage Corporation Ltd. and others.

A. L. Edgson, for Peat Marwick Limited.

(Vancouver No. J860255)

[1] December 29, 1986. GIBBS J.:— This is a reference by a taxing officer under s. 92(8) of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, upon the taxation of accounts for legal services rendered.

[2] Peat Marwick, receiver-manager for Victoria Mortgage, took out an appointment before the registrar for the taxation of several statements of account rendered by Russell & DuMoulin to Victoria Mortgage for services provided over the period 1st May 1985 to 8th November 1985. That was a particularly turbulent time in the life of Victoria Mortgage. According to affidavits sworn by John Michael McCormick of Russell & DuMoulin on 3rd June 1986 in action. No. A851628, and on 15th December 1986 in this action, the retainer commenced on the day Victoria Mortgage suspended issuance of debentures and payment of principal and interest on issued debentures in late April 1985, and continued through until remaining matters, consequent upon the appointment of Peat Marwick as receiver-manager by Hinds J. of this court on 24th July 1985, were completed.

[3] During the period in issue, upon the instructions of the officers and directors of Victoria Mortgage, Russell & DuMoulin acted in respect of a cease trading order by the Superintendent of Brokers, conducted an appeal to the Corporate and Financial Services Commission, applied for a compromise or arrangement order under s. 276 of the Company Act, R.S.B.C. 1979, c. 59, opposed an application to the court by the Superintendent of Brokers for the appointment of a receiver-manager, prosecuted an appeal from the order of Lander J. of this court appointing a receiver-manager on 27th June 1985, and opposed the second application by the Superintendent of Brokers to the court which led to the appointment of Peat Marwick as receiver-manager by Hinds J. on 24th July 1985.

[4] On 28th April 1986, some eight months after the appointment of the receiver-manager, a number of individuals commenced a representative action, action No. C862031, on behalf of all series VI debentureholders of Victoria Mortgage against Victoria Mortgage, its sole shareholder, and certain individuals who held office as officers or directors or both with

Victoria Mortgage or its sole shareholder. The action sounds in negligence and fraud. Peat Marwick is allied to the plaintiffs in action No. 0862031 under and by virtue of an order made by Wallace J. of this court in action No. A851628 on 28th February 1986, requiring Peat Marwick, as receiver-manager, to "assist the Debenture Holders with respect to the preparation and disposition of their proposed legal action" and directing that "all costs, including the costs of the receiver manager and legal counsel selected by the Debenture Holders be paid out of the estate of Victoria Mortgage Corporation Ltd."

[5] Shandro Dixon, barristers and solicitors, occupy the dual positions of solicitors for Peat Marwick, receiver-manager, on the proposed taxation of the Russell & DuMoulin statements of account, and solicitors of record for the debentureholders in action No. C862031.

[6] To complete the narrative of relevant proceedings to this date, on 15th October 1986 the Chief Justice ordered certain paragraphs struck from the statement of claim in the debentureholders' action to the end that it ceased to be a representative action and became a personal action by the named plaintiffs.

[7] Upon the taxation of the Russell & DuMoulin statements of account being set down, issues of solicitor-client privilege arose. In his affidavit of 15th December 1986, Mr. McCormick of Russell &. DuMoulin takes this position:

> 3. The taxation of Russell & DuMoulin's accounts in this matter is being sought not by the persons who provided instructions to this firm, but rather by those persons who were directly adverse in interest to the management of the Corporation on the application for the appointment of the Receiver-Manager. The persons who were responsible for directing this firm's services have not sought to challenge this firm's accounts for fees rendered for those services.

[8] Whatever solicitor-client privilege exists in respect of the statements of account has not been waived, except to the extent that it lies with Peat Marwick, as receiver-manager, to waive it. At least partly underlying the solicitor-client issue on the taxation is an apprehension that questions asked there might be put for the purposes of, and used in the prosecution of, the debentureholders' action. In that connection, the position of the solicitors for Peat Marwick and the debentureholders is that the events addressed in the debentureholders' action occurred in the period 1981 through 1984, whereas the Russell & DuMoulin retainer did not commence until April or May 1985. Accordingly, the apprehension appears to be unfounded.

[9] The taxing officer made his reference to the court under s. 92(8) of the Barristers and Solicitors Act, which provides:

> (8) Where a dispute arises respecting a retainer, or any other matter in the taxation of a bill, the taxing officer may refer the matter to the Supreme Court for directions.

[10] The taxing officer stated three issues for determination. They will be dealt with in the sequence stated:

> (1) Whether the accounts for professional services rendered by Russell & DuMoulin to Victoria Mortgage Corporation Ltd. acting through its directors and officers can be taxed at the instance of Peat Marwick Limited, Receiver Manager for Victoria Mortgage Corporation Ltd.

[11] The answer is yes, that Peat Marwick can cause the accounts to be taxed. The order of Hinds J., appointing Peat Marwick receiver-manager, authorizes the receiver-manager "to enter into possession of all of the property of the Company and to manage the business affairs of the Company", and "to execute and prosecute any suit, proceeding or action at law or in equity in any court or before any administrative body or statutory authority as it considers necessary for the proper protection of the property of the Company". Those words are sufficiently broad to cover taxation of solicitors' accounts rendered to Victoria Mortgage.

> (2) Whether the said accounts for professional services are subject to solicitor/client privilege in favour of Victoria Mortgage Corporation Ltd. or other persons.

[12] In the context the word "accounts" appears to refer to the statements of account submitted for payment. Whether solicitor-client privilege ever attached to those statements is now an academic question as they have been made public through the taxation, and through these proceedings without, evidently, privilege ever having been claimed.

[13] If the word "accounts" is intended to be sufficiently broad to embrace the solicitors' records substantiating the statements of account, if those records could be demanded and compelled by Victoria Mortgage they cannot be denied to the receiver-manager. They fall within the expression "property of the Company" in the order of Hinds J. The receiver-manager is vested with the power to manage the affairs of the company and conduct its business: *Moss S.S. Co. v. Whinney,* [1912] A.C. 254 (H.L.), *Ont. Securities Comm. v. Greymac Credit Corp.; Ont. Securities Comm. v. Prousky* (1983), 41 O.R. (2d) 328, 21 B.L.R. 37, 33 C.P.C. 270, 146 D.L.R. (3d) 73 (Div. Ct.). The taxation of solicitors' accounts is one of the company's powers exercisable in the conduct of its business affairs. The receiver-manager must have the right to obtain and make use of those records which would be available for use by the company on taxation to enable him to exercise that power in the place and stead of the company officers. Furthermore, in order to enable him to prosecute the taxation, he must have the right to waive whatever solicitor-client privilege there is in respect

of those records, at least to the extent necessary for taxation purposes. A power to tax would be an empty power indeed if the supporting records could be refused on the grounds of privilege.

[14] In any event, privilege attaches only to communications in which legal advice is either sought or offered: *Solosky v. R.,* [1980] 1 S.C.R. 821, 16 C.R. (3d) 294, 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745, 30 N.R. 380 [Fed.]. It is difficult to imagine how billing records could be classified as communications of that sort.

[15] For the above reasons, the answer to this second issue is a qualified no, qualified in the sense that the accounts, whether in the narrow meaning or the broad meaning, are not privileged as against the receiver-manager or as against production on taxation of the solicitors' bills.

> (3) Whether Peat Marwick Limited, Receiver Manager of Victoria Mortgage Corporation Ltd. has the authority to waive the solicitor/client privilege of Victoria Mortgage Corporation Ltd. or other persons in relation to the professional services rendered by Russell & DuMoulin to Victoria Mortgage Corporation Ltd.

[16] This is the real issue between the parties, for "in relation to the professional services rendered" embraces the entire solicitor-client relationship including instructions and advice sought and given. A letter dated 13th August 1985 from Shandro Dixon to Russell & DuMoulin, attached to an affidavit, in action No. A851628, sworn by Alan Kemp-Gee, chairman of Peat Marwick on 3rd June 1986, illustrates some of the reasons why the receiver-manager wishes to probe the relationship on the taxation. Here are some excerpts from the letter:

> The Receiver has instructed us to advise that it is his position that any funds of the Company in your hands or paid to you after July 24, 1985, on account of the aforesaid Appeal [a notice of appeal from the order of Hinds, J.] or future legal services are "property" of the Company which fall within the reference of Judge Hinds' Order of July 24, 1985 …
>
> … it appears that an account in the amount of $18,276.24 was rendered after the pronouncement of the Order appointing Peat Marwick Limited. It is the position of the Receiver that any Company funds appropriated to that account similarly are "property" of the Company which is subject to the Order of Mr. Justice Hinds …
>
> The Receiver has requested our opinion as to the reasonableness of the quantum of accounts …

[17] The question is extremely difficult to answer with a flat yes or no, as there are not before the court any documents or questions in respect of which privilege has been claimed. It may well be that there are, or will be, some of each for which privilege might be claimed, for

example, by persons or companies other than Victoria Mortgage. In *Solosky v. R*., supra, Dickson J. (now C.J.C.) said at p. 758:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege — (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advise; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the Judge, which requires, at a minimum, that the documents be under the jurisdiction of a Court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

[18] In *Re Dilawri; Clarkson Co. v. Chilcott* (1984), 48 *O.R.* (2d) 545, 53 C.B.R. (N.S.) 251, 13 C.R.R. 41, 13 D.L.R. (4th) 481, 6 O.A.C. 291 (C.A.), the court had before it the questions for which answers were refused on the grounds of solicitor-client privilege. In *A. & D. Logging Co. v. Convair Logging Ltd.* (1967), 63 D.L.R. (2d) 618, Gould J. of this court required the disputed documents to be delivered to him so that he could determine the validity of a claim of privilege document by document and even as to parts of documents. And in *Ont. Securities Comm. v. Greymac Credit Corp.,* supra, at p. 51, Southey J. said of a similarly broadly worded question that it was too general and that "A stated case should be specific as to the questions sought to be put. It must at least specify the type of question as to which the direction of the Court is sought".

[19] As a general proposition, on the authority of the *Greymac* case, the receiver-manager here can waive the Victoria Mortgage solicitor-client privilege. In that case the receiver-manager was appointed by order of the court, as is the case here. Southey J., for the court, held that the receiver-manager could waive the company's solicitor-client privilege but only in the exercise of the powers for which it was appointed: see p. 62:

> The powers of the board of directors of Greymac Credit to manage the affairs of the corporation are held for the time being by the receiver and manager. Included in these powers, in my judgment, is the power to waive any solicitor-and-client privilege of the corporation. *But that power of waiver, like the other powers of the board of directors held by the receiver and manager, can be exercised by the receiver and manager only for the purposes for which it was appointed.* [Emphasis added.]

[20] In *Greymac,* the receiver-manager was appointed for the purpose of preserving the undertaking and assets of the company pending completion of an investigation by the Ontario Securities Commission (see p. 61 of the report). There is no such limitation here. The order of Hinds J. vests complete management in Peat Marwick, including the power to take over all of the assets of the enterprise and to dispose of, protect, manage and preserve property, all under the control of the court. Waiver of the Victoria Mortgage solicitor-client privilege "in

relation to the professional services rendered by Russell & DuMoulin" is a power exercisable for the purposes for which Peat Marwick was appointed. However, that finding is not to be taken as denying in advance the validity of a claim of solicitor-client, privilege in respect of any particular documents or questions. It is not, and cannot be, more than a general guideline in response to a general question. In the event that solicitor-client privilege is raised on some ground other than those that are covered by the general guideline, it will be necessary to apply to have the matter determined by the court on the particular document or portion thereof, or the particular question, for which privilege is claimed.

[21] These reasons constitute the directions sought by the taxing officer under s. 92(8) of the Act.

Order accordingly.

Re Ontario Securities Commission and Greymac Credit Corp.
Re Ontario Securities Commission and Prousky

41 O.R. (2d) 328
146 D.L.R. (3d) 73

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT
SOUTHEY, KREVER AND CRAIG JJ.
30TH MARCH 1983.

Barristers and solicitors -- Solicitor-and-client privilege -- Receivership order -- Whether receiver can waive solicitor-and-client privilege.

Barristers and solicitors -- Solicitor-and-client privilege -- Trust account -- Whether solicitor may be compelled to testify as to payments into and out of trust account.

Barristers and solicitors -- Solicitor-and-client privilege -- Corporate officer solicitor -- Whether privilege available.

Barristers and solicitors -- Solicitor-and-client privilege -- Name of client -- Whether solicitor may be compelled to testify as to name of client.

M was appointed by the Minister of Consumer and Commercial Relations pursuant to the Loan and Trust Corporations Act, R.S.O. 1980, c. 249, s. 152, to make a special examination and audit of the books, accounts and securities of certain trust companies. Under that Act M had the power to summon witnesses and take evidence under oath and generally had the powers of a commission under Part II of the Public Inquiries Act, R.S.O. 1980, c. 411. In carrying out this mandate, M examined certain solicitors who had acted for the trust companies in question,

and those solicitors refused to answer many questions on the ground of solicitor-and-client privilege. The registrar under the Loan and Trust Corporations Act, s. 159, ordered to take possession and control of the assets of the companies, informed M that he was willing to waive the privilege on behalf of the companies. M stated a case for the court which raised the following questions:

1. Would answers to the questions involve a breach of solicitor-and-client privilege? 2. Could the registrar, appointed as receiver of the companies under the Loan and Trust Corporations Act, waive the privilege? 3. Is the president of a company, who is a solicitor, prohibited by solicitor-and-client privilege from answering questions as to the ownership of that company? 4. Does solicitor-and-client privilege extend to prohibit a solicitor from answering questions as to the movement of funds into and out of his trust account.

Held, the questions, which the court answered in the following sequence, should be answered as follows:

Question 2: The purpose for which the registrar under the Loan and Trust Corporations Act, s. 159, was ordered to take possession and control of the assets of these companies was to conduct their businesses and take such steps as should be taken towards their rehabilitation or continued operation. The Order in Council appointing the registrar gave him all the powers of the boards of directors which would include the power to waive a solicitor-and-client privilege, but such powers were expressly conferred for the purposes for which the registrar was ordered to take control. It was no part of those purposes to render assistance to the commission in its inquiry into the affairs of the companies, and accordingly the registrar had no right to waive the privilege to enable their solicitors or former solicitors to disclose confidential information to the commission.

Question 4: Payments into and out of a solicitor's trust account do not constitute communications from the client and accordingly are not covered by solicitor-and-client privilege.

Thus, a solicitor may be compelled to give evidence as to the movement of funds into and out of his trust account, including the source and recipient of payments, and to produce for inspection his books and records relating thereto.

Question 1: The question as phrased was too general as a stated case should be specific and at least specify the type of question to which the direction of the court is sought. The question did, however, appear to relate to whether disclosure by the solicitor of the name of his client is protected by solicitor-and-client privilege. In general, a solicitor cannot refuse to identify the client on whose behalf the privilege is asserted because the identity of his client is not the subject of a professional confidence. While there may be circumstances in which a solicitor would be justified in refusing to disclose the name of his client or his former client, those circumstances were not present here.

Question 3: The president of a company who is also a solicitor cannot assert solicitor-and-client privilege in respect of information acquired by him in the performance of duties that could be and usually are performed by an employee or an agent of the company who is not a solicitor. A president would have or could acquire knowledge of the names of registered shareholders. However, the names of beneficial owners may come to the president in his capacity as a solicitor. If so, it would be privileged unless shares were held in the name of the solicitor or his partner, employee or agent on trust for the beneficial owner.

Re Furney, a debtor, [1964] A.L.R. 814; Bursill v. Tanner (1885), 16 Q.B.D. 1; Canary v. Vested Estates Ltd., [1930] 3 D.L.R. 989, [1930] 1 W.W.R. 996, 43 B.C.R. 1, apld
Re Cirone, Sabato and Priori (Con-form Construction Co.) (1965), 8 C.B.R. (N.S.) 237, distd

Other cases referred to

Descoteaux et al. v. Mierzwinski and A.-G. Que. et al. (1982), 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462; Solosky v. The Queen,

[1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 50 C.C.C. (2d) 495, 16 C.R. (3d) 294, 30 N.R. 380; R. v. Littlechild (1979), 108 D.L.R. (3d) 340, 51 C.C.C. (2d) 406, [1980] 1 W.W.R. 742, 11 C.R. (3d) 390, 19 A.R. 395; Re Borden & Elliot and the Queen (1975), 13 O.R. (2d) 248, 70 D.L.R. (3d) 579, 30 C.C.C. (2d) 337, 36 C.R.N.S. 334 sub nom. Re R. v. Froats; Re Director of Investigation & Research and Shell Canada Ltd. (1975), 55 D.L.R. (3d) 713, 22 C.C.C. (2d) 70, 18 C.P.R. (2d) 155, [1975] F.C. 184, 29 C.R.N.S. 361, 7 N.R. 157, sub nom. Re Shell Canada Ltd.; Re Abacus Cities Ltd. (1981), 128 D.L.R. (3d) 566, 40 C.B.R. (N.S.) 172, 16 Alta. L.R. (2d) 279; Re Presswood et al. and Int'l Chemalloy Corp. (1975), 11 O.R. (2d) 164, 65 D.L.R. (3d) 228, 25 C.P.R. (2d) 33, 36 C.R.N.S. 322; Alfred Crompton Amusement Machines Ltd. v. Com'rs of Customs & Excise (No. 2), [1972] 2 All E.R. 353; affd [1973] 2 All E.R. 1169

Barristers and solicitors -- Solicitor-and-client privilege -- Receiver -- Whether privilege precludes solicitor from disclosing information relating to affairs of company to receiver -- Securities Act, R.S.O. 1980, c. 466, ss. 11, 17.

Securities -- Receiver -- Solicitor-and-client privilege -- Whether privilege precludes solicitor from disclosing information relating to affairs of company to receiver -- Securities Act, R.S.O. 1980, c. 466, ss. 11, 17.

A receiver-manager, appointed by the court pursuant to the Securities Act, R.S.O. 1980, c. 466, s. 17, is to preserve the undertaking and assets of the company in question pending completion of an investigation pursuant to s. 11. The function of the receiver-manager is not to investigate the affairs of the company except to the extent necessary to locate and take possession of its assets. Persons appointed pursuant to s. 11 of the Act to conduct an investigation are no more entitled to demand disclosure of privileged information and documents than are peace officers executing a search warrant. The powers of the receiver appointed pursuant to s. 17 are those of the board of directors, but those powers can only be exercised by the receiver-manager for the purposes for which he was appointed. Accordingly, the receiver can waive the privilege to obtain

information regarding the assets and affairs of the company. The report of the receiver-manager to the court is not confidential although it is based in part upon formerly privileged information from the solicitors. However, the receiver-manager does not have authority to waive privilege with respect to an investigation conducted by persons appointed pursuant to s. 11.

Cases referred to

Moss Steamship Co., Ltd. v. Whinney, [1912] A.C. 254

Statutes referred to

Combines Investigation Act, R.S.C. 1970, c. C-23
Loan and Trust Corporations Act, R.S.O. 1980, c. 249, ss. 152, 158a(1)(b) (enacted 1982 (Ont.), c. 62, s. 3); 159 (am. idem, s. 4(1))
Public Inquiries Act, R.S.O. 1980, c. 411, ss. 8, 11
Securities Act, R.S.O. 1980, c. 466, ss. 11, 17

DETERMINATION of a case stated by a commission under the Public Inquiries Act (Ont.); APPEALS from two orders of O'Brien J.

Ian V. B. Nordheimer, for Morrison Commission.

Ronald E. Carr, for Greymac Credit Corporation, Greymac Trust Company and Crown Trust Company, clients.

James J. Carthy, Q.C., for Victor Prousky, solicitor.

Ronald B. Moldaver, Q.C., for Gordon, Traub and Rotenberg, solicitors.

B. P. Bellmore, and D. C. Moore, for Ontario Securities Commission and Coopers and Lybrand Limited, receiver and manager of Greymac Credit Corporation.

The judgment of the court was delivered by

SOUTHEY J.:-- These three matters, a stated case and appeals from two orders of O'Brien J. dated February 21, 1983, all involve questions as to the extent of the solicitor-and-client privilege, and the right of a person appointed to manage the affairs of a corporate client to waive that privilege. I shall deal first with the stated case, because the issues of law are raised clearly in it, without the procedural complexities which exist in the two appeals and may affect their outcome.

The stated case

The stated case was stated to this court by James A. Morrison (the ''Morrison Commission"), who was appointed by the Minister of Consumer and Commercial Relations on November 23, 1982, under s. 152 of the Loan and Trust Corporations Act, R.S.O. 1980, c. 249, to make a special examination and audit of the books, accounts and securities of Seaway Trust Company, Seaway Mortgage Corporation, Greymac Trust Company, Greymac Mortgage Corporation and Crown Trust Company, and to inquire generally into the conduct of the business of those corporations. Under s. 152(4) of the Loan and Trust Corporations Act, the Morrison Commission has the power to summon witnesses and take evidence under oath, and generally has the powers of a commission under Part II of the Public Inquiries Act, R.S.O. 1980, c. 411. Part II applies to the inquiry of the commission, and authorizes it in s. 8 to state a case to the Divisional Court as follows:

> 8. Where any person without lawful excuse,
>
> . . . . .
>
> (b) being in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the commission to be taken or made, or to produce any document or thing in his power or control legally required by the commission to be produced to it, or to answer any question to which the commission may legally require an

answer ...

. . . . .

the commission may state a case to the Divisional Court setting out the facts ...

The stated case stated by the Morrison Commission on February 17, 1983, after its introductory paragraphs, reads as follows:

> As part of the special examination being conducted by me, I have examined various individuals as witnesses under oath. On January 17th, 1983 I attempted to examine Walter M. Traub with respect to matters within the scope of my special examination. Mr. Traub is a solicitor and had acted for Greymac Credit Corporation, Greymac Trust Company and Crown Trust Company at times material to the matters which are the subject of the special examination. Mr. Traub refused to answer a great number of salient questions on the ground that he could not answer such questions without being in breach of the privilege between solicitor and client.
>
> On February 16, 1983 I attempted to examine Victor Prousky, Q.C., on similar matters. Mr. Prousky had also acted for the aforesaid three companies at material times. The nature of the questions asked of Mr. Prousky were similar in kind to those asked of Mr. Traub. Mr. Prousky also objected to answer numerous salient questions on the same ground that Mr. Traub had refused, that is, that to do so would be a breach of solicitor/client privilege.
>
> It was my view that the questions asked of Mr. Traub and Mr. Prousky were proper questions necessary to my special examination and I directed them to answer. Both Mr. Traub and Mr. Prousky refused. Pursuant to section 8 of the Public Inquiries Act of Ontario I am therefore stating this case to the Divisional Court to determine whether Mr. Traub and Mr. Prousky should be compelled to answer such questions and in particular to determine:
>
> 1. Was I right in ruling that answers to the questions asked

did not involve any breach of solicitor/client privilege in the circumstances of this special examination?

2. Was I right in ruling that, even if the answers to the questions asked would have involved a breach of solicitor/client privilege, there can be no such breach now since the privilege has been waived by the person now in charge, possession and control of the clients involved namely, the Registrar under the Loan and Trust Corporations Act of Ontario?

3. Was I right in ruling that the President of a company is not prohibited by solicitor/client privilege from answering questions as to the ownership of that company merely because the President also happens to be a solicitor?

4. Was I right in ruling that solicitor/client privilege does not extend to prohibit a solicitor from answering questions as to the movement of funds into and out of his trust account?

Question 2

I shall deal first with Q. 2, which involves important questions relating to the waiver of the solicitor-and-client privilege.

The registrar under the Loan and Trust Corporations Act, to whom reference is made in Q. 2, was ordered to take possession and control of the assets of Greymac Trust Company and Crown Trust Company by Orders in Council passed on January 7, 1983, under s. 158a(1)(b) of the Loan and Trust Corporations Act, as amended by 1982 (Ont.), c. 62, s. 3. The powers of the registrar resulting from those Orders in Council are derived from s. 159 of the Act, as amended in 1982 [idem, s. 4], which provides, in part, as follows:

159(1) If so ordered by the Lieutenant Governor in Council under section 158 or 158a, the Registrar shall take possession and control of the assets of a provincial corporation and shall thereafter conduct its business and

take such steps as in his opinion should be taken toward its rehabilitation, or where an order is made under paragraph 1 of section 158a, its continued operation, and for such purposes the Registrar has all the powers of the board of directors of the corporation, and, without limiting the generality of the foregoing, the Registrar may,

(a) exclude the directors, officers, servants and agents of the corporation from the premises, property and business of the corporation; and

(b) carry on, manage and conduct the operations of the corporation and in the name of the corporation preserve, maintain, realize, dispose of and add to the property of the corporation, receive the incomes and revenues of the corporation and exercise all the powers of the corporation.

The registrar has informed the Morrison Commission that he is willing to waive the client's privilege of Greymac Trust Company and Crown Trust Company in respect of the questions put by the Morrison Commission to the former solicitors for those corporations, Gordon, Traub & Rotenberg and Victor Prousky.

The nature and importance of the solicitor-and-client privilege were recently considered at some length by the Supreme Court of Canada in Descoteaux et al. v. Mierzwinski and A.-G. Que. et al. (1982), 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, 44 N.R. 462. Lamer J., delivering the judgment of the court, quoted early in his reasons (at p. 601 D.L.R., p. 516 N.R.) from a prior decision of the court in Solosky v. The Queen, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 50 C.C.C. (2d) 495, in which Dickson J. had said [at p. 839 S.C.R., p. 760 D.L.R.]:

"... the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client ...".

He also quoted with approval at p. 609 D.L.R., p. 526 N.R., the following passage from the judgment of Laycraft J.A. in R. v. Littlechild (1979), 108 D.L.R. (3d) 340 at p. 347, 51 C.C.C.

(2d) 406, [1980] 1 W.W.R. 742, emphasizing the importance of the privilege:

> "The privilege protecting from disclosure communications between solicitor and client is a fundamental right -- as fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege. The Courts should be astute to protect both. As long ago as Pearson v. Foster (1885), 15 Q.B.D. 114, Brett, M.R., warned the free and confident communication within the solicitor-client relationship is so vital a part of the right to counsel that the privilege ought not to be "frittered away". At pp. 119-20 he said:
>
> 'The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free and confident communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client ...' "

As to the scope of the privilege, Lamer J. at 603 D.L.R., p. 518 N.R., referred to Wigmore:

> The following statement by Wigmore (8 Wigmore, Evidence, Section2292, p. 554 (McNaughton Rev. 1961), of the rule of evidence is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:
>
> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived."

The Supreme Court of Canada approved the decisions of lower courts that the privilege is not simply a rule of evidence which prevents the disclosure of confidential communications in

evidence at trial, but that the privilege comes into existence at the time when the communications are made. Thus, the privilege protects documents in the hands of a solicitor from seizure under a search warrant issued under the Criminal Code (Re Borden & Elliot and The Queen (1975), 13 O.R. (2d) 248, 70 D.L.R. (3d) 579, 30 C.C.C. (2d) 337 (Ont. H.C.J.)), or from examination by the director of investigation in an inquiry under the Combines Investigation Act, R.S.C. 1970, c. C-23 (Re Director of Investigation & Research and Shell Canada Ltd. (1975), 55 D.L.R. (3d) 713, 22 C.C.C. (2d) 70, 18 C.P.R. (2d) 155 (Federal Ct. of Appeal)).

The privilege applies to items of information that a lawyer requires from a person in order to decide if he will agree to advise or represent him, and remains even if the lawyer does not agree to advise or act. It applies not only to information given before the retainer is perfected concerning the legal problem itself, but also to information concerning the client's ability to pay the lawyer and any other information which a lawyer is reasonably entitled to require before accepting the retainer (Descoteaux v. Mierzwinski at p. 606 D.L.R., p. 522 N.R.).

As is pointed out by Lamer J. at p. 603 D.L.R., p. 518 N.R., communications made to a lawyer in order to facilitate the commission of a crime or fraud will not be privileged, whether or not the lawyer is acting in good faith. This exception to the rule of confidentiality has no application to the cases at bar, because no allegations have been made against any of the clients in these cases that their communications with Gordon, Traub & Rotenberg or Victor Prousky were in furtherance of a crime or fraud.

The Public Inquiries Act itself clearly stipulates that a commission may not compel a witness to give evidence that is privileged. Section 11 of the Act reads as follows:

> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

The issue raised in Q. 2 in the stated case is whether the solicitor-and-client privilege, which has been recognized by the courts as being of such fundamental importance to our legal system, can be waived by the registrar under the Loan and Trust Corporations Act on behalf of Greymac Trust and Crown Trust, in order to assist the Morrison Commission in its inquiry into the conduct of the business of Seaway Trust Company, Seaway Mortgage Company, Greymac Trust Company, Greymac Mortgage Corporation and Crown Trust Company.

Counsel for the commission, in urging that the answer to Q. 2 should be in the affirmative, relied on the decision of McDermott J. in Re Cirone, Sabato and Priori (Con-Form Construction Co.) (1965), 8 C.B.R. (N.S.) 237, that a trustee of a bankrupt client steps into the shoes of the bankrupt and may waive the solicitor-and-client privilege to obtain confidential information from the bankrupt's solicitor. McDermott J. relied on the following passage in 2 Hals., 3rd ed., p. 408:

> The solicitor of a person who afterwards becomes bankrupt cannot set up against the trustee in the bankruptcy any privilege which is the client's.

The decision in Re Cirone et al. was followed by MacDonald J. in the Alberta Queen's Bench (in Bankruptcy) in Re Abacus Cities Ltd. (1981), 128 D.L.R. (3d) 566, 40 C.B.R. (N.S.) 172, 16 Alta. L.R. (2d) 279.

The decision in Re Cirone et al. is not determinative of the issue raised in Q. 2, in my judgment, because of the differences between the purposes for which a trustee in bankruptcy is appointed, and the purposes, as stated in s. 159 of the Loan and Trust Corporations Act, for which the registrar was ordered to take possession and control of the assets of Greymac Trust and Crown Trust. The object of a bankruptcy, as was pointed out by the late R. W. S. Johnston, Q.C., in his lecture on "Receivers" in Special Lectures of the Law Society of Upper Canada (1961), Remedies, 101 at p. 113, is to liquidate the assets of the bankrupt and distribute them amongst the creditors. The purposes for which the registrar was

ordered to take possession and control of the assets of Greymac Trust and Crown Trust were to conduct the businesses of those corporations and take such steps as in his opinion should be taken towards their rehabilitation or continued operation. Section 159 of the Loan and Trust Corporations Act expressly provides that the registrar has his powers "for such purposes". The result of the Orders in Council is that the registrar has all the powers of the boards of directors of Greymac Trust and Crown Trust, which would include the power to waive a solicitor-and-client privilege of either of those corporations, but those powers are expressly conferred for the purposes for which the registrar was ordered to take control. It is no part of those purposes, in my judgment, to render assistance to the Morrison Commission in its inquiry into the affairs of Greymac Trust and Crown Trust and other corporations. That being so, the registrar, in my judgment, has no right to waive the solicitor-and-client privilege of Greymac Trust or Crown Trust so that their solicitors or former solicitors may be free to disclose confidential information to the commission.

This conclusion is consistent with the clear implication of the decision of Osler J. in Re Presswood et al. and Int'l Chemalloy Corp. (1975), 11 O.R. (2d) 164, 65 D.L.R. (3d) 228, 25 C.P.R. (2d) 33, that the Clarkson Company Limited, which had been appointed receiver of Chemalloy in other proceedings (the nature of which is not disclosed in his decision), was the only person qualified to claim the privilege, and was prepared to waive it, could not waive the privilege of Chemalloy in order to make privileged material available to an inspector appointed under s. 186(1) of the Business Corporations Act, R.S.O. 1970, c. 53. Section 186(3) of the Act required every director, officer, agent, employee, etc. of the corporation, and every other person to produce for the examination of the inspector all accounts and records of or relating to the affairs of the corporation in their custody or control. It was submitted that the receiver could waive the privilege, but Osler J. refused to permit a general inspection by the inspector (who was also the Clarkson Company) because the inspector had been appointed at the instance of one Delzotto (presumably a shareholder of Chemalloy outside the control group), and was under a duty to report to Delzotto, as well as the court. Osler J. said there

might be a conflict of interest in such a situation, and that this pointed up the necessity of insuring that whatever proper privilege existed should be claimed and exercised in the interest of the client corporation. He did not decide as to what documents, or classes of documents, the privilege related, but directed that the bundle of documents seized from a director of Chemalloy, who was also its solicitor, should be opened in the presence of the solicitor, or his solicitor, who would have the right to claim privilege for any particular letter. Such direction would obviously have been unnecessary, if Osler J. had thought that the receiver had the power to waive the privilege.

The answer to Q. 2 is "NO".

Question 4:

4. Was I right in ruling that solicitor/client privilege does not extend to prohibit a solicitor from answering questions as to the movement of funds into and out of his trust account?

The other questions in the stated case relate to matters involving clients, about which, it is submitted by counsel for the commission, a solicitor may be compelled to testify without any waiver by the client of the solicitor-and-client privilege. It is convenient to deal first with Q. 4 quoted above.

The only case directly in point that was cited to us was the decision of Clyne J. in the Federal Court of Bankruptcy in Australia in Re Furney, a debtor, [1964] A.L.R. 814. There a solicitor for a bankrupt, when summoned by the registrar in bankruptcy to attend and give evidence relating to moneys received from the debtor, or held in trust for the debtor, or paid from his trust account to the debtor, refused to answer on the grounds of solicitor-and-client privilege. He also refused to produce documents relating to such payments. In very short reasons, Clyne J. ruled that the solicitor was obliged to answer the questions, and should produce any relevant documents, because the privilege was intended to protect communications, whereas the questions related to "questions of

objective fact".

In my judgment, if I may say so with respect, the Furney case was rightly decided. Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged, and the solicitor may be compelled to answer the questions and produce the material.

It may be helpful to ask in such a case whether the client himself if he were the witness, could refuse on the ground of the solicitor-and-client privilege to disclose particulars of a transaction directed by him through his solicitor's trust account. The fact that a client has paid to, received from, or left with his solicitor a sum of money involved in a transaction is not a matter as to which the client himself could claim the privilege, because it is not a communication at all. It is an act. The solicitor-and-client privilege does not enable a client to retain anonymity in transactions in which the identity of the participants has become relevant in properly constituted proceedings.

The answer to Q. 4 is "YES". In answering questions as to the movement of funds into and out of his trust account, the solicitor must give the source and recipient of payments, and produce for inspection his books and records relating thereto.

Question 1

1. Was I right in ruling that answers to the questions asked did not involve any breach of solicitor/client privilege in the circumstances of this special examination?

This question is too general. A stated case should be specific as to the questions sought to be put. It must at least specify the type of question as to which the direction of the court is sought.

Mr. Nordheimer stated at the beginning of his argument that the questions in issue fall into three categories.

1. Whether disclosure by the solicitor of the name of his client is protected by the solicitor-and-client privilege.

2. Whether particulars of receipts and disbursements of funds through a solicitor's trust account are the subject of the solicitor-and-client privilege.

3. Whether an individual who is the president of a company, but who also is a solicitor, can refuse to answer questions about the company on the ground that his knowledge is protected by the solicitor-and-client privilege.

The only one of those three categories that is not covered by questions in the stated case which I have answered, or shall answer shortly, is the first question, as to disclosure of the name of the client. I shall deal with that question next.

The general rule is that whenever a solicitor asserts that a communication is protected by the solicitor-and-client privilege, he cannot refuse to identify the client on whose behalf the privilege is asserted, because the identity of his client is not the subject of a professional confidence: see Bursill v. Tanner (1885), 16 Q.B.D. 1, per Lord Esher at p. 4.

As I have earlier said in connection with Q. 4, a solicitor cannot withhold as privileged the name of a client on whose behalf he receives, pays, or holds money, if the identity of the person paying, receiving, or holding such money becomes relevant in legal proceedings. The same rule applies, in my judgment, whenever a solicitor does any act on behalf of a client, and it becomes relevant in legal proceedings to determine on whose behalf the act was done. The doing of an act does not fall within the ambit of the privilege, because it is not a communication at all.

I am not prepared to go so far as to say that circumstances can never arise in which a solicitor being examined in legal

proceedings would be justified in refusing to disclose the name of a client, or former client. It suffices to say that none of the questions before the commission that were the subject of argument before us arose out of circumstances which would justify the withholding by the solicitor or former solicitor of the names of his clients.

Question 3

3. Was I right in ruling that the President of a company is not prohibited by solicitor/client privilege from answering questions as to the ownership of that company merely because the President also happens to be a solicitor?

The law relating to this question is stated as follows by Morrison C.J.S.C. (B.C.) in Canary v. Vested Estates Ltd., [1930] 3 D.L.R. 989 at p. 990, [1930] 1 W.W.R. 996 at p. 998, 43 B.C.R. 1:

> The fact that a person is by profession a solicitor and is intrusted with and performs duties which can be and usually are, performed by an official, servant or agent of a company does not render him immune from examination on discovery if he performs those duties. In this particular transaction I am inclined to believe that the defendant company is advised to take refuge behind one who in reality was an agent or servant engaged for this particular negotiation along with his associate Austin. He was not clothed for this particular transaction with the professional duties of a solicitor by the defendants. Mr. Brougham [the solicitor], as agent or servant or agent ad hoc of the defendants being in possession of knowledge which is relevant to the issues herein and which is necessary for the proper and final determination of the matters in dispute, I think must submit to be examined as applied for.
>
> The character of the particular work performed and in respect of which examination is sought, is to be looked at.

In Re Presswood and Int'l Chemalloy Corp., supra, Osler J. referred [at p. 165 O.R., p. 229 D.L.R.] to Canary v. Vested

Estates Ltd. as "authority, if one is needed, for the proposition that not every communication or transaction between persons, one of whom happens to be the solicitor of the other, is privileged". He also quoted [at pp. 166-7 O.R., pp. 230-1 D.L.R.] the following passage from the judgment of Lord Denning M.R. in Alfred Crompton Amusement Machines Ltd. v. Com'rs of Customs & Excise (No. 2), [1972] 2 All E.R. 353; affirmed [1973] 2 All E.R. 1169, at pp. 376-7 of the earlier report:

> "It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser. It is true, as the Law Reform Committee said in their report in 1967 that the 'system is susceptible to abuse', but I have never known it abused. So much so that I do not think the law should be changed in the way that the judge would have it. There is a safeguard against abuse. It is ready to hand. If there is any doubt as to the propriety or validity of a claim for privilege, the master or the judge should without hesitation inspect the documents himself so as to see if the claim is well-founded, or not."

It follows from these authorities that the president of a company, who is also a solicitor, cannot assert the solicitor-and-client privilege in respect of information acquired by him in the performance of duties that can be, and usually are, performed by an employee or agent of the company who is not a solicitor.

One must next ask whether knowledge as to "ownership" of the company would ordinarily be acquired by a president who was not a solicitor? It is obvious that such a president would have, or could acquire, the names of the registered shareholders of the company, and no president, in my judgment, can lawfully refuse to disclose such information on the ground that it is privileged.

It appears from the transcript of the examination of Victor Prousky by the Morrison Commission that the commission was asking for information as to the beneficial ownership of shares of the companies involved. The beneficial owners may not be the registered owners of the shares, and the president may or may not know the identity of the beneficial owners. If the president is a solicitor, information as to the identity of the beneficial owners may have come to him in his capacity as a solicitor. If so, it would be privileged, unless the shares were held for the client in the name of the solicitor, or a partner, employee or agent of the solicitor. In that case, holding the shares for the client, but in the name of the solicitor or his partner, employee or agent, would be like holding money for a client in the solicitor's trust account. As with money in his trust account, the solicitor must give particulars of the beneficial ownership of shares held by him for clients, when such particulars are relevant in any duly constituted legal proceedings. Such particulars relate to acts or transactions, not to communications.

Applying the test suggested above in connection with Q. 4, the client, if giving evidence himself, would be obliged to disclose that his solicitor was holding shares for him. Particulars of such holdings are, therefore, not privileged.

To sum up, the answer to Q. 4 is "YES" in respect of the names of registered owners of shares, but not necessarily as to the names of persons beneficially entitled, who are not the registered owners of shares, unless the shares are registered in the name of the solicitor, or in the name of a partner, employee or agent of the solicitor.

An order will go declaring that the answers to the questions in the stated case are as stated in the foregoing reasons. There will be no costs of the stated case.

The appeals from the two orders of O'Brien J. of February 21, 1983 (Ontario Securities Commission v. Greymac Credit and Ontario Securities Commission v. Victor Prousky)

The reasons for judgment of O'Brien J. released on February 21, 1983, disposed of two motions by the Ontario Securities Commission ("OSC") which were heard together and which involved the assertion of a solicitor-and-client privilege in respect of Greymac Credit Corporation by the same solicitors who raised such privilege on behalf of Greymac Trust and Crown Trust before the Morrison Commission.

The first motion (OSC v. Greymac Credit) related to the refusal of those solicitors, Gordon, Traub and Rotenberg and Victor Prousky, as former solicitors for Greymac Credit, to deliver the property of their former client to Coopers & Lybrand Limited, which had been appointed receiver and manager of Greymac Credit by order of the court under s. 17(2) of the Securities Act, R.S.O. 1980, c. 466, and to answer questions put by the receiver and manager relating to the affairs of their former client.

The second motion (OSC v. Victor Prousky) related to the refusal of Victor Prousky, on the grounds of solicitor-and-client privilege, to answer questions put to him by persons appointed by the OSC under s. 11(2) of the Securities Act to make an investigation into the affairs of Greymac Credit.

In both cases, the information refused by the solicitors included information as to large sums of money belonging to Greymac Credit that had been paid to the solicitors.

Coopers & Lybrand Limited was originally appointed receiver and manager of Greymac Credit under s. 17(2) of the Securities Act by order of Maloney J. made ex parte on January 21, 1983. The appointment was to continue until February 4, 1983. An application to set aside the order of Maloney J. was dismissed on January 25, 1983, by Montgomery J. On February 4, 1983, O'Brien J. made a further order appointing Coopers & Lybrand Limited until March 31, 1983, as receiver and manager of all property in the possession of or under the control of Greymac Credit. The order required the receiver and manager to report to the court and to the OSC as to its findings and conclusions regarding the affairs of Greymac Credit on or before March 31, 1983.

The order of O'Brien J. of February 4, 1983, also contained the following provisions:

> 3. AND IT IS FURTHER ORDERED that Greymac Credit Corporation their officers, directors, trustees, servants, solicitors and agents, do forthwith deliver to the said Coopers & Lybrand Limited as such Receiver and Manager or to such agent or agents or counsel as it may appoint, all of the said property and all books, documents, papers, deeds and records of every nature and kind whatsoever and wherever situate relating to the said Respondent.
>
> 4. AND IT IS FURTHER ORDERED that the said Receiver and Manager be and it is hereby authorized and empowered to subpoena witnesses and conduct examinations under oath in relation to the affairs of Greymac Credit Corporation.

The provisions I have quoted obviously resulted from the difficulties being encountered by the receiver and manager in locating and taking possession of the assets owned by or otherwise in the possession of Greymac Credit, including the sum of $7,500,000 that had apparently been paid to the solicitors of Greymac Credit. The order contained the following recital: "and nothing in this order shall be deemed to affect any applicable solicitor client privilege".

A motion for leave to appeal from the order of O'Brien J. of February 4, 1983, appointing Coopers & Lybrand as receiver and manager for Greymac Credit was brought before Labrosse J. on March 8, 1983. It was argued particularly that the paragraphs of the order authorizing the examination of witnesses, and directing the receiver and manager to report to the OSC and the court were in error. Labrosse J. dismissed the application for leave to appeal, and in my view, it is no longer open to Greymac Credit to question the validity of any part of the order of O'Brien J. of February 4, 1983, appointing Coopers & Lybrand as receiver and manager.

On February 4, 1983, O'Brien J. also dismissed an application brought by Greymac Credit for an order directing Coopers &

Lybrand to retain counsel independent of the solicitors acting for the OSC, and to refrain from consulting with the OSC, or its counsel, with respect to matters concerning Greymac Credit. O'Brien J. further dismissed on February 4, 1983, an application by Greymac Credit to discharge Coopers & Lybrand as receiver and manager of Greymac Credit on the grounds, inter alia, that it had failed to maintain a position of neutrality between the OSC and Greymac Credit, had retained as counsel Messrs. Lockwood, Bellmore and Moore, who were the same solicitors as were retained to act for the OSC in the matter, and were carrying out an investigation for and on behalf of the OSC to determine the status of a deposit of $7,500,000 paid by Crown Trust to Greymac Credit. No leave was sought to appeal the orders of O'Brien J. of February 4, 1983, dismissing the motions referred to in this paragraph.

By order dated January 25, 1983, the OSC appointed G. W. Curran and others under s. 11(2) of the Securities Act to make an investigation for the due administration of the Act into the affairs of Greymac Credit during the period from September 1, 1982, to the date of the order.

The powers of the investigators so appointed are derived from s-ss. (3) and (4) of s. 11 of the Securities Act, which read as follows:

> 11(3) For the purposes of any investigation ordered under this section, the person appointed to make the investigation may investigate, inquire into and examine,
>
> (a) the affairs of the person or company in respect of whom the investigation is being made and any books, papers, documents, correspondence, communications, negotiations, transactions, investigations, loans, borrowings and payments to, by, on behalf of or in relation to or connected with the person or company and any property, assets or things owned, acquired or alienated in whole or in part by the person or company or by any person or company acting on behalf of or as agent for the person or company; and
>
> (b) the assets at any time held, the liabilities, debts,

undertakings and obligations at any time existing, the financial or other conditions at any time prevailing in or in relation to or in connection with the person or company and the relationship that may at any time exist or have existed between the person or company and any other person or company by reason of investments, commissions promised, secured or paid, interests held or acquired, the loaning or borrowing of money, stock or other property, the transfer, negotiation or holding of stock, interlocking directorates, common control, undue influence or control or any other relationship.

(4) The person making an investigation under this section has the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise, and to produce documents, records and things, as is vested in the Supreme Court for the trial of civil actions, and the failure or refusal of a person to attend, to answer questions or to produce such documents, records and things as are in his custody or possession makes the person liable to be committed for contempt by a judge of the Supreme Court as if in breach of an order or judgment of the Supreme Court provided that no provision of the Evidence Act exempts any bank or any officer or employee thereof from the operation of this section.

The former solicitors for Greymac Credit refused to deliver all of the property of Greymac Credit to Coopers & Lybrand, despite the provision to do so that was contained in the order appointing Coopers & Lybrand as receiver and manager of Greymac Credit. The former solicitors also made it clear that they would not answer questions about the affairs of Greymac Credit of the type I have dealt with in the stated case in any examination by the receiver and manager under its order of appointment, or by the investigators appointed under s. 11 of the Securities Act. The OSC then brought motions for rulings as to the extent to which the former solicitors could rely on the solicitor-and-client privilege of Greymac Credit as against the receiver and manager, and as against the investigators appointed under s. 11 of the Securities Act. These motions were argued together before O'Brien J. on February 18, 1983.

In reasons for judgment delivered on February 21, 1983, O'Brien J. held that the solicitor-and-client privilege, if it existed, could be waived by the receiver and manager. Counsel had agreed that one decision by him would apply to both applications. The effect of his decision, therefore, was to hold that the receiver and manager could waive the solicitor-and-client privilege of Greymac Credit both in its examinations of the solicitors in connection with its duties as receiver and manager and in respect of the investigation under s. 11 of the Securities Act.

Linden J. granted leave to appeal to this court from the order of February 21, 1983, in OSC v. Greymac Credit, the application dealing with the right of waiver in connection with the inquiries by the receiver and manager. The grounds for the granting of leave were that the decision of O'Brien J. appeared to be in conflict with the decision of Osler J. in Re Presswood et al. and Int'l Chemalloy Corp. (1975), 11 O.R. (2d) 164, 65 D.L.R. (3d) 228, 25 C.P.R. (2d) 33, and it was desirable that an appeal be allowed. Linden J. assumed that the order under appeal was interlocutory in nature.

The order regarding the investigation under s. 11 of the Securities Act was appealed by Greymac Credit directly to the Court of Appeal. We were informed that the Court of Appeal held that an appeal did not lie to it, because the order below was interlocutory. In order that all matters might be heard together, I granted leave to appeal the order to this court, for the reasons given by Linden J. in the case of the other order.

Decision on the appeal in OSC v. Greymac Credit

The duty of Coopers & Lybrand, as receiver and manager appointed under s. 17 of the Securities Act by the order of O'Brien J. of February 4, 1983, was and is, in its role as receiver, to locate and take possession of property belonging to Greymac Credit on behalf of, or in trust for, any other person or company. As manager, it was and is the responsibility of Coopers & Lybrand to manage the business of Greymac Credit for the time being. The appointing order states in several

places, where special powers are given to the receiver and manager, that they are given for the protection of the undertaking, property and assets of Greymac Credit.

The receiver and manager was appointed by the court, not by the OSC, and its purpose, in my view, is to preserve the undertaking and assets of Greymac Credit pending completion of the investigation of Greymac Credit by investigators appointed by the OSC under s. 11 of the Securities Act, or pending the expiry of other sanctions imposed by the OSC under s. 17(1) that may affect its ability to carry on business. It is only to that extent, in my view, that the appointment of the receiver and manager under s. 17(2) can be said to be a part of the investigating process, as was suggested by Labrosse J. in his endorsement of March 8, 1983, refusing leave to appeal from the order of O'Brien J. of February 4, 1983, appointing the receiver.

The function of the receiver and manager is not to investigate the affairs of Greymac Credit, except to the extent necessary to locate and take possession of its assets. If it was intended that Coopers & Lybrand should investigate generally the affairs of Greymac Credit, Coopers & Lybrand should have been appointed by the OSC for that purpose under s. 11 of the Act. Persons appointed by the OSC under s. 11 are no more entitled to demand disclosure of privileged information and documents than are peace officers executing a search warrant, or the director of investigation under the Combines Investigation Act. It is significant that the OSC has no power to appoint a receiver or a receiver and manager under s. 11. That power can only be exercised by the court under s. 17. A receiver and manager thus appointed is an officer of the court, and responsible to the court.

Greymac Credit still exists as a legal entity. The effect on a corporation of the appointment of a receiver and manager was described by the House of Lords in Moss Steamship Co., Ltd. v. Whinney, [1912] A.C. 254 at p. 263, in the following passage quoted by O'Brien J.:

> This appointment of a receiver and manager over the assets

and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.

The powers of the board of directors of Greymac Credit to manage the affairs of the corporation are held for the time being by the receiver and manager. Included in these powers, in my judgment, is the power to waive any solicitor-and-client privilege of the corporation. But that power of waiver, like the other powers of the board of directors held by the receiver and manager, can be exercised by the receiver and manager only for the purposes for which it was appointed. Thus, the receiver and manager, as was held by the learned judge below, can waive the privilege to obtain information regarding the assets and affairs of the company from a solicitor or former solicitor of the company. Neither Gordon, Traub and Rotenberg nor Victor Prousky can lawfully refuse to answer questions put to them by, or on behalf of, the receiver and manager, regarding the assets and affairs of Greymac Credit, because the receiver and manager can waive the solicitor-and-client privilege of Greymac Credit upon which the solicitors now rely as justification for their refusal to answer.

The receiver and manager is required under the order of O'Brien J. of February 4, 1983, to report to the court and to the OSC "as to its findings and conclusions regarding the affairs of Greymac Credit on or before the 31st day of March, 1983". No doubt that date may be extended, if necessary, because of the delays resulting from the events and proceedings that led to the matters before this court. There is no merit, in my view, in the submission that such report should be confidential, if it is based, in part, on information received from the solicitors that was formerly privileged. The submission is that the report should be for the eyes of the

court only, and should be sealed. That suggestion is quite unrealistic, in my view, because the court is not equipped or qualified to deal with the report from the receiver and manager without hearing the submissions of counsel for interested persons. One of those persons is the OSC. As Labrosse J. pointed out, the OSC is a public body, and its duty is to protect the interests of members of the public who are creditors of, or otherwise interested in, Greymac Credit.

In any event, it is obvious that the likelihood of the report being based to any great extent on privileged material is greatly reduced by the finding above on the stated case, that many of the matters as to which those solicitors have asserted the privilege are not protected by the privilege, apart altogether from the question of waiver.

For the foregoing reasons, the appeal from the order of O'Brien J. in the application OSC v. Greymac Credit Corp. is dismissed. There will be no order as to costs.

Decision on the appeal in OSC v. Victor Prousky

With the greatest deference to the learned judge below, I think he was wrong in holding that the receiver and manager has power to waive the solicitor-and-client privilege of Greymac Credit for the purpose of requiring the former solicitors to answer questions put to them by the persons appointed under s. 11 of the Securities Act to investigate the affairs of Greymac Credit. This conclusion follows from the views expressed above that the powers of the receiver and manager can be validly exercised only for the purposes for which the receiver and manager was appointed. As the investigation of the affairs of Greymac Credit is not one of those purposes, the power to waive the solicitor-and-client privilege cannot be exercised in order to make available to the investigators privileged information and material that they could not otherwise obtain.

On the other hand, it is apparent from the findings above that much of the information and material refused by the former solicitors is not privileged. I think that the reasons above respecting the stated case will provide sufficient guidance as

to what is privileged and what is not.

The appeal, therefore, is allowed, and the order below is varied by adding to para. 2 thereof the words "except to the extent that such questions require the disclosure of information that is subject to the solicitor-and-client privilege of Greymac Credit Corporation."

Again, there will be no costs of the appeal.

Orders accordingly.

2020 - 08 - 22

Law of Privilege in Canada

Chapter 11 — SOLICITOR-CLIENT PRIVILEGE

Chapter 11 — SOLICITOR-CLIENT PRIVILEGE

11.10 — SUMMARY OF SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege protects the direct communications — both oral and documentary — prepared by the lawyer or client and flowing between them, in connection with the provision of legal advice. The communication must be intended to be made in confidence, in the course of seeking or providing legal advice, and must be advice based upon the professional's expertise in law.

The privilege belongs to the client, not the solicitor and can, therefore, only be waived by the client. Waiver can be voluntary or implicit. Examples of waiver include where the communication was evidence in a previous action, where the communication was sent to a third party, where the document in question is handed by one party to the opposing party or where the client instructs the lawyer to communicate with a third party.

Originally, privilege was only asserted at trial, but recently there has been an extension of privilege to discovery, to the early investigative stage of the case and non-litigious contexts. Most privilege assertions occur in the oral and written discovery process in civil litigation cases, in the Crown disclosure stage or during testimony in criminal cases, on the ground of the necessity of confidentiality in obtaining good and complete legal advice and the inextricable connection of that purpose with the administration of justice.

Solicitor-client privilege is no longer considered to be a rule of evidence, but a substantive rule that has evolved into a fundamental civil and constitutional right.

Solicitor-client privilege is not absolute, but it is the privilege that is as close to absolute as possible to ensure public confidence and retain relevance. It will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis.

The exceptional circumstances in which solicitor-client privilege can yield are where other societal interests prevail. Those exceptions include: where an accused's innocence is at stake; where the communications at issue are criminal or have a view to facilitate the commission of a crime; or where public safety requires protection.

Where there is a conflict over whether a certain communication is subject to solicitor-client privilege, it should be resolved in favour of protecting the privilege.

Solicitor-client privilege applies to government and in-house lawyers. The determination of whether there is a solicitor-client relationship in any given circumstance, and thus whether the communications are subject to solicitor-client privilege, depends on the nature of the relationship, the subject-matter of the advice and the circumstances in which the advice was sought and rendered.

11.20 — KEY POINTS TO REMEMBER CONCERNING SOLICITOR-CLIENT PRIVILEGE

The key points to remember concerning solicitor-client privilege are:

→ Originally a law of evidence, solicitor-client privilege has now been extended to a substantive legal right.

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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(Receiver's Access to ATS Documents, returnable August 28, 2020)

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