

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH
QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ, and
CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

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

**COMPENDIUM OF THE
RESPONDENT, THE RECEIVER**

LENCZNER SLAGHT LLP

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

Monique J. Jilesen (43092W)

Tel: (416) 865-2926
Fax: (416) 865-9010
Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018
Fax: (416) 865-9010
Email: dknoke@litigate.com

Lawyers for the Respondent,
the Receiver

TO: **THE SERVICE LIST**

INDEX

Tab	Description	Page
1	Judgment of Newbould J. re oppressive conduct and costs award, October 28, 2015	1
2	Order of Newbould J. re Costs Award to Margarita, December 21, 2015	4
3	Order of the Divisional Court re dismissal of appeal, December 30, 2016	7
4	Excerpt from M. Castillo Affidavit of January 14, 2019 at para. 43 (Juan Guillermo Gutierrez Motion Record dated January 23, 2023 (“JGG MR”) Tab 5C, pp.905-906	10
5	Order of McEwen J. Appointing Receiver (copy Certified on 2020.02.06), July 5, 2019	13
6	Excerpt of Juan Guillermo Gutierrez Affidavit of February 22, 2021 at paras. 23-108, JGG MR, Tab 5G, pp. 964-1000	30
7	Excerpt of Responding Factum of Juan Guillermo Gutierrez, March 18, 2021, at paras. 7, 31, JGG MR, Tab 5H, pp. 1010, 1017-1018	68
8	Endorsement of McEwen J. re various issues, along with unofficial transcription of same, March 25, 2021	72
9	Order of McEwen J. re Investigative Powers and Fees, March 25, 2021	100
10	Endorsement of McEwen J. re costs, along with unofficial transcription of same, March 25, 2021	108
11	Endorsement of McWatt ACJSCJ, Sachs and Penny JJ. in Divisional Court, July 9, 202	126
12	Endorsement of McEwen J. re productions and contempt motion, March 2, 2022	127
13	Notice of Motion of Mr. Gutierrez dated March 25, 2022, JGG MR, Tab 5I, pp. 1044-1057	129
14	Endorsement of McEwen J. re compliance with Productions Orders, March 25, 2022	143
15	Transcription of Endorsement of McEwen J. re compliance with Product, March 25, 2022	156
16	Order of McEwen J. re Compliance with Productions Orders, March 25, 2022	160
17	Notice of Motion of Juan Guillermo Gutierrez re stay, March 28, 2022, JGG MR, Tab 5J, pp. 1059-1073	165
18	Notice of Motion of Juan Guillermo Gutierrez for Leave to Appeal, March 30, 2022, JGG MR, Tab 5K, pp. 1075-1089	180

Tab	Description	Page
19	Affidavit of Grace Tsakas. Sworn November 15, 2022, at para. 20, 21, JGG MR, Tab 5, p. 889	195
20	Notice of Motion of Juan Guillermo Gutierrez, February 9, 2021, JGG MR, Tab 5F, pp. 949-961	197
21	Endorsement of McEwen J. re refusal to schedule motion, July 25, 2022	210
22	Endorsement on Security for Costs of McEwen J., December 1, 2022	212
23	Unofficial Transcription of Endorsement on Security for Costs of McEwen J., December 1, 2022	227
24	Order of McEwen J. re Production of Documents, August 28, 2020	232
25	Order of McEwen J. re Protocol to image Juan Guillermo Gutierrez's devices, October 27, 2020	240
26	Order of McEwen J. re Imaging servers under ATS' control, October 27, 2020	246
27	Excerpt of July 25, 2017 Transcript of Examination in Aid of Execution of Juan Guillermo Gutierrez, JGG MR, Tab 5A, pp. 892-894	252
28	Excerpt of August 30, 2018 Transcript of Continued Examination in Aid of Execution of Juan Guillermo Gutierrez, JGG MR, Tab 5B, pp. 896, 898-900	255
29	Teraview search results in ALL counties re Juan Guillermo Gutierrez, November 15, 2022, JGG MR, Tab 5N, pp. 1106-1107	259
30	Parcel Registers showing Juan Guillermo Gutierrez no longer on title, November 15, 2022, JGG MR, Tab 5O, pp. 1109-1116	261

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE) WEDNESDAY, THE 28th
)
MR. JUSTICE NEWBOULD) DAY OF OCTOBER, 2015

BETWEEN:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents



JUDGMENT

THIS APPLICATION, heard only with respect to issues relating to the respondent, Tropic International Limited ("**Tropic**"), was heard on June 4 and June 5, 2015, at the Court House, 330 University Avenue, Toronto, Ontario, in the presence of the lawyers for Margarita Castillo ("**Margarita**"), Xela Enterprises Ltd. ("**Xela**"), Tropic, Fresh Quest, Inc. ("**Fresh Quest**"), 696096 Alberta Ltd., Juan Guillermo Gutierrez ("**Juan**") and Juan Arturo Gutierrez ("**Arturo**").

ON READING THE APPLICATION RECORDS, COMPENDIA, FACTA AND BOOKS OF AUTHORITIES and upon hearing the submissions of the lawyers for the parties appearing in this application,

AND FOR THE REASONS set out in the Reasons for Judgment dated October 28, 2015,

1. **THIS COURT DECLARES THAT** the respondents, other than 696096 Alberta Inc., engaged in conduct that was oppressive to Margarita's interests as a director and shareholder of Tropic, within the meaning of section 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16;
2. **THIS COURT ORDERS AND ADJUDGES THAT** the fair value of Margarita's 100 common shares in Tropic is \$4,250,000.00;
3. **THIS COURT ORDERS THAT** Arturo, Juan and Xela jointly pay Margarita \$4,250,000.00 for her 100 common shares held in Tropic;
4. The remaining issues in the application, including the issue of costs, will be addressed separately.

This judgment bears interest at the rate of 2 per cent per year from its date.



NOV 27 2015

R. Ittleman, Registrar
Superior Court of Justice

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

NOV 27 2015



MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.

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

Respondents

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

JUDGMENT

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto ON M5X 1A4

Jeffrey S. Leon (LSUC# 18855L)
Tel: (416) 777-7472
leonj@bennettjones.com

Jason W.J. Woycheshyn (LSUC# 53318A)
Tel: (416) 777-4662
Fax: (416) 863-1716
woycheshynj@bennettjones.com

Lawyers for the applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE) WEDNESDAY, THE 21st
)
MR. JUSTICE NEWBOULD) DAY OF DECEMBER, 2015

BETWEEN:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents



ORDER

THIS APPLICATION, heard only with respect to issues relating to the respondent, Tropic International Limited ("**Tropic**"), was heard on June 4 and June 5, 2015, at the Court House, 330 University Avenue, Toronto, Ontario, in the presence of the lawyers for Margarita Castillo ("**Margarita**"), Xela Enterprises Ltd. ("**Xela**"), Tropic, Fresh Quest, Inc. ("**Fresh Quest**"), 696096 Alberta Ltd., Juan Guillermo Gutierrez ("**Juan**") and Juan Arturo Gutierrez ("**Arturo**").

AND WHEREAS Judgment was granted in favour of Margarita on October 28, 2015, with the issue of costs to be addressed separately.

ON READING THE COSTS SUBMISSIONS of the parties, including the Bill of Costs of Margarita,


AND FOR THE REASONS set out in the Cost Endorsement dated December 21, 2015,

1. **THIS COURT ORDERS THAT** the respondents, other than 696096 Alberta Inc., pay Margarita a total of \$889,858.21 for costs, disbursements and expert fees associated with this portion of the Application.
2. The amount ordered to be paid in paragraph 1, above, bears interest at the rate of 2 per cent per year from the date of this Order.



THE HONOURABLE MR. JUSTICE NEWBOULD

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

 JAN 06 2016

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.

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

Respondents

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto ON M5X 1A4

Jeffrey S. Leon (LSUC# 18855L)
Tel: (416) 777-7472
leonj@bennettjones.com

Jason W.J. Woycheshyn (LSUC# 53318A)
Tel: (416) 777-4662
Fax: (416) 863-1716
woycheshynj@bennettjones.com

Lawyers for the applicant

Divisional Court File No. 65/16

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

THE HONOURABLE)

)

FRIDAY, THE 30th

JUSTICE MOLLOY)

)

JUSTICE DAMBROT)

)

DAY OF DECEMBER, 2016

JUSTICE VARPIO)

)

BETWEEN:

MARGARITA CASTILLO

Respondent / 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**

Appellants / Respondents

ORDER

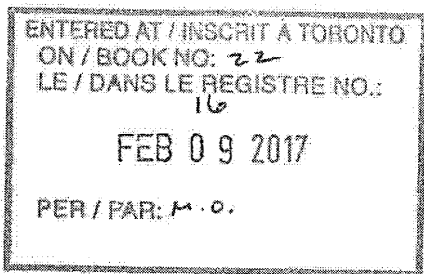
THIS APPEAL, by the appellants of the Judgment of The Honourable Justice Newbould dated October 28, 2015 (the "Judgment") and the Order of Justice Newbould dated December 21, 2015 (the "Costs Order"), was heard on September 26, 2016 at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the materials filed, including the Appeal Book and Compendium of the Appellants, the Exhibit Books, the Respondent's Compendium, and the Facta and Books of

Authorities of the Appellants and Respondent, and on hearing the submissions of counsel for the Appellants and Respondent, ^{v.v.} judgement reserved to this day, ^{-v.v.}

1. **THIS COURT ORDERS** that leave to appeal the Costs Order is granted;
2. **THIS COURT ORDERS** that the appeal of the Judgment and the Costs Order is dismissed; and
3. **THIS COURT ORDERS** that the respondent, Margarita Castillo, is awarded \$76,096.47 for the costs of this appeal, inclusive of HST, fees and disbursements, and payable by the Appellants within 30 days from the date of this Order.

THIS ORDER BEARS INTEREST at the rate of 2.0 per cent per year commencing on January 30, 2017.



W. W. W. W.
A/Assistant - Registrar

MARGARITA CASTILLO
Respondent / Applicant

-and-

XELA ENTERPRISES LTD. ET AL.
Appellants / Respondents

Divisional Court File No. 65/16

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

Proceeding commenced at Toronto

ORDER

BENNETT JONES LLP
Barristers & Solicitors
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Jeffrey S. Leon (LSUC No. 18855L)
Jason W. Woycheshyn (LSUC No: 53318A)
Tel: (416) 777-7472/4662
Fax: (416) 863-1716

Lawyers for the Applicant,
Margarita Castillo

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARGARITA CASTILLO

Moving Party

- 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

Responding Party

AFFIDAVIT OF MARGARITA CASTILLO
(Sworn January 14, 2019)

I, MARGARITA CASTILLO, of the City of Toronto, in the Province of Ontario, MAKE
OATH AND SAY:

Introduction

1. I am the applicant and judgment creditor in this proceeding, as a former shareholder and director of Tropic International Limited (“**Tropic**”), a shareholder of 696096 Alberta Ltd. (“**Alberta Co.**”) and a former director of Xela Enterprises Ltd. (“**Xela**”). I know of the matters contained in this affidavit either from my personal knowledge, or where indicated, from information provided to me by others, which in all cases I believe to be true.

would cause Carmen. My lawyers confirmed that I intended to proceed with the examination. Mr. McLean advised, on the afternoon of November 22, 2018, that Carmen would not attend the examination. Carmen failed to attend on November 23, 2018. Attached as **Exhibit “DD”** is a copy of this correspondence with Mr. McLean. Attached as **Exhibit “EE”** is a certificate of non-attendance prepared by a commissioner of oaths at Network Reporting & Mediation.

41. Regarding Xela, the Judgment Debtors’ lawyers offered Calvin Shields to be examined again as Xela’s representative. As reflected in the correspondence attached above as Exhibit “Z”, Xela’s lawyers declined proposals suggesting that either Juan (Xela’s President) or Juan Jose Rodriguez (a lawyer identified on Xela’s corporate profile report as an officer) be examined instead. Attached as **Exhibit “FF”** is a transcript of Mr. Shield’s examination.

42. Based on the lengthy process of obtaining answers to undertakings and refusals from the initial examinations of Juan, Xela and Carmen, held in July 2017, I believe it would be futile to continue to pursue answers from the Judgment Debtors.

Most of the Judgment Debt Remains Unpaid

43. Attached as **Exhibit “GG”** is a chart, prepared by my lawyers, summarizing the amounts I have recovered from the Judgment Debtors. The collected amounts total \$1,568,293.37, and arise from:

- (a) Garnishments from Judgment Debtor bank accounts held at TD Canada Trust, in amounts totaling \$155,485.74;

- (b) The seizure and sale, by the Enforcement Office for the Regional Municipality of Halton, of four motor vehicles owned by Juan or Arturo, from which I received \$213,685.37;
- (c) The seizure and sale, by the Enforcement Office for the Town of Parry Sound, of Juan's joint ownership interest in the Cottage, from which I received \$774,122.26. On July 18, 2018, shortly before the second auction was held, I received a cheque for \$16.58 from the Ministry of the Attorney General, possibly for the deposit paid regarding the failed first auction attempt; and
- (d) The sale, with my consent, of the Toronto House, from which I received \$425,000.

44. Based on the answers received from Juan's and the Estate's examinations in aid of execution, I do not anticipate obtaining significant further amounts from them.

45. Juan has indicated that he relies on financial support from his wife, Wencke, and mother, Carmen, to finance his living expenses. However, Juan had also indicated, during his first examination in aid of execution, that Wencke did not have her own source of income and was financially reliant on Juan. Juan similarly stated in his first examination he had been providing financial assistance to Carmen. It is unclear how Wencke and Carmen now have assets available to support Juan. Before 2010, I had a close relationship with Carmen (my mother) and Wencke (my sister-in-law). In the decades that I knew them, I never knew them to have independent sources of income or wealth. Rather, each was financially dependent on Arturo and Juan.

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

C. Irwin
Registrar
REGISTRAR GREFFIER

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE)

JUSTICE MCEWEN)

FRIDAY, THE 5th

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.

- 2 -

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;

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DATED AT TORONTO THIS 6th DAY OF February 2020
FAIT À TORONTO LE 6 JOUR DE February

- 3 -

- (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;

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DATED AT TORONTO THIS 6 DAY OF February 20 20
FAIT À TORONTO LE 6 JOUR DE C. IRWIN

[Signature]
Registrar

REGISTRAR

GREFFIER

- 4 -

- (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

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DATED AT TORONTO THIS 16th DAY OF February 20
FAIT A TORONTO LE 16th JOUR DE

DAY OF February 20
JOUR DE

G. H. Wirt
Registrar

- 5 -

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;

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DATED AT TORONTO THIS 6 DAY OF February 2020
FAIT À TORONTO LE 6 JOUR DE février 2020

Registrar

REGISTRAR

GREFFIER

- 6 -

- 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

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DATED AT TORONTO THIS 16th DAY OF February 20
FAIT À TORONTO LE

DAY OF
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Registrar

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

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<p>DATED AT TORONTO THIS 20th DAY OF February, 2000</p>	<p>JOUR DE 20^e Février, 2000</p>
<p><i>C. Irwin</i> Registrar</p>	

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

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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

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- 10 -

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

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- 11 -

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.

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- 12 -

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

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- 13 -

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.

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FAIT A TORONTO LE 6th JOUR DE Février 20 20

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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:
I.E / DANS LE REGISTRE NO:

JUL 05 2019

PER / PAR: 

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DATED AT TORONTO THIS 6th DAY OF February 2020
FAIT A TORONTO LE 6th JOUR DE February 2020


REGISTRAR C. Irwin 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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 FAIT A TORONTO LE 6th JOUR DE Febru

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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:

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DATED AT TORONTO THIS 6th DAY OF February 20 20
FAIT A TORONTO LE 6 JOUR DE Feb. 20 20

Registrar

REGISTRAR

GREFFIER

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
P.O. Box 130
Toronto, ON M5X 1A4

Jeffrey S. Leon (#18855L)
Email: leonj@bennettjones.com

Jason Woycheshyn (#53318A)
Email: woycheshynj@bennettjones.com

William A. Bortolin (#65426V)
Email: bortolinw@bennettjones.com

Telephone: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the moving party, Margarita Castillo

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 February 22, 2021)

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

1. I have historically been the President and owner of 100% of the voting shares of Debtor Xela Enterprises Ltd., (**“Xela”**), subject to the above-entitled receivership and the Appointment Order dated July 5, 2019 (**the “Appointment Order”**), by which KSV Restructuring Inc. (**“KSV”**) was appointed receiver over Xela (**the “Receiver”**). I swear this Affidavit in response to the Motion for Investigative Powers and Recognition Order (returnable March 22, 2021) (**the**

motivated to recover all of LISA's rightful dividends – in control of the Villamorey litigation.

II. BACKGROUND

A. *The Multi-Jurisdictional Dispute over Non-Payment of LISA's Dividends*

23. The Motion – and, indeed, the receivership itself – should not be evaluated outside the context of the highly contentious, decades-old, multi-jurisdictional dispute over the Nephews' improper withholding of LISA's dividends, which have an estimated value in the range of US\$400 million. There should be no mistake about the identity of the bad actors in this running dispute.

24. After my father ceded operational control of the Avicolas to the Nephews when my family relocated from Guatemala to Toronto in 1984, the Nephews began to defraud my father as well as the Guatemalan tax authorities by understating the actual revenues of the Avicolas (and the corresponding amount of dividends disbursed to LISA) and concealing the truth with phony accounting records. It was only after the Nephews proposed to buy out LISA's interest in the Avicolas and inadvertently delivered to my father a genuine financial statement that we serendipitously discovered the truth, which was that we had been receiving false financial statements for years, along with less than the entitled sums as dividends.

25. Shortly thereafter, during the first quarter of 1998, the Nephews sent two high-level Avicola executives to Toronto to explain the discrepancies. The meeting was attended by me, along with Xela's CFO, Wayne Langdon, and Al Rosen, a forensic accountant Xela had hired to help us evaluate the financial records. Margarita's husband Ricardo Castillo ("**Ricardo**") was also present. The Avicola executives tried to explain that the Avicolas had been maintaining two separate sets of accounting records, which they justified as part of the Avicolas' "tax strategy." They revealed that the Avicolas had been selling large quantities of live chickens in the

Guatemalan countryside, where refrigeration was largely unavailable, and had been concealing those revenues in a separate set of books. As soon as I heard that fact, I immediately stopped the meeting and stressed that neither my father nor I would be participants in any kind of tax evasion scheme. We agreed to have a follow-up meeting in Miami as soon as possible, which would be attended by the Nephews themselves, along with me and my father.

26. Almost six months passed before the second meeting took place. A few days beforehand, the Nephews informed us that they would be unable to attend, but they suggested that the meeting go forward in Toronto. However, they said, because sensitive information would be disclosed at the meeting, it was important that I attend for Xela by myself alone. The next decision has cost us dearly, but my father and I believed that exposing the truth was the right thing to do. Specifically, due to concerns that the lack of any other witnesses on Xela's side of the table could later be manipulated by the Nephews, we consented to have our lawyers arrange to videotape the second meeting in Toronto under the supervision of a retired RCMP officer, without the knowledge of the Avicola executives. As the meeting went forward, the same two executives who had attended the first meeting explained the Nephews' fraudulent tax evasion scheme in great detail, all of which was captured on videotape. Although we did not intend to make the videotape public, litigation followed when the Nephews refused to give my father full value for his shares. The videotape eventually came out during a three-week trial in Bermuda in 2008, discussed below, and was an important part of the evidence proving fraud and money laundering. The Nephews cut off all dividend payments to LISA as of 1999, and embarked on what can only be described as a crusade to ruin my father and me.

27. The overarching strategy employed by the Nephews has been one of attrition, in which their lawyers use scorched-earth litigation tactics to delay distribution of LISA's dividends, while

consuming my family's resources. Consequently, in 2005, LISA was forced to begin borrowing from BDT in order to cover the cost of pursuing the dividends, and, over time, the accumulated debt to BDT grew to approximately US\$50 million, ultimately resulting in a settlement under which LISA assigned all of its dividends rights to BDT.

28. Along the way, although the process has been slow and arduous, justice has occasionally emerged. After the Nephews stops disbursing dividends in 1999, LISA sued companies controlled by the Nephews in Bermuda, alleging that they had misappropriated some of LISA's dividends and converted the monies to their own use, laundering illicit cash receipts through the sale of bogus insurance policies at an inflated premium issued 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 as Exhibit A to my Affidavit sworn on March 22, 2020 (**"my 2020 Affidavit"**). As indicated there, the Leamington Judgment establishes, among other things, the following unrefuted facts:

- a. That LISA was a victim of a conspiracy to defraud by the Nephews;
- b. That the Avicolas used accounting records that recorded only a portion of its true income;
- c. That a substantial portion of the income generated by the Avicolas was kept off the books and used to fund distributions to the Nephews but not to LISA;
- d. That the re-insurance policies at issue were not genuine;
- 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 Avicolas;

- f. That the Nephews used cash-only operations to conceal the Avicola's true earning from the Guatemalan tax authorities;
 - g. That the Nephews intended to injure LISA through a fraudulent conspiracy;
 - h. That LISA had been excluded from participating in the distributions made to the Nephews; and
 - i. That the members, officers and directors of the various Avicolas companies had "actual knowledge of all of the facts which made the conspiracy unlawful."
29. Justice Kawaley, who presided over the Leamington trial and issued the Leamington Judgment, also made one significant comment concerning the real mastermind behind the fraud, which LISA had formally alleged in its pleadings was Avícola Villalobos S.A. (referred to "AVSA"), the largest of the Avicola companies and the conduit for distribution of the laundered funds. While Justice Kawaley's observation was not a conclusive part of the judgment – which actually found *against* LISA on its allegation of fraud by AVSA – his observation as factfinder in the case are nevertheless interesting:

48. Bearing in mind the high standard of proof required for allegations of fraud, I am not satisfied that AVSA was either the de facto parent or controller of the operating Avicola companies so as to render AVSA liable for any frauds which such companies and/or Leamington may have committed. Even if AVSA alone could declare dividends and the operating companies were just cost centres, it does not follow that AVSA was the controlling corporate entity. It seems more plausible that a company wholly owned by the other two branches of the Gutierrez family such as Multi Inversiones was in reality the controlling corporate entity, if there was one. For example, in notes recording negotiations between the parties in Toronto on February 21, 1998, Juan Guillermo himself described the two sides as "Lisa's side" and "Multi-Inversiones' side". And paragraph 3 of these notes record Rossell indicating that "Multi-Inversiones provides strategic planning, legal advise [sic], fiscal strategy and high level administration services to the Avicola Companies."¹³ This is admittedly far from conclusive in terms of ascertaining

which corporate entity played a controlling role before Lisa sold its interest in Multi-Inversiones, however. This is because Juan Guillermo suggests that this sale happened as late as 1997. [Emphasis mine.]

30. Thus, LISA has established in a court of law, in a full-fledged trial lasting three weeks, that the Nephews systematically stole a portion of LISA's dividends and laundered them. The Leamington Judgment, however, involved a relatively small sum of money in comparison to the much larger pool of Avicola and Villamorey dividends that have been declared in LISA's favor since 1999, but withheld by the Nephews.

31. Further, as set out in my 2020 Affidavit, after the Leamington case was decided, the parties met through representatives more than a dozen times to discuss potential settlement of the dispute. It was during this extended period of negotiations that Margarita secretly joined forces with the Nephews, and conspired with them to plan a counterattack against Xela, my father and me, causing the settlement negotiations – which were quite advanced – to stop abruptly and fail.

B. The Nephews' Role in the Oppression Action

32. On its face, this receivership seems like nothing more than an ordinary attempt to collect a judgment. Taken in context, however, the Oppression Action, which led to the Castillo Judgment and ultimately to the receivership, was part of the well-planned counterattack by the Nephews, which weaponized Margarita's position as a trusted member of Xela's board of directors.

33. In 2010, shortly after the Leamington decision, Margarita and her husband Ricardo began surreptitiously to meet with the Nephews, including at least once in Guatemala City. The meetings occurred while Margarita was a director of Xela. Margarita was eventually removed from Xela's board in April 2010.

34. In early 2011, Margarita filed the Oppression Action, alleging (among other things) that

Xela, my father and I had oppressed her in connection with negotiations to purchase her shares of Tropic S.A. (**“Tropic”**), a distribution company for products produced by a Xela agricultural subsidiary. (My father, Margarita and I collectively owned all of the shares of Tropic, but Tropic was not a subsidiary of Xela.) Importantly, the Nephews played a key role in helping Margarita fund the Oppression Action by arranging for a friendly bank in Guatemala, G&T Continental Bank (**“G&T Bank”**), to give her a loan for US\$4.35 million (**the “Castillo Loan”**). The Castillo Loan appears to have been collateralized with a CD purchased by one of the Nephews with LISA’s unpaid 2010 Villamorey dividends. As detailed below, the Castillo Loan was reportedly transacted through Margarita’s nephew, Roberto Barillas – who acted as her legal representative – and repaid through foreclosure of the collateral.

35. Specifically, as I stated in my 2020 Affidavit, 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 to my 2020 Affidavit as Exhibit B.
- 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 to my 2020 Affidavit; 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 US\$4,166,250 (**the “CD”**). A true and correct copy of the CD is attached as Exhibit D to my 2020 Affidavit; see also Exhibit B to my 2020 Affidavit, referencing CD #010152676.

36. 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 Barillas 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 US\$4.35 million;
- c. A portion of the Castillo Loan was intended to finance the Oppression Action; 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 Elliott), 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.

37. Under cross-examination on April 17, 2012 in Toronto, Margarita admitted receiving the Castillo Loan, and she testified that G&T Bank had given her the loan solely on the basis of her “net worth,” as she had no assets in Guatemala and had not lived there in decades. A copy of an excerpt from Margarita’s cross-examination is attached to my 2020 Affidavit 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 copy of that Affidavit is attached to my 2020 Affidavit as Exhibit F. In any case, Margarita confirmed in cross-examination that she had used at least some of the Castillo Loan proceeds to pursue the Oppression Action against Xela, Arturo and me. (See Exhibit E to my 2020 Affidavit.)

38. These facts underscore the key role the Nephews played in bringing the Oppression Action, as Margarita could not have obtained the Castillo Loan and funded the litigation without their assistance. This background also sheds some light on the Nephews' interest in this receivership, along with their relationship with Margarita, who selected the Receiver.

C. The Theft and Misuse of Xela's Computer Records

39. Another element of the Nephews' counterattack after the Leamington Judgment involved the theft and malicious misuse of documents illegally downloaded from Xela's computer servers. The original complaint in the Oppression Action, which was filed in early 2011, attached as an exhibit a trove of confidential and/or privileged documents owned by Xela. Those documents included, among other things, confidential internal emails, invoices from lawyers and investigators, and privileged communications with counsel.

40. My father and I were shocked to see such sensitive and confidential documents attached to a public-record pleading, and we could not understand how Margarita and/or her lawyers had gained access to them, as Margarita herself was never privy to them while she served as a Xela director, and in any case, she had been removed from the board almost a year earlier. As it turns out, Margarita's husband Ricardo was ultimately responsible for the theft.

41. It seemed clear that the documents had been stolen from Xela's servers. Accordingly, I instructed the head of Xela's IT department, Julio Fabrini, to investigate. Mr. Fabrini performed an audit and discovered that files equivalent in size to the documents attached as the exhibit to Margarita's Complaint had been downloaded from Xela's servers to an encrypted USB stick at an identifiable moment in time. Further investigation of Xela's email servers uncovered an email from Willy Aguilar, one of Mr. Fabrini's subordinates in the IT department, to Ricardo shortly

after the documents had been downloaded to the USB stick. That email attached the encryption software necessary to open the Xela files contained on the USB stick.

42. When I confronted Mr. Aguilar, he broke down in tears and confessed that he had, in fact, downloaded the documents and given them over to Ricardo, along with the encryption software needed to access the data. He explained that he and Ricardo had been considering a joint business venture together, and that Ricardo claimed to have spent about \$25,000 in due diligence expenses, which he wanted Mr. Aguilar to reimburse. Mr. Aguilar further explained that Ricardo had demanded payment and had presented a draft complaint to Mr. Aguilar, listing him as a defendant, and alleging breach of contract and theft of corporate opportunity. The draft complaint coversheet listed as counsel Jason Woycheshyn, who at the time was with the Bennet Jones law firm, subsequently counsel for Margarita in the Oppression Action. Mr. Aguilar explained that Ricardo had promised not to file the lawsuit if only Mr. Aguilar would download all of the data from Xela's servers and hand them over to Ricardo. Mr. Aguilar agreed, and Ricardo gave Mr. Aguilar the draft complaint. Mr. Aguilar also confessed to emailing the encryption software to Ricardo so that he could open the files. Mr. Aguilar was dismissed from Xela at that point, but he left the draft complaint with me. A copy of that document is attached hereto as **Exhibit 3**.

43. Bennet Jones subsequently attached a massive trove of the stolen documents to the Complaint in the Oppression Action, apparently feeling unconstrained to place documents that were clearly confidential and privileged into the public record. The documents were unrelated to the claims in the Oppression Action, and were attached in bulk as a single exhibit.

44. Once Xela's confidential documents were in the public record, the Nephews took their turn. In April 2011, three months after Margarita filed the Oppression Action, the Nephews caused each

of the individual companies that comprise the Avicolas to adopt a corporate resolution purporting to exclude LISA as a shareholder, thereby seeking to appropriate for themselves LISA's entire interest in the Avicolas. The resolutions quoted some of the stolen Xela documents attached to the Complaint in the Oppression Action verbatim.

45. Further, the Nephews caused each of the Avicola companies to file Exclusion Actions in Guatemala against LISA, alleging in essence that the stolen documents demonstrated that everything LISA was doing to collect its unpaid dividends was intended to injure the Avicolas, which was patently false. As indicated, LISA ultimately prevailed in the Exclusion Actions (the Nephews are still pursuing appeals in some), but the process has taken more than a decade and has been quite expensive.

46. There was no doubt in my mind that Ricardo's draft complaint against Mr. Aguilar and the resulting theft of Xela's documents (which I saw as a form of extortion) was part of a broader conspiracy between Margarita, Ricardo, the Nephews and perhaps others, which included attaching the stolen documents as an exhibit to the Complaint in the Oppression Action so that the Nephews would have some semblance of above-board access to them for use in the Exclusion Actions to either appropriate LISA's interest altogether or at least delay LISA's collection efforts.

47. Accordingly, shortly after these events occurred, Xela, my father and I filed a complaint for civil conspiracy against Margarita, Ricardo, the Nephews and others, in the Ontario Superior Court of Justice (Commercial List) in Court File No. CV-11-9177-00CL (**the "Conspiracy Action"**), alleging these and other related facts. Regrettably, the Court declined to amalgamate the Conspiracy Action with the Oppression Action, and when the Nephews challenged service of process in the Conspiracy Action (which they lost in the Superior Court and eventually on appeal),

that case was delayed, while the Oppression Action proceeded on course to summary judgment. The Castillo Judgment and this receivership were the resulting outcome of the Oppression Action. The Conspiracy Case, by contrast, remains pending, although neither Xela nor I have the resources to prosecute it. If it is ever considered, I am confident that we will prevail and obtain judgment against Margarita in an amount that will eclipse the Castillo Judgment.

III. THE MOTION SHOULD BE DENIED BECAUSE IT WOULD PERPETUATE THE PATTERN OF CONDUCT THAT HAS ALREADY FRUSTRATED THE PURPOSE OF THE RECEIVERSHIP

48. The Motion seeks to perpetuate the same pattern of conduct the Receiver has embarked upon since its appointment, the highlights of which are detailed in the following paragraphs. In my view, the Receiver's actions have done nothing to advance the collection of LISA's dividends. For more than 18 months, it has ignored my requests to meet and discuss how we might collaborate in litigation against the Nephews in Panama and/or Guatemala, and has instead incurred more than a million dollars pursuing matters wholly unrelated to the dividends. Indeed, the Receiver has been quite disruptive by, as detailed below, preventing LISA from securing funding that could discharge the receivership, and secretly trying to take over the foreign entities that are at the heart of the 20-year dispute with the Nephews, all without any recognition of his authority abroad. That course is perfectly aligned with the interests of the Nephews, and is serious enough to thwart the purpose of the receivership altogether. Further, I believe that the issue can only be resolved by replacing KSV with an alternate receiver selected not by Margarita, but by this Court.

A. The Receiver's Refusal to Disclose Communications Suggesting Potential Coordination

49. Owing to the Receiver's pattern of conduct and the impression of coordination with the Nephews that it creates, my lawyers asked that the Receiver provide copies of any communications

between the Receiver and/or its lawyers, on the one hand, and the Nephews and/or their lawyers, on the other hand. My lawyers made the request initially by letter on May 4, 2020, a copy of which is attached as **Exhibit 4**, but the Receiver declined to answer. My lawyers renewed that request by letter dated November 16, 2020, a copy of which is attached as **Exhibit 5**. The Receiver responded to that letter on November 24, 2020, but refused to provide any documents, asserting that it had no duty. Notably, the Receiver did not deny communicating with the Nephews. A copy of the Receiver's letter dated November 24, 2020 is attached as **Exhibit 6**.

50. I now understand why the Receiver refused. It was not until after the Receiver filed its Motion on January 15, 2021 that I received copies of the billing records showing ongoing communications between the Receiver's lawyers at Aird Berlis and the Nephews' lawyers at Stikeman Elliott. Notably, all descriptions in the invoices from Lenczner Slaght, a second law firm representing the Receiver – and the law firm driving the Receiver's latest discovery push in Toronto – are redacted in their entirety.

51. Several points can be gleaned from a review of the Aird Berlis billings:

- a. Communications between the Receiver's lawyers and the Nephews lawyers span a period of more than 13 months (from August 29, 2019 through October 3, 2020), involving at least three separate Aird Berlis lawyers;
- b. A variety of communication methods are reflected, including emails, letters, teleconferences and Zoom calls;
- c. The available billing records stop at November 19, 2020, and therefore do not reflect any potential communications after that date;

- d. Katherine Kay – who attended at least one meeting with Margarita’s lawyers in or around 2010, where planning for the Oppression Action was discussed – is the Nephews’ lawyer who appears most frequently in the billings;
- e. Representatives of KSV participated directly in multiple calls involving the Nephews’ counsel; and
- f. At least one communication between the Receiver’s counsel and the Nephews’ counsel appears to have involved the Receiver’s Barbados counsel.

52. Thus, there is evidence to suggest that some level of coordination between the Receiver and the Nephews is ongoing. If – as is apparent from one billing entry on September 18, 2019 involving Steven L. Graff, the most senior of the Aird Berlis lawyers representing the Receiver – the discussions with Katherine Kay included the Receiver’s Barbados counsel, the implication is that the Nephews were involved in strategic decisions of the Receiver. Of course, it is impossible to determine the subject matter of any of the communications from the billing records.

53. The Receiver’s lack of transparency regarding its apparent coordination with the Nephews is troubling. The blanket redaction of billing descriptions in the Lenczner Slaght invoices, aside from making it impossible to evaluate the reasonableness of their bills, only exacerbates those concerns.

B. *The Receiver’s Focus on the “Reviewable Transactions”*

54. KSV was appointed Receiver on July 5, 2019. Shortly thereafter, the Receiver and I met two separate times in Toronto. On both occasions, I stressed that there was only one potential source of funds to satisfy the Castillo Judgment, the unpaid dividends owed to LISA by the Avicolas and by Villamorey. I also tried repeatedly to explain the background of LISA’s dispute with the Nephews, along with specifics concerning the litigation in Panama against Villamorey

and in Guatemala against the Avicolas to collect the dividends. Initially, Mr. Kofman was dismissive, changing the subject whenever I brought up any element of the dispute over LISA's dividends. However, as I continued to press the point, he became impatient and eventually told me plainly that the Receiver was not interested in hearing about LISA's dispute with the Nephews.

55. Indeed, the Receiver's attention for the past 18 months has been primarily on what it calls "reviewable transactions," all of which are perfectly justified and, in my opinion, should not be considered "reviewable" at all. The first involves what the Receiver has identified as the "EAI Transaction," which involved my father's estate planning culminating in 2016, shortly before he passed away. At the time, EAI owed him approximately \$9 million. In satisfaction, he accepted the shares of BDT and Arven, both of which were owned by EAI. A Deloitte valuation showed the combined value of the companies to be approximately \$6.5 million. My father then transferred the BDT and Arven shares to the ArtCarm Trust in Barbados, of which my mother, my wife and our four children are beneficiaries, but I am not. Further, I had no knowledge of the transaction at the time, as my father did all of his estate planning without my knowledge or input.

56. BDT's separate response to the Motion addresses the EAI Transaction in greater detail and demonstrates that the transfers were entirely valid and supported by adequate consideration. More importantly, the Receiver has never explained how its focus on the EAI Transaction might satisfy any part of the Castillo Judgment. The Receiver has not acknowledged the cost of unwinding the transactions abroad, even if that were legally possible, nor has the Receiver taken any steps to seek recognition in Barbados. Obviously, taking that path would entail substantial new expense for both the Receiver and BDT, not to mention the additional time required.

57. The same cost issues arise in connection with the other "reviewable transaction," which

relates to LISA's assignment to BDT of its claims to dividends, partially at first in 2018 in exchange for continued funding of LISA's litigation, and later in 2020, in full satisfaction of approximately US\$47 million of unreimbursed litigation financing from BDT. It is noteworthy on this issue that a substantial part of LISA's debt to BDT had been reduced in 2012 to a final judgment in Panama equivalent to US\$19,184,680, a copy of which is attached hereto as **Exhibit 7**. The Receiver's concerns over the fairness of the transaction are unfounded because any windfall that might inure to BDT is offset by the risk associated with what is obviously a hard-fought dispute. Additionally, the Receiver does not address the viability of unwinding the transaction, which would be particularly challenging in that LISA is a Panama entity and BDT is a Barbados company. Again, the Receiver has taken no steps to be recognized in either jurisdiction, or to explain the rationale behind foregoing that process.

C. The Receiver's Lack of Interest in the Castillo Loan

58. There is evidence to suggest that the Castillo Loan was secured by the CD (*i.e.*, LISA's 2010 Villamorey dividends), and that the loan was never repaid by Margarita, but was instead repaid by G&T Bank's foreclosure of the collateral. That transaction is, in my view, worthy of review by the Receiver because, if true, the Castillo Judgment has already effectively been satisfied by an indirect subsidiary of Xela. I have brought the transaction to the Receiver's attention multiple times, although the Receiver seems disinterested.

59. As I affirmed in my 2020 Affidavit, I participated in at least four meetings in Guatemala in 2016 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.

60. 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.

61. If indeed the CD was pledged as security for the Castillo Loan, and if in fact the loan was satisfied by G&T Bank's foreclosure of the collateral, it would appear that Margarita was never required to repay the Castillo Loan and has, in effect, already received the sum of US\$4.35 million from LISA, which is more than enough to satisfy what remains of the Castillo Judgment.

62. In my early meetings with the Receiver, I pointed out these facts, and of course I detailed them again under oath in my 2020 Affidavit. My lawyers have asked the Receiver to request copies of the Castillo Loan documents from Margarita (see Exhibit 4 hereto) which might at least offer a clue whether the Castillo Judgment was effectively satisfied with LISA dividends long before the Receiver was appointed. The Receiver has not so much as acknowledged the request. To my knowledge, the Receiver has never even raised this issue with Margarita, nor does the issue

appear in the Receiver's reports. It is certainly the case that the Receiver has never provided me with any documents showing that Margarita repaid the Castillo Loan, if there are any such documents.

D. The Receiver's Lack of Interest in the Gadais Limited Promissory Note

63. Margarita's husband Ricardo was employed by Xela until approximately 2007. Upon his departure from the company, my father became concerned about his ability to support Margarita and her daughters financially. Consequently, to provide some income for Ricardo, my father caused Xela to sell its 86.6% stake in Digalta LLC, a real estate management company in Russia, to Gadais Limited ("**Gadais**"), a Cyprus corporation owned by Ricardo. The purchase was in the form of a promissory note for \$400,000 from Gadais to Xela. A copy of the purchase/sale agreement and corresponding promissory note (**the "Gadais Note"**) are attached collectively as **Exhibit 8**.

64. The shares of Digalta LLC were duly transferred to Gadais, and the Gadais Note was signed, but the note has never been repaid, although, to my knowledge, neither has a payment demand been made. The purchase/sale agreement provides for enforcement through friendly consultation, failing which any disputes are to be resolved through final and binding arbitration proceedings in Toronto. (*See Exhibit 8, ¶13.*)

65. I informed the Receiver about the Gadais Note and its non-payment, and I suggested that some action should be taken on Xela's behalf to collect. The Receiver's reports, however, are silent on the subject. They give no indication that any payment demand has been made, or that the Receiver has initiated any "friendly consultations" with Ricardo concerning repayment.

E. The Receiver's Lack of Interest in the Conspiracy Action

66. As indicated above, Xela, my father and I filed the Conspiracy Action against Margarita, Ricardo, the Nephews, and others in early 2013, on the heels of Margarita's Oppression Action and the Exclusion Actions. A copy of the Amended Complaint in the Conspiracy Action (without exhibits) is attached hereto as **Exhibit 9**. The Conspiracy Action alleges broad misconduct by Margarita in breach of her fiduciary duties as a director of Xela, in conjunction with Ricardo, the Nephews and others.

67. The general overview of the Conspiracy Action is that:

- a. It is related to prior litigation before the Bermuda Supreme Court, which issued the Bermuda Judgment on September 5, 2008, which provided, *inter alia*, that the Nephews had conspired to defraud Xela. Following that decision, the Nephews attempted to negotiate a purchase of LISA's stake in the Avicolas as part of a global settlement. Negotiations ultimately failed due to: (i) the Nephews' failure to produce any legitimate financial statements for the Avicolas; (ii) the Nephews' refusal to pay fair value for LISA's shares; and (3) the defendants' pursuit of the conspiracy alleged in the Amended Complaint. Although not alleged specifically in the Amended Complaint, Margarita's breach of fiduciary duty in conspiring with the Nephews was an overarching factor in their decision to withdraw from the negotiations.
- b. The Conspiracy Action involves (among other things) the conspiracy of the Nephews who, acting in concert with Margarita, Ricardo and others, undertook a scheme to pressure Xela into selling, at a significant discount, LISA's one-third ownership interest in the Avicolas. The conspiracy included the filing of the Oppression Action in the Ontario Superior Court of Justice (Commercial List) with the ulterior and improper purpose of facilitating the confiscation of LISA's shares in the Avicolas without compensation. The Nephews also provided funding for the Oppression Action by diverting dividends that were due to LISA, in the form of the

Castillo Loan, which the Nephews helped arrange through G&T Bank using LISA dividends as collateral. The true purpose of the Oppression Action was two-fold. First, the defendants used the Oppression Action as a vehicle to place in the public domain numerous confidential, privileged and proprietary Xela documents that the defendants unlawfully obtained by inducing a Xela employee to misappropriate copies. Second, the defendants used the unlawfully obtained documents as the basis for an uncompensated minority-shareholder squeeze-out by which the Nephews purported to have confiscated LISA's entire ownership interest in the Avicolos.

- c. The defendants' acts constitute civil conspiracy, abuse of process, unjust enrichment, knowing receipt of trust proceeds, and breach of fiduciary duty.
- d. Tortious acts in furtherance of the conspiracy were committed in Ontario, and the plaintiffs suffered and continue to suffer significant damages in Ontario.

68. Preliminarily, as indicated above, the Receiver's aggressive approach to my personal electronic devices and all of my emails seems like a redux of these events, especially given the Receiver's apparent coordination with the Nephews. Neither the Nephews nor Margarita have been held accountable for their theft of Xela's documents or for the resulting Exclusion Actions that almost misappropriated LISA's stake in the Avicolos. The time and expense associated with defeating the conspiracy has been massive, and the human toll has also been significant.

69. As indicated, the Conspiracy Action is stalled in the Ontario Superior Court of Justice, due to the foibles of the system and the expense of prosecuting the case. Nevertheless, the claims asserted there are genuine and substantial, and they represent a potential direct offset against the Castillo Judgment. The Receiver has never acknowledged the pendency of the Conspiracy Action or the potential impact of the damages alleged there on the receivership. Although the Receiver might not be obligated to reactivate and prosecute the Conspiracy Case, there is little time or expense associated with, for example, asking Margarita to produce copies of her Castillo Loan

bank records and proof that she repaid the Loan. The Receiver is not viewing the Castillo Loan or the Xela document theft as “reviewable transactions,” nor are any of the allegations in the Conspiracy Action raised in any of the Receiver’s reports.

F. LISA’s Loan Commitment and the Receiver’s Response in Panama

70. The biggest point of contention in these receivership proceedings has, without question, been the Receiver’s reaction to a loan commitment secured by LISA that could have discharged the receivership, which included activities by the Receiver’s counsel in Panama, all of which is still the subject of judicial process in Panama City and in Toronto. In my opinion, the relevant facts and circumstances have never been fully or properly explained to this Court.

71. As I have stated, in late 2019, while the Receiver’s powers were still limited by Paragraph 4 of the Appointment Order, LISA secured a private loan commitment sufficient to satisfy the Castillo Judgment in full, along with the receivership expenses (**the “Loan Commitment”**). I played no part in identifying the lender, negotiating the terms or otherwise securing the Loan Commitment, nor was I given a copy of any related documents or told any of the details concerning the loan (**the “LISA Loan”**). My information was limited to the fact that the LISA Loan exceeded the amount required to discharge the Receivership, that its source was not one of the ArtCarm entities, and that it was secured by a percentage of LISA’s outstanding shares in Villamorey. I was also told that the lender had required strict agreement that LISA not disclose the identity of the lender to any person outside of LISA and its lawyers, and specifically not to me.

72. On December 17, 2019, Amsterdam & Partners LLP – which acted for LISA in connection with its dividend rights until those were assigned to BDT – wrote to inform the Receiver about the Loan Commitment, and requested a payoff amount for the Castillo Judgment and an estimate of

the total actual and anticipated receivership expenses. A copy of Amsterdam & Partners LLP's letter dated is attached hereto as **Exhibit 10**.

73. Because the proceeds of the LISA Loan would not be available until after Paragraph 4 of the Appointment Order gave the Receiver full powers over Xela on January 1, 2020, Cambridge LLP filed a motion on December 31, 2019, requesting an Order to vary Paragraph 4 and suspend the receivership under further Order (**the "Motion to Vary"**). The Motion to Vary included an affidavit by LISA's President indicating that LISA had secured the Loan Commitment, stated that the Castillo Judgment would be satisfied in full, and indicated that the sum of \$4,682,800 was expected to be transferred to the Receiver during the week of January 13, 2020. A copy of the Notice of Motion to Vary is attached hereto as **Exhibit 11**.

74. On January 8, 2020, Aird Berlis reacted in writing on behalf of the Receiver to the Motion to Vary. The Aird Berlis letter, a copy of which is attached as **Exhibit 12**, demands the following:

* * *

Even apart from Xela's motion, the Receiver needs to be able to determine how the economics of the proposed Lisa, S.A. loan affect the interests of other stakeholders of Xela or its subsidiaries. For that reason, on behalf of the Receiver, we formally request of Xela and of any officer, director or shareholder of Xela giving instructions to your firm, a copy of the Lisa, S.A. loan agreement described in the Hals Affidavit along with a copy of any closing agenda prepared in connection with contemplated loan transaction. Our authority for this request lies in paragraph 6 of the Appointment Order, which requires all persons to provide to the Receiver, among other things, any documents, contracts and information of any kind relating to Xela. Our authority for the request also lies in paragraph 3(p) of the Appointment Order, by which the Receiver is now authorized and empowered to exercise any shareholder rights that Xela might have, including Xela's 100% indirect ownership of Lisa, S.A. (through Gabinvest S.A.), to the exclusion of all other persons, including Xela itself. The limitations placed on this power by paragraph 4 of the Appointment Order only concerned exercise of the power in connection with litigation proceedings and, in any case, only applied until December 31, 2019.

75. With that letter, the Receiver set in place three erroneous principles under which it has

operated ever since, to the prejudice of Xela, LISA, Gabinvest and me personally: (a) it fails to recognize the territorial limitation of the Appointment Order, and specifically the Receiver's inability to act for Xela in foreign jurisdictions without advance recognition of its Appointment Order abroad; (b) it ignores the fact that duly established corporations – even if subsidiaries – are distinct and independent entities; and (c) it holds to the inconsistency that I have no authority over Xela, yet I should somehow be able to dictate to LISA, a foreign subsidiary of a foreign subsidiary of Xela.

76. On January 9, 2020, an email from Aird Berlis to Cambridge LLP, attached as **Exhibit 13**, perpetuated the same errors, incorrectly assuming that I had access to the details of the Loan Commitment, that I could control LISA without any authority over Xela, and that the Receiver had some authority over LISA, a Panama corporation, without formal recognition from the Panamanian authorities. It is worth noting that the Receiver seemed prepared at that juncture to take steps against LISA in Panama, even though the Receiver lacked recognition of its Appointment Order outside of Ontario:

In addition, and per our discussions following our attendance before His Honour, the Receiver hereby requests that your client provide to the Receiver any and all documentation and details relating to the proposed loan arrangement to be entered into by the Company's subsidiary, Lisa S.A., which is referenced in the Affidavit of Harald Johannessen Hals dated December 30, 2019 by no later than 12:00 pm tomorrow, January 10, 2020, so that the Receiver may review and consider the terms of such arrangement. If by noon tomorrow the Receiver is not provided with the full details of the loan arrangement or if the Receiver is not satisfied with the proposed terms of the loan, taking into account the interest of all stakeholders, the Receiver will take whatever steps it deems necessary (and that are in the best interest of Xela and its stakeholders), as permitted by the Receivership Order, to protect the assets and business. [Emphasis mine.]

77. On January 10, 2020, a follow-up email from Aird Berlis to Cambridge LLP, a copy of which is attached as **Exhibit 14**, further purports to instruct LISA through me:

No further steps should be taken by Lisa with respect to the loan until the Receiver has been able to review and make a determination as to the terms of the proposed loan documents.

78. The Receiver's demand that LISA suspend the LISA Loan was shocking to me, given the Receiver's knowledge that it would satisfy the Castillo Judgment in full and would cover any enforcement costs and expenses of the receivership, such that the receivership could be discharged. I still do not understand the basis for the Receiver's belief that it was entitled to further evaluate the Loan Commitment, knowing that it had no authority over LISA, and that the LISA Loan would fully satisfy the only ground for the receivership itself. Although the Receiver subsequently tried to justify its position by asserting that other creditors of Xela had objected to a discharge, it is my understanding that the basis for the receivership is limited to the Castillo Judgment.

79. Nevertheless, on January 13, 2020, Cambridge LLP responded to the Receiver and provided the limited information that I had concerning the Loan Commitment. A copy of that letter is attached as **Exhibit 15**. Cambridge LLP also assured the Receiver that I had instructed LISA to cooperate, and invited the Receiver to address LISA directly on the subject:

* * *

Second, we acknowledge your request for information to evaluate the loan arrangement through which Xela proposes to satisfy the Margarita Castillo judgment and all other creditors, fees and expenses of the receivership (the "Loan"). Xela's knowledge of the Loan is as follows: (1) it is being procured by LISA, S.A., a Panama corporation ("LISA"), from a third party that is unrelated to any Xela entity or any entity owned by The ArtCarm Trust; (2) the Loan is adequate to satisfy the monetary threshold for a motion to discharge the receivership, according to the totals provided by the Receiver when he learned of the Loan in December 2019; and (3) LISA will pledge some of its common shares of Villamorey, S.A. as collateral for the Loan, and nothing more.

We think this information is enough for a finding that the Loan is in the best interest of Xela and its stakeholders. However, in case the Receiver should disagree, we have instructed LISA to cooperate, and we respectfully invite the Receiver to direct any further questions directly to LISA.

80. Later in the day on January 13, 2020, KSV's Bobby Kofman (*i.e.*, the Receiver) responded personally to the email enclosing Cambridge LLP's letter. A copy of Mr. Kofman's email is attached as **Exhibit 16**, which states in its totality as follows:

Thank you.

This information is insufficient.

81. On January 14, 2020, Aird Berlis sent a letter, a copy of which is attached as **Exhibit 17**, more thoroughly responding to Cambridge LLP:

* * *

In your letter you state that Xela has the following knowledge of the Loan: (a) it is to be made by a party that is not owned by LISA or by The ArtCarm Trust; (b) the Loan proceeds will be adequate to repay the debts to the Receiver and the Applicant; and (c) the only security to be granted is a pledge of shares in Villamorey, S.A. This limited information is not sufficient for the Receiver to evaluate whether the Loan is in the best interests of the stakeholders of Xela. Without limitation, you have not informed us whether the Loan will be sufficient or purposed to pay debts of Xela to other creditors, a number of whom have requested that the Receivership not be terminated.

The following facts lead us to believe that the principal of Xela giving your firm directions has the draft loan documentation: (a) the Loan is being procured for Xela's ultimate benefit by one of its indirect 100% subsidiaries; (b) Xela's principal knows the identity of the lender and the terms of the Loan; and (c) Xela's principal had confidence enough in the Loan to cause Xela to bring the Motion. To repeat the request made in Kyle Plunkett's letter of January 8, 2020, please provide a copy of the Loan agreement and any closing agenda. We refer you again to paragraph 6 of the Appointment Order which imposes obligations on Xela's principal which cannot be shed simply through your suggestion that we seek any further information from LISA directly.

82. The Aird Berlis letter was simply wrong. As I had indicated to the Receiver, I had no documentation whatever relating to the Loan Commitment or the LISA Loan. Moreover, the Aird Berlis letter conveys a tone of mistrust that was simply not warranted, which the Receiver has continued to perpetuate in these proceedings, and which is personally offensive. LISA is a separate

corporate entity in Panama, governed by a duly constituted board of directors, subject to the laws of Panama, fully capable of taking independent legal advice and evaluating the potential impact of the receivership on its dividend rights. For those reasons, LISA undertook to identify potential funding that it could provide to Xela to help Xela extricate itself from the burden of the receivership, which in turn benefited LISA because it eliminated the risk that the Receiver might eventually take steps to liquidate its dividend rights in satisfaction of the Castillo Judgment. My input was not required for LISA to reach any of those conclusions, and LISA was aware enough to limit the information that was given to me, even if it would have been permitted by the non-disclosure agreement the lender had insisted upon. Further, because – as the Receiver reminds us – I no longer had any authority to act for Xela, either as its President or as a shareholder, I had no authority to demand information from LISA. The Receiver’s implication that because Mr. Johannessen is my brother-in-law, I must control him is insulting to both of us.

83. Xela may be the ultimate beneficial owner of LISA, but I was always required, before the receivership divested my shareholder rights, to follow corporate formalities applicable to Xela’s foreign assets, including strict Panamanian requirements concerning how Xela must prove its authority over Gabinvest within the actual minutes of every Gabinvest shareholder meeting. The Receiver is similarly required to follow the laws applicable to Xela’s assets. In this case, the Receiver sidestepped those requirements by ignoring the territorial limits of the Appointment Order and the Receiver’s obligation to seek recognition by Panamanian authorities before acting in that country, preferring instead to cast me as non-cooperative and threaten me with contempt motions. The fact that the Receiver is now asking this Court for further authorization (which the Receiver already had) to seek recognition in Panama demonstrates that the Receiver knows it acted misguidedly.

84. On January 16, 2020, Amsterdam & Partners LLP responded to Aird Berlis on behalf of LISA, a copy of which is attached hereto as **Exhibit 18**:

Dear Kyle:

As you know, we are international lawyers for LISA, S.A., a Panama corporation (“LISA”), and counsel of record for LISA in the garnishment case in Miami. We understand that the receiver is demanding documents and other details about the loan LISA is procuring to seek to discharge the receivership (the “Loan”). Xela has instructed LISA to cooperate as much as it can.

As you can appreciate, this is a unique receivership. It was created at the behest of Margarita Castillo, who – if allegations in pending litigation in Toronto are true – is acting in conspiracy with the majority stakeholders (i.e., the so-called “Cousins”) of the poultry conglomerate in Guatemala that has been trying for decades to avoid paying LISA its due share of dividends (approaching US\$400 million) while paying themselves in full. At the same time, LISA’s stake in the poultry conglomerate is Xela’s biggest asset. Thus, the Cousins have a special interest in the outcome of the receivership, as underscored by the presence of lawyers from Stikeman Elliott LLP at the case conference earlier this week. Make no mistake; the Cousins are using this receivership to try to achieve an inexpensive win in a high-stakes, 20-year-old multijurisdictional contest.

Therefore, in order to discharge the receivership, LISA’s Board of Directors gave its President, on or about December 30, 2019, the authority to procure the Loan. As you might anticipate in these circumstances, LISA did not share the details of the Loan with Xela beyond confirming that it was not a loan from any of the ArtCarm Trust entities, it was adequate to meet the threshold in Paragraph 25 of the receivership Order, and that some of LISA’s shares of Villamorey were being pledged as security, but nothing more. All of the details of the Loan, including loan documents, were and are held exclusively by LISA. More importantly – owing to past conduct of the Cousins and the unique circumstances of the receivership – the lender required LISA to make a confidentiality agreement as a condition for the Loan, barring LISA from disclosing the identity of the lender and any details of the Loan to any third parties, including without limitation Xela. Thus, LISA is under a contractual duty to withhold all information concerning the Loan in all circumstances short of a Panama Court Order compelling disclosure, which we are not certain would issue even if the receiver’s powers in Panama were recognized in principle by the Court.

Lastly, we emphasize that LISA considers the Loan to be integral to the preservation of its interest in the poultry conglomerate. LISA will therefore react to any improper interference with the Loan. Having said that, we are confident that the receiver can be relied upon to act appropriately in this regard, and we appreciate your courtesy and professionalism.

85. On January 17, 2020, Aird Berlis responded to Amsterdam & Partners LLP, a copy of which is attached as **Exhibit 19**. The Aird Berlis letter again ignores the territorial limitations of the Appointment Order, and presumes that the Receiver has authority over Xela's Panamanian assets without recognition of the Appointment Order in Panama. The letter further implies that I was lying about the information that had been provided to me – or, paradoxically, that I still had some authority over LISA to demand information – and it threatens me with a contempt motion.

86. Even more significantly in my mind, the Aird Berlis letter reveals that the Receiver's action in Panama to take over the Gabinvest board of directors, and subsequently the LISA board, was a direct reaction to the LISA Loan Commitment:

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, appointed pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the “Court”) issued and entered on July 5, 2019 (the “Appointment Order”).

*I am writing in response to your email of January 16 and further to our letter to Canadian counsel for Mr. Juan Guillermo Gutierrez (“Juan Guillermo”), Cambridge LLP, dated January 14, a copy of which is enclosed as **Schedule A** hereto.*

In your email you refuse, on behalf of LISA, S.A. (“LISA”), to comply with the Receiver's repeated request for information and documentation relating the proposed loan (the “Loan”) to LISA (“LISA”), the proceeds of which are to be used to pay debts of Xela to the Receiver and to the applicant in the above-referenced receivership proceedings (the “Receivership”). As you note, LISA is a subsidiary of Xela and a significant asset and source of recovery for Xela's stakeholders. Such refusal by LISA and Juan Guillermo is contrary to the spirit of our chambers appointment before Justice McEwen on January 9, 2020. As counsel for Juan Guillermo can attest, Justice McEwen was very clear that full disclosure of the loan documentation by Juan Guillermo and LISA was to be provided to the Receiver prior to LISA entering into the Loan.

Your email is not an answer to our January 14 letter. In particular, your email does not relieve Juan Guillermo or any other principal of Xela from the Court-imposed obligation to comply with the Receiver's repeated request for information and documentation relating the Loan. By copying Cambridge LLP on this letter, I put

them on notice that we still expect an appropriate, timely response from them to our January 14 letter. It is the Receiver's position that the terms of the Appointment Order regarding disclosure trump any confidentiality provisions contained in purported loan agreement. The Receiver will respect an appropriate confidentiality provision. The fact that the potential lender insisted on keeping its identity confidential is a significant concern to the Receiver regarding the propriety and nature of the Loan. The Receiver will be bringing these concerns, among others, to the attention of the Court.

*Furthermore, Mr. Gutierrez and LISA have to date failed to comply with the Order of Justice McEwen dated October 29, 2019 (the "**Disclosure Order**"), pursuant to which various parties, including LISA, were ordered to produce all information pertaining to certain transactions, including the Assignment Transaction (as defined in the Disclosure Order, a copy of which was delivered to you previously).*

*Although the Receiver was appointed by the Court upon application of the applicant judgement creditor, Margarita Castillo (the "**Applicant**"), the Receiver's duties are to the Court and to all the stakeholders of Xela. The Receiver is not directed by nor specifically accountable to the Applicant, nor does it inappropriately disclose information to the Applicant or otherwise. Juan Guillermo has, at all times, had competent Canadian counsel acting for Xela to challenge any impropriety in the appointment of the Receiver or the conduct of the Receivership.*

As requested by the Receiver's representative, Bobby Kofman, in his reply to your email, please advise immediately if the Loan transaction has closed and if it the Loan has been advanced. If either has not occurred, please advise immediately when that is scheduled to occur.

To repeat what was said in our January 14 letter, the Receiver will not be in a position to approve of the procurement of the Loan or any loan for that matter until the Receiver receives and has evaluated the requested Loan documentation in full and, until such time, the Receiver explicitly objects to LISA completing the Loan transaction. As you are aware, any limitation imposed on the Receiver under the Appointment Order have automatically expired as of December 31, 2019. The Receiver will take any and all steps it deems necessary to protect and preserve the debtor's property, including its ownership interest in its various subsidiaries, which steps may include pursuing all recoveries and remedies available to the Receiver with respect improper transactions carried out by Xela and its subsidiaries prior to its appointment.

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 stakeholders of Xela, all of which will be reported to the Court. Such steps may include, without limitation, a motion to hold Mr. Gutierrez in contempt of Court orders, which orders he continues to willfully disregard. [Emphasis mine.]

87. As it happens, even before Aird Berlis sent the above letter on January 17, 2020, the Receiver had already instructed Panamanian counsel to convene a Gabinvest shareholder meeting and to change the Gabinvest board of directors, and subsequently the LISA board of directors. The Gabinvest Minutes are Exhibit 1 hereto, as notarized before Hatstone's Alvaro Almengor, the Receiver' agent in Panama, and filed in the Public Registry of Panama. Of particular importance is that part of the Gabinvest Minutes that recites those in attendance:

* * *

***PRESENT:** The following were present at the meeting -----*

***ALL OF THE SHAREHOLDERS:** In person or through an authorized representation, who duly represents the totality of the shares that are issued, paid and in circulation, of the corporation (the "**Shareholder**") -----*

88. In fact, that representation was false. Mr. Almengor was not "authorized" and did not "duly represent" Xela, the sole shareholder of Gabinvest, in Panama City on January 16, 2020. Setting aside that the minutes do not identify the person who purportedly "authorized" Mr. Almengor to "duly represent" the totality of Xela's shareholdings, Mr. Almengor had no power of attorney from the Receiver, which I personally know, as explained further below. The requirement of a valid power of attorney is not a technicality that can be waived off; it is a strict prerequisite of Panama law that must precede any act by the designee of a Panamanian corporation's shareholder(s).

89. Further, even if Mr. Almengor had been in possession of a duly executed power of attorney from the Receiver, that power would have been invalid for purposes of exercising Xela's shareholder rights over Gabinvest, a Panama company, because the Appointment Order has never been recognized in Panama. The Receiver has no Xela shareholder rights apart from that Order, and the Receiver therefore had no authority to designate Mr. Almengor to act for Xela in Panama.

Moreover, nowhere in the Gabinvest Minutes is the Receiver identified or even referenced generally, which would have been required in any case. Thus, the statement in the Gabinvest Minutes that Mr. Almengor was sitting in “authorized representation” of Xela and “duly represented” the shareholder was false, and it was therefore unlawful for Mr. Almengor to file the Gabinvest Minutes in the Public Registry of Panama, purporting to alter the Gabinvest board. There may be other legal violations in connection with Mr. Almengor’s conduct, but the ones I reference are sufficient to underscore the problem.

90. I understand that Mr. Almengor also purported to convene a LISA shareholder meeting to alter LISA’s board of directors, based on the changes ostensibly made to the composition of Gabinvest’s board, as evidenced by the Gabinvest Minutes. I further understand that Mr. Almengor caused minutes of the LISA meeting (**the “LISA Minutes”**) to be filed with the Public Registry in Panama at or about the same time as the Gabinvest Minutes. To the extent the LISA Minutes and their contents were based on Mr. Almengor’s purported authority expressed in the Gabinvest Minutes, the LISA Minutes are similarly defective.

91. When LISA discovered the Gabinvest Minutes and the LISA Minutes in the Public Registry, it assumed that the Nephews were responsible. It therefore alerted the Public Registry to the defects, and the Public Registry withdrew the minutes.

92. Subsequently, as the Court knows, LISA’s President filed a criminal complaint against Mr. Almengor for filing a false statement in the Public Registry, which I understand he felt compelled by Panamanian law to submit. As the Court also knows, I signed a sworn statement in those criminal proceedings, although I did not believe (and still do not believe) that in doing so I was initiating or furthering some proceeding against the Receiver, or the Receiver’s agent, in

violation of the Appointment Order. If I was, it was certainly not intentional, as I stated earlier.

93. As noted, the Gabinvest Minutes are completely silent as to who had “authorized” Mr. Almengor to exercise Xela’s shareholder rights, or in what manner that had allegedly occurred. My sworn statement in December 2020 clarifies that the purported authorization did not come from me as President and shareholder of Xela. Thus, in my view, my sworn statement merely eliminated one possible (but erroneous) conclusion that could arise from a reading of the Gabinvest Minutes, which was that I had been the unidentified person, in my capacity as the shareholder of Xela, who had authorized Mr. Almengor to act. In any event, I provided no input whatsoever into the decision to file the criminal complaint; that decision was made solely by Mr. Johannessen in consultation with legal counsel.

94. Regarding the effectiveness of the Receiver’s purported authorization to Mr. Almengor, I am personally aware that the Receiver had not given Mr. Almengor a power of attorney until well after the Gabinvest Minutes were filed on or about January 16, 2020. I know this because I was present at a meeting in Bogotá, Colombia on February 21, 2020, the purpose of which was to give the Receiver copies of documents relating to the litigation in Panama against Villamorey, as well as documents concerning LISA’s assignment of its dividend rights to BDT. As indicated, I had been asking the Receiver for a face-to-face meeting to discuss collection of the dividends, and I was delighted that the Receiver had agreed to meet with me. As it happens, however, I made the trip from Toronto to Colombia in anticipation of meeting with the Receiver, but the Receiver backed out without letting me know. Once in Bogotá, we found ourselves meeting with lawyers from the Hatstone firm, without the Receiver. When LISA and BDT asked to see Hatstone’s power of attorney from the Receiver, Mr. Almengor was not able to provide one.

95. Owing to LISA's and BDT's inability to confirm Hatstone's mandate, they were unable to leave copies of the documents with the Hatstone lawyers, although the documents were shown to them on an informal basis on February 21, 2020. We all agreed to meet the following week in Panama, on February 28, 2020.

96. On February 24, 2020, Hatstone and LISA engaged in an email exchange, a copy of which is attached collectively as **Exhibit 20**. There, Hatstone transmitted its signed power of attorney from the Receiver for the first time.

97. Additionally, the Hatstone emails referred to the previous meeting on February 21, and confirmed February 28 for the upcoming meeting. Interestingly, Hatstone characterized both as settlement meetings, although I had understood their purpose was to share documents relating to litigation against Villamorey and the LISA/BDT assignment with the Receiver. Regardless, what is notable is that Hatstone conditioned the February 28 meeting on LISA's and Gabinvest's voluntary consent to the Receiver's desired board composition for Gabinvest and LISA:

The Receiver has advised me that prior to the 28 February meeting taking place, you accept the Receiver's changes to the boards of each of these companies: namely, the board of Gabinvest S.A is replaced entirely by the Receiver's representatives and three representatives are added to the board of Lisa S.A making it a mixed board.

* * *

As mentioned in the previous email, in order for the meeting to proceed on Friday, it is a requirement from the Receiver that its changes to the boards of both Gabinvest and Lisa are accepted. Again, should a full and final settlement be concluded, then the boards can then be changed as you wish.

98. In response to the Receiver's conditions, LISA declined, responding that the Receiver had not obtained recognition of his appointment order, and also that Hatstone had not followed the requirements of LISA's and Gabinvest's articles of incorporation as they relate to modifications

to the board of directors. Consequently, the Receiver cancelled the February 28 meeting, where LISA had been scheduled to deliver documents relating to the Panama litigation, which the Receiver had been requesting. Thus, by failing to appear in person or to provide a valid power of attorney to Mr. Almengor in advance of the February 21 meeting, and by subsequently cancelling the February 28 meeting, the Receiver actually prevented LISA from cooperating with the Receiver.

99. On March 11, 2020, Hatstone sent a further email to LISA, a copy of which is attached as **Exhibit 21**. There, Hatstone indicated that it had conveyed LISA's views to the Receiver, and that the Receiver's response was as follows:

I am not prepared to meet with Juan in the absence of their agreement to our board changes. We will be asking for a contempt order. You can tell them that.
[Emphasis mine.]

100. The Receiver did indeed bring a contempt motion, as the Court will recall; however, the Receiver eventually adjourned that motion *sine die*. Unfortunately, my sworn affidavit in connection with the criminal complaint against Mr. Almengor in Panama has now invigorated the Receiver, although, as I said, I was only trying to clarify that I had not been the person who had authorized Mr. Almengor to exercise Xela's shareholder rights, and I certainly did not believe that I was violating the Appointment Order. In any case, I have followed to the letter the Court's requirements to withdraw my sworn statement and to direct Mr. Johannessen and Mr. Alcides de Leon to withdraw the criminal complaint. While I understand that both Mr. Johannessen and Mr. Alcides de Leon have responded negatively to that direction, I reiterate that it seems unfair, and it is in fact incorrect, to assume that I can control LISA and its representatives when I have no legal right to do so.

101. In my view, this series of events reflects some resistance by the Receiver to acknowledge the limits of its power and to conform its conduct to applicable legal requirements. I believe that it further demonstrates the Receiver's willingness to pressure me with threats of legal process and even incarceration to accomplish its objectives. These tactics seem heavy-handed to me, especially since the Receiver's motivation to change LISA's board was to challenge the LISA Loan, which, as indicated, would have fully satisfied the Castillo Judgment, thereby accomplishing the purpose of the receivership. Unfortunately, the Receiver ultimately succeeded in preventing the LISA Loan, as the lender withdrew the Loan Commitment in the face of the public-record controversy over LISA's board of directors.

G. The Receiver's Pursuit of Discovery in Toronto

102. The fiasco in Panama occurred in January 2020, and the Receiver was on notice even earlier that it needed recognition in Panama to exercise Xela's shareholder rights in that country. Still, the Receiver has yet to take steps in Panama in that regard. Instead, the Receiver changed tactics shortly after its contempt motion against me was adjourned *sine die* on or about April 8, 2020, and launched an expensive and time-consuming discovery initiative in Toronto against me and my family, where the Receiver's jurisdiction is unassailable.

103. First, the Receiver issued discovery requests to Arturo's Technical Services ("**ATS**"), a company owned by the ArtCarm Trust and operated jointly in Toronto by my sons Andres and Thomas. ATS had been storing some of Xela's physical archives, which the Receiver requested. Contrary to what the Receiver's Fourth Report says, ATS fully cooperated with the Receiver, and the Receiver took possession of all physical Xela documents. (Separately, the Receiver has never provided me with any index or other tracking method that would allow me to determine whether the document set is intact after the receivership is discharged.) The significant point about this

request is that it did not occur until April 2, 2020, some nine months after the Receiver's appointment, but in the same approximate timeframe as its contempt motion against me, which, as indicated, did not go forward beyond the initial case conference. In other words, it appears to me that the Receiver took stock of its efforts to change LISA's board of directors and its pending contempt motion – neither of which had any basis in fact or law, in my opinion – and settled on another way to continue its pattern of conduct, using new litigation specialists in Toronto.

104. Indeed, the discovery requests did not end with the physical documents stored by ATS. ATS also owns certain computer servers that it purchased from Xela in 2017, after Xela's operations were essentially shuttered. ATS uses those servers to provide cloud storage services to some of its clients. Apparently, some part of the ATS servers contain historical Xela documents, which the Receiver has requested. However, I understand that producing the Xela documents in the format requested by the Receiver will also expose documents owned by ATS's clients, who are third parties independent of Xela. Counsel for ATS is addressing those issues with the Receiver and this Court, but I understand from the Receiver's Motion that the Receiver is giving very little consideration to the privacy of ATS's clients, who are not covered by the scope of the receivership. I also understand that the Receiver's aggressive approach to this issue is a serious threat to ATS's viability as a company because of the potential access by the Receiver to documents that ATS's clients expect to keep private. Further, the process has already involved significant time and expense, and promises to continue doing so.

105. Additionally, my own emails are maintained on ATS servers, and the Receiver has demanded that ATS provide copies of all emails that I have ever sent or received. The Receiver's demand is not limited to emails written or received in my capacity as President and owner of Xela, but includes all personal and business emails, without limitation or restriction, regardless of

whether they have any bearing on Xela. I strongly object to this request for several reasons. First, it exceeds the scope of the Receiver's mandate and of the receivership. Second, it likely covers privileged communications concerning matters unrelated to Xela. Third, it is unduly burdensome and oppressive in that the amount of time and expense required to review and potentially challenge production of (not to mention translate) the entire universe of my emails is virtually incalculable. Fourth, I believe the request has been made for an improper purpose, that is, to consume my time and resources, and that of my two sons, without advancing the objective of the receivership, in keeping with the Receiver's pattern of conduct described above.

106. Finally, the Receiver has also asked to review my personal electronic devices, on the grounds that they may contain some documents that belong to Xela, and that therefore the Receiver would be entitled to see them. The Receiver and I have agreed to a consent Order governing the review and production of data on the devices, although we disagree about the interpretation of the Order, as discussed further below. In any case, it seems clear to me that the Receiver is targeting my personal devices as part of the same pattern of conduct, which does nothing but consume resources without advancing the purpose of the receivership, all of which is consistent with the interests of the Nephews. My disagreement with the Receiver over interpretation of the consent Order is discussed further below.

107. The overarching conclusions that I take from the Receiver's discovery requests are as follows: (a) none of the information will help the Receiver collect LISA's dividends; (b) the process will be intensely expensive and time consuming, as the amount of data is massive and the documents are largely in Spanish; (c) it seems clear that there will be significant disagreements concerning the discoverability of my emails and the documents on my personal devices, requiring the involvement of this Court and/or a special master; and (d) there is a substantial risk that some

of the information will fall into the Nephews' hands, through Margarita if not some other way, which would then be used by the Nephews, if at all possible, to avoid paying LISA's dividends and even to misappropriate LISA's interest in Villamorey and/or the Avicolas. I see no reasonable basis to think that the process will advance the purpose of the receivership, and even if it might, the potential benefit is eclipsed by the certain financial and emotional toll on me and my family.

H. *The Receiver's Rejection of BDT's Settlement Proposal*

108. The Receiver's pattern of conduct is also reflected in its rejection of a recent settlement proposal advanced by BDT, under which BDT would give the Receiver an enforceable commitment to pay into the receivership the first of any dividends recovered from Villamorey in the Panama litigation. I understand that BDT has submitted materials to the Court discussing the details of that proposal, so I do not address them here. However, I see no logical reason why the Receiver would reject a proposal that offers just as much value to the receivership as the Receiver could possibly recover from investigating and unwinding the "reviewable transactions," except without further wasted time or expense, and without any of the attendant legal hurdles. There is nobody more motivated than BDT to collect LISA's dividends, and the interest of efficiency clearly favors accepting BDT's proposal. The Receiver's out-of-hand rejection of the proposal is consistent with its overall pattern of conduct because it keeps the receivership active. In my view, the Court should require the Receiver to accept the offer.

IV. THE MOTION SHOULD BE DENIED ON ITS MERITS

A. *The Receiver Requires No New Authorization to Seek Recognition in Panama or Barbados*

109. Paragraphs 30 and 31 of the Appointment Order give the Receiver all the authority it needs to seek recognition in, among other places, Panama and Barbados. The Appointment Order speaks

**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, as Executor of the Estate of
Juan Arturo Gutierrez

Respondents

FACTUM OF RESPONDENT, JUAN GUILLERMO GUTIERREZ

I. OVERVIEW

1. More than 20 months have passed since the Receiver's appointment over Respondent Xela Enterprises Inc. ("**Xela**"). In that time, the Receiver has incurred over one million dollars in receivership expenses but made no significant progress toward collecting the judgment debt (**the "Castillo Judgment"**). The Receiver has shown significant bias against Respondent Juan Guillermo Gutierrez ("**Mr. Gutierrez**") and a pattern of conduct that is unlikely ever to accomplish the main purpose of the receivership.
2. The only realistic source of funds to satisfy the Castillo Judgment is dividends owed to Xela's indirect subsidiary Lisa S.A., a Panama company ("**LISA**"). The Receiver has shown no interest in helping LISA collect, but has focused instead on: (a) preventing LISA from closing a loan that would have satisfied the Castillo Judgment (**the "LISA Loan"**); and (b) investigating legitimate past transactions unlikely to yield actual money.

Mr. Gutierrez. The Receiver's Fourth Report contains numerous such mischaracterizations, and it lacks evidentiary support. Annex A hereto contains details.

7. Questions are also raised with respect to the Receiver's ongoing but unreported communication with the majority shareholders who have wrongfully withheld the dividends since 1998 (**the "Nephews"**). Billing records reflect communications over a period of at least 13 months between the Receiver's lawyers and counsel for the Nephews, including time descriptions suggestive of strategic discussions. The Receiver denies coordination but does not explain the contacts and refuses to disclose the content.

8. The Receiver's Motion relates to discovery sought from Mr. Gutierrez, most or all of which is outside the scope of the Receiver's authority. In an effort to cooperate, Mr. Gutierrez consented to an Order dated October 27, 2020 (**the "Consent Order"**), relating to review of his personal electronic devices, not property of Xela. The Receiver's interpretation of the Consent Order is incorrect and prejudicial; it would require Mr. Gutierrez to unlock and upload the entire contents of his personal devices to a database maintained by the Receiver's agent before Mr. Gutierrez and/or his lawyers have reviewed the contents. Also, the Receiver's agent has already conducted forensic analysis of the devices and agreed that file deletions are consistent with normal operations, yet the Receiver wishes to conduct further forensic analysis without a basis.

9. The Receiver also seeks access to the entire universe of Mr. Gutierrez's emails, without any limitation to Xela's business operations or explanation how they might assist.

10. The new investigative authority requested by the Receiver is virtually unlimited, without any valid articulated relationship to the receivership. It would perpetuate (and probably exacerbate) the Receiver's current pattern of conduct, and it promises massive

president refused to withdraw the complaint, the Receiver sought contempt.²⁴

29. **Discovery into Mr. Gutierrez's Personal Information** – The Receiver has launched discovery seeking access to Mr. Gutierrez's personal electronic devices as well as his emails. The discovery is intrusive and includes information beyond the scope of the Receiver's authority. The cost is almost incalculable. Further, the information sought does not seem reasonably calculated to advance the receivership, as the information would not assist in the collection of LISA's unpaid dividends.²⁵

30. **Rejection of BDT Settlement Proposal** – BDT owns the rights to LISA's dividends, and it is pursuing the litigation against Villamorey in conjunction with LISA. On December 17, 2020, BDT offered to commit proceeds from its recovery against Villamorey to the receivership, thereby satisfying the purpose of the receivership while suspending the costs and expenses incurred by the Receiver. The Receiver summarily rejected the offer, and has made no attempt to discuss any of its alleged concerns with BDT to try to find an agreeable solution that would suspend the costs and expenses being incurred by the Receiver.²⁶

31. **The Receiver's Lack of Interest in the Castillo Loan** – There is evidence to suggest that the Castillo Loan was secured by and paid with Lisa's 2010 Villamorey dividends. If true, the Castillo Judgment has already effectively been satisfied by an indirect subsidiary of Xela. Mr. Gutierrez brought this transaction to the Receiver's

²⁴ Gutierrez Affidavit at paras 8-14; Responding Record dated March 9, 2021 at Tab A pages 4-7.

²⁵ Gutierrez Affidavit at paras 18, 105-106; Responding Record dated March 9, 2021 at Tab A pages 9 and 46-47.

²⁶ Gutierrez Affidavit at paras 21, 108; Responding Record dated March 9, 2021 at Tab A pages 10-11 and 49.

attention on numerous occasions, but the Receiver seemed disinterested.²⁷ It does not appear that the Receiver has even asked Margarita for a copy of the loan documents.²⁸

32. The Receiver's Lack of Interest in the Conspiracy Action – Neither the Nephews nor Margarita have been held accountable for the theft of Xela documents or for the resulting exclusion actions that almost misappropriated LISA's stake in the Avicolas.²⁹ The conspiracy action has been stayed in the Ontario Superior Court of Justice and could offset the Castillo Judgment.³⁰ The Receiver has expressed no interest in that action, and has made no mention of it in its reports.

33. The Receiver's Lack of Interest in the Gadais Limited Promissory Note – In 2007, Margarita's husband Ricardo signed a promissory note for \$400,000 on behalf of a Gadais Limited, a company he owned, in exchange for Xela's 86.6% stake in a real estate management company.³¹ The shares were duly transferred, but the note has never been repaid, nor is there any indication a demand has been made. Mr. Gutierrez informed the Receiver, but the Receiver's reports make no mention of the matter.³²

34. The Receiver's Failure to Seek Recognition in Panama or Barbados – Paragraphs 30 and 31 of the Appointment Order give the Receiver all the authority it needs to seek recognition in, among other places, Panama and Barbados. The Appointment Order was obtained on July 5, 2019 and the Receiver is only now moving to seek recognition of the Appointment Order, which is unnecessary. The Receiver's failure

²⁷Gutierrez Affidavit at paras 58-62; Responding Record dated March 9, 2021 at Tab A pages 26-28.

²⁸ Gutierrez Affidavit at para 62; Responding Record dated March 9, 2021 at Tab A pages 27-28.

²⁹ Gutierrez Affidavit at para 68; Responding Record dated March 9, 2021 at Tab A page 30.

³⁰ Gutierrez Affidavit at para 69; Responding Record dated March 9, 2021 at Tab A pages 30-31.

³¹ Gutierrez Affidavit at para 63; Responding Record dated March 9, 2021 at Tab A page 28.

³²Gutierrez Affidavit at paras 64-65; Responding Record dated March 9, 2021 at Tab A page 28.

Court File Number: CU-11-9062-0001

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo

Plaintiff(s)

AND

Xela Enterprises Ltd et al

Defendant(s)

Case Management Yes No by Judge: McBrien

Counsel	Telephone No:	Facsimile No:
<u>(see attached)</u>		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: _____
- Time Table approved (as follows): _____

This motion, brought by the Receiver KSV Restructuring Inc (the Receiver), seeks a number of orders.

I will deal with each below.

① The first deals with the Receiver's attempts to have Juan Guillermo Gutierrez (Juan Guillermo) deliver his electronic devices for analysis.

I previously granted an order to

25 March 21

Date

McBrien

Judge's Signature

Additional Pages 21

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

which Juan Guillermo consented, on August 28/20 in which Juan Guillermo was to (amongst other things) deliver to the Receiver all company devices.

Thereafter, I granted another order on October 27/20, to which Juan Guillermo also consented, setting out a protocol for the imaging and review of Juan Guillermo's devices.

Juan Guillermo, contrary to the terms of the above order, has refused to permit the devices to be imaged, without being uploaded to a password protected drive. He primarily submits that he wishes to review the data, provide the Receiver with a mirror image, and then advise what he is prepared to produce - subject to claims of privilege and relevancy.

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

I am not prepared to alter the terms of my previous order where a protocol has been agreed to by the Receiver and Juan Guillermo.

The relationship between the Receiver and Juan Guillermo has become extremely acrimonious (as will be outlined further below). To allow for further alterations to my orders will delay matters and possibly undermine the Receiver's legitimate investigations.

I urge the Receiver and Juan Guillermo to work co-operatively on this issue and to proceed in an economic fashion, but the terms of the above negotiated consent orders stand and shall be adhered to. Thus, Juan Guillermo is to provide the

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

password so that Epic Global (who I agree will succeed Duph + Phelps) can load the data onto the Relativity platform. Thereafter, the protocol concerning Juan Guillermo's objection, can proceed, as per the Order.

(2) The second issue concerns access to certain computer servers.

By way of background Arturo's Technical Services Inc (ATS) purchased certain assets from Xela in June 17, subsequent to the judgment against Xela, Juan Guillermo and others. Juan Guillermo's sons - Thomas and Andres - are directors and officers of ATS.

The Receiver has asked ATS to deliver, amongst other things, digital records.

The August 28/20 order ~~was~~^{made} which was ^{made} an notice to ATS, but

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

ATS did not appear) provided, inter alia, that the Receiver be entitled to conduct forensic examination of Xela devices; and that ATS provide assistance; and that no privilege claim could be asserted in respect of any Xela documents or devices.

It has now been ascertained that Xela servers were transferred to ATS. These Xela servers have been called the "blue network" by ATS and contain data related to Xela's business. This includes the Xela.com server, financial records and information concerning former clients of Xela.

The Receiver seeks unrestricted access to the blue servers in accordance with the terms of the August 28/20 order and the 2nd October 27/20 order (the October

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

order was not opposed and was obtained after negotiations between counsel for the Receiver and ATS.)

An impasse has arisen between the Receiver and ATS.

ATS has suggested a protocol taking the position that the blue servers also contain information of third parties and this is not captured by the Appointment Order.

I do not agree with ATS.

First, the third party information identified by ATS (and in Andres' cross-examination) consists of information regarding Xtra's subsidiaries (customers' including Greenpack - a related company / officers and employees who uploaded personal information onto the blue servers.

In my view, this is captured

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

by paragraph 6 of the Appointment Order which refers to unfettered access to records of any kind related to the business or affairs of Xela.

It is not surprising that client records are on those servers as they were related to Xela's business.

The Receiver's position is supported by the decision of D. Brown J, as he then was, in GE Real Estate vs. Liberty Assisted Living 2011 ONSC 5741 at para 19, wherein he held that the company's records were not limited to documents owned by the company.

He added that it was "inevitable" that the Receiver in that case would have to inspect and consider documents owned by companies related to the company in question.

~~So~~ I do not accept ATS's

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

position that G.E Real Estate is distinguishable as it speaks to broad principles.

Second, without casting aspersions at this time, it cannot be ignored that ATS is operated by Juan Guillermo's sons. They have been the beneficiaries of what the Receiver has identified as being, Reviewable Transactions. In these circumstances the provisions of my earlier orders should be adhered to without modification by ATS or Juan Guillermo.

I should note that at the motion, a debate broke out about the process should be carried out and whether ATS and for the Receiver was acting reasonably. ATS referred to what

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

I considered to be, a complicated protocol. It is expected that ATS and the Receiver and their experts can agree on a sensible method of providing the Receiver with access to the blue servers.

Third, I also do not accept the argument of ATS / Juan Guillermo that the nature of the Receivership should preter access. The Receivership was granted pursuant to s. 101 of the QIA which allows for broad powers if appropriate - it is appropriate here to grant unfettered access to the blue servers.

Last, with respect to both issues ① and ②. I should note that Juan Guillermo has submitted that the Receiver should not be pursuing access to devices, or granted access

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

to devices, since it has received a settlement offer from BOT.

I disagree.

BTS, a Barbadian company is a former subsidiary of Xelq. It has refused to attain to the jurisdiction of this Court. Andres, Juan Guillermo son, is a director.

The offer does not involve a payment but rather a promissory note, conditional on the future receipt of proceeds ~~of~~^{of} an apparent Panamanian judgment involving the oft-noted "Autosola Litigation" (involving Juan Guillermo and others) that has been going on for over two decades.

I accept the Receiver's position that the offer ought not be accepted where there is no payment, no timeline for payment, ~~and~~^{and} is

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

likely unenforceable and involves a related company in which Andres is a director.

③ The third issue involves the Receiver seeking to expand its powers.

This requires some discussion about the above noted acrimonious relationship between the Receiver and Juan Guillermo Xela.

Juan Guillermo and ATIS take the position that the Receiver has acted inappropriately and failed to pursue sensible ways of collecting funds.

These include:

- Prioritizing the pursuit of LISA dividends.
- Communicating with "the Nephews" who Juan Guillermo accuses of wrongly withholding dividends owed

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

to LISA which is Xelac subsidiary

- Preventing LISA from closing a loan which would have satisfied the Castillo Judgment
- Rejecting the aforementioned BDT proposal
- Focusing on the Reviewable Transactions which may not result in realization
- Generally, inappropriate pursuing Juan Guillermo and his family, including the scheduled contempt ~~and~~ motion.

In addition to the above Juan Guillermo (and ATS) make a number of other allegations which I have reviewed.

The Receiver submits that it has not had any real, legitimate co-operation from Juan Guillermo, Xelac or ATS.

The Receiver points to a ~~number~~ ^{Mr} ~~number~~ ^{Mr}

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

number of instances, including but not restricted to:

- Contradictory evidence received from Juan Guillermo and his sons concerning electronic devices / servers
- Juan Guillermo exercising control over Xela subsidiaries and related companies
- Suspicious financial dealings involving Lisa / Xela / BDT / Arwen
- Juan Guillermo's brother-in-law (Hals) who is the President of Xela's subsidiary LISA filed a criminal complaint against the Receiver agents in Panama when they attempted to implement an order made by me. The complaint was based on a declaration sworn by Juan Guillermo. I subsequently ordered that Juan Guillermo and Hals take steps to withdraw the complaint as

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

being, prima facie, a collateral attack on my order.

Additionally, the history of the litigation cannot be ignored.

Justice Newbould in his Oct/15 decision made substantial findings of oppression in granting judgment to Castillo.

Subsequently, shares of the Xela subsidiary BDT & Arca were transferred to a trust (the EAI Transaction) benefiting Juan Guillermo's family. ATS was incorporated as a subsidiary to BDT with the same directors and officers. Xela was essentially shut down with certain assets sold to ATS. LISA assigned most of the proceeds from the Arca action (the Assignment Transaction) to BDT.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Subsequently the Receiver the appointed

In light of all of the above it is reasonable to expand the investigative powers of the Receiver.

It is not up to Xela/Tuan Guillermo to dictate how the Receiver, a court officer, should direct the investigation. If in fact the LISA loan or BDT offer is meaningful, full particulars and terms of payment should be provided. To date this has not occurred.

The EAI and Assignment Transactions are worthy of further investigation, as is the LISA transfer concerning the assignment of Lisa's interest in the Avicola Group to BDT.

Accordingly, I am authorizing the relief sought in paragraph (a)

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

(i) - (ii) of the Notice of Motion.

I am not, at this time, authorizing examination under oath of any person as requested in subpoena (iii). If problems arise concerning co-operation of witnesses I can be spoken to. Subpoena (ii) provides for the ability to conduct interviews. JM

I am also authorizing that (f) the information sought in subpoena (g) be granted. It is consistent with my previous orders and Cabinvest, a Kela subsidiary, wholly-owns LISA.

For similar reasons I am granting the relief sought in subpoena (g). AFRA was LISA's / Cabinvest's registered agent in Panama until Feb/20. It maintained these companies' share register and other information. They have advised that they require a

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Court order to release the information.

In my view, the above expanded powers are reasonable, fair and the Receiver has demonstrated that there is sufficient reason to believe that a financial benefit will be gained.

The expansion, therefore, is consistent with the C.A. jurisprudence in *Weig vs Weig* 2012 ONSC 7262 and *Akapi v Synergy Group* (2000) 2015 ONCA 368.

Overall, I am satisfied that the extensive inter-corporate transactions involving Xela related companies warrant further investigation particularly where there is evidence in the record of ongoing participation by Iven Guillermo and his family in these companies.

(4) I am also satisfied that a foreign recognition order is fair

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

and reasonable particular in light of what transpired in Panama with respect to the Receiver's assets.

Neither Juan Guillermo nor JATS strenuously object although they submit that one should have been sought earlier. That may be the case, but the Receiver cannot be faulted for not anticipating the problems that have developed in this Receivership, which now warrant such an order.

(5) The Fees of the Receiver and its counsel. In my view, they should be approved.

I have considered the relevant Factors: CIBC v. Urbancorp 2017 ONSC 4205 at para 57; Re Martel 2017 ONSC 673 at paras 14-15

The Receiver's undertaking is a

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

significant as given the complicated structure of the Xela related Corporation, the after judgment transactions and LISA's Aurcola interest.

I also agree that the Receiver has faced a number of hurdles in dealing with Juan Guillermo, the Xela Subsidiaries and Hals.

While I am concerned about the amounts expended, I am not of the view that the Receiver or its counsel has acted in anything other than a neutral position, to date. In this regard I rely on my comments above, particularly concerning the alleged LISA loan and BTS settlement offer.

I also reject Juan Guillermo's submission that the costs issue should be directed to a reference.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

This would only add more costs and delay to an already complicated situation.

⑥ I agree that Duff + Phelps be replaced with Epiz Global. This relief is unopposed and settles a debate over whether Duff + Phelps had a conflict of interest, which was denied.

There were a number of orders included in the Receiver materials.

The order beginning at p. A183 of the materials, requesting assistance, appears to accord with this endorsement.

I am prepared to sign it unless parties wish to make submissions as to form and content.

The order beginning at p. A176 deals with a number of issues also appears to accord with this endorsement.

Again I am prepared to sign it

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

subject to submission as to Form and content.

last, the Order beginning at p. A1626 deals with the replacement of Duff + Phelps. It should go as it is proposed, ~~open~~ⁱⁿ subject to submission as to Form and content.

I stress, however, that the review of the Order is not an invitation to relitigate issues that have been before me and decided upon, on at least one occasion.

If the parties cannot agree on costs I can be spoken to.

M. J. [Signature]

COURT FILE NO.: CV-11-9062-00CL
DATE: March 25, 2021

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RE: 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

BEFORE: **The Honourable Justice Thomas J. McEwen**

COUNSEL: *Jeff Leon and Jason Woycheshyn* for Margarita Castillo
Monique Jilesen and Derek Knoke for the Receiver
Philip Cho and Michael Ly for ATS
Chris MacLeod and Joan Kasozi for Juan Guillermo Gutierrez
Aaron Kreaden for Avicola Group, Juan Luis Bosch Gutierrez, Felipe Antonio
Bosch Gutierrez, Dionisio Gutierrez Mayorga and Juan Jose Gutierrez Moyorga

HEARD BY ZOOM HEARING: March 22, 2021

ENDORSEMENT

[1] This motion, brought by the Receiver KSV Restructuring Inc. (the “Receiver”), seeks a number of orders. I will deal with each below.

Electronic Devices

[2] The first deals with the Receiver’s attempts to have Juan Guillermo Gutierrez (“Juan Guillermo”) deliver his electronic devices for analysis. I previously granted an order, to which Juan Guillermo consented, on August 28, 2020 in which Juan Guillermo was to (amongst other things) deliver to the Receiver all company devices.

[3] Thereafter, I granted another order on October 27, 2020, to which Juan Guillermo also consented, setting out a protocol for the imaging and review of Juan Guillermo’s devices.

- [4] Juan Guillermo, contrary to the terms of the above orders, has refused to permit the devices to be imaged, without being uploaded to a password protected drive. He primarily submits that he wishes to review the data, provide the Receiver with a mirror image, and then advise what he is prepared to produce – subject to claims of privilege and relevancy.
- [5] I am not prepared to alter the terms of my previous orders where a protocol has been agreed to by the Receiver and Juan Guillermo.
- [6] The relationship between the Receiver and Juan Guillermo has become extremely acrimonious (as will be outlined further below). To allow for further alterations to my orders will delay matters possibly undermine the Receiver’s legitimate investigations.
- [7] I urge the Receiver and Juan Guillermo to work co-operatively on this issue and to proceed in an economic fashion, but the terms of the above negotiated, consent orders stand and shall be adhered to. Thus, Juan Guillermo is to provide the password so that Epiq Global (who I agree will succeed Duff & Phelps) can load the data onto the Relativity platform. Thereafter, the protocol concerning Juan Guillermo’s objections, can proceed, as per the Order.

Computer Servers

- [8] The second issue concerns access to certain computer servers.
- [9] By way of background, Arturo’s Technical Services Inc. (“ATS”) purchased certain assets from Xela in June 2017, subsequent to the judgment against Xela, Juan Guillermo and others. Juan Guillermo’s sons – Thomas and Andres – are directors and officers of ATS.
- [10] The Receiver has asked ATS to deliver, amongst other things, digital records.
- [11] The August 28, 2020 order (which was made on notice to ATS, but ATS did not appear) provided, *inter alia*, that the Receiver be entitled to conduct forensic examinations of Xela devices, and that no privilege claims could be asserted in respect of any Xela documents or devices.
- [12] It has now been ascertained that Xela servers were transferred to ATS. These Xela servers have been called the “blue network” by ATS and certain data related to Xela’s business. This includes the Xela.com server, financial records and information concerning former clients of Xela.
- [13] The Receiver seeks unrestricted access to the blue servers in accordance with the terms of the August 28, 2020 order and the 2nd October 27, 2020 order (the October order was not opposed and was obtained after negotiations between counsel for the Receiver and ATS).
- [14] An impasse has arisen between the Receiver and ATS.
- [15] ATS has suggested a protocol, taking the position that the blue servers also contain information of third parties and thus is not captured by the Appointment Order.
- [16] I do not agree with ATS.

- [17] First, the third party information identified by ATS (and in Andres' cross-examination) consists of information regarding Xela's subsidiaries, customers (including Greenpack – a related company) officers and employees who uploaded personal information onto the blue servers.
- [18] In my view, this is captured by paragraph 6 of the Appointment Order which refers to the unfettered access to records of any kind related to the business or affairs of Xela.
- [19] It is not surprising that client records are on those servers as they were related to Xela's business.
- [20] The Receiver's position is supported by the decision of D. Brown J., as he then was, in *GE Real Estate v. Liberty Assisted Living* 2011 ONSC 5741 at para 19, wherein he held that the company's records were not limited to documents owned by the company. He added that it was "inevitable" that the Receiver in that case would have to inspect and consider documents owned by companies related to the company in question. I do not accept ATS' position that *GE Real Estate* is distinguishable as it speaks to broad principles.
- [21] Second, without casting aspersions at this time, it cannot be ignored that ATS is operated by Juan Guillermo's sons. They have been the beneficiaries of, what the Receiver has identified as being, Reviewable Transactions. In these circumstances, the provisions of my earlier orders should be adhered to without modification by ATS or Juan Guillermo.
- [22] I should note that, at the motion, a debate broke out about the **process [that]** should be carried out and whether ATS and/or the Receiver was acting reasonably. ATS referred to what I considered to be a complicated protocol. It is expected that ATS and the Receiver and their experts can agree on a sensible method of providing the Receiver with access to the blue servers.
- [23] Third, I also do not accept the argument of ATS/Juan Guillermo that the nature of the Receivership should fetter access. The Receivership was granted pursuant to s. 101 of the CJA, which allows for broad powers if appropriate – it is appropriate here to grant unfettered access to the blue servers.
- [24] Last, with respect to both issues 1 and 2, I should note that Juan Guillermo has submitted that the Receiver should not be pursuing access to devices, or granted access to devices, since it has received a settlement offer from BDT.
- [25] I disagree.
- [26] **BTS [BDT]**, a Barbadian company, is a former subsidiary of Xela. It has refused to attorn to the jurisdiction of this Court. Andres, Juan Guillermo's son, is a director.
- [27] The offer does not involve a payment, but rather a promissory note, conditional on the future receipt of proceeds of an apparent Panamanian judgment involving the oft-noted "Avicola Litigation" (involving Juan Guillermo and others) that has been going on for over two decades.
- [28] I accept the Receiver's position that the offer ought not be accepted where there is no payment, no timeline for payment, is likely unenforceable and involves a related company in which Andres is a director.

Powers of the Receiver

[29] The third issue involves the Receiver seeking to expand its powers.

[30] This requires some discussion about the above noted acrimonious relationship between the Receiver and Juan Guillermo/Xela.

[31] Juan Guillermo and ATS take the position that the Receiver has acted inappropriately and failed to pursue sensible ways of collecting funds.

[32] These include:

- Prioritizing the pursuit of LISA dividends
- Communicating with “the Nephews” who Juan Guillermo accuses of wrongfully withholding dividends owed to LISA, which is Xela’s subsidiary.
- Preventing LISA from closing a loan which would have satisfied the Castillo Judgment
- Rejecting the aforementioned BDT proposal
- Focusing on the Reviewable Transactions which may not result in realizations
- Generally, inappropriately pursuing Juan and his family, including the scheduled contempt motion.

[33] In addition to the above Juan Guillermo and (and ATS) make a number of other allegations which I have reviewed.

[34] The Receiver submits that it has not had any real, legitimate co-operation from Juan Guillermo, Xela or ATS.

[35] The Receiver points to a number of instances, including but not restricted to:

- Contradictory evidence received from Juan Guillermo and his sons concerning electronic devices/servers
- Juan Guillermo exercising control over Xela subsidiaries and related companies
- Suspicious financial dealings involving LISA/Xela/BDT/Arven
- Juan Guillermo’s brother-in-law (“Hals”) who is the President of Xela’s subsidiary LISA filed a criminal complaint against the Receiver’s agents in Panama when they attempted to implement an order made by me. The complaint was based on a declaration sworn by Juan Guillermo. I subsequently ordered that Juan Guillermo and Hals take steps to withdraw the complaint as being, *prima facie*, a collateral attack on my order.

[36] Additionally, the history of the litigation cannot be ignored.

[37] Justice Newbould in his October 2015 decision made substantial findings of oppression in granting judgment to [Ms.] Castillo.

[38] Subsequently, shares of the Xela subsidiaries BDT & Arven were transferred to a trust (the “EAI Transaction”) benefitting Juan Guillermo’s family. ATS was incorporated as a subsidiary

to BDT with the sons as directors and officers. Xela was essentially shut down with certain assets sold to ATS. LISA assigned most of the proceeds from the Avicola action (the “Assignment Transaction”) to BDT.

[39] Subsequently, the Receiver [was] appointed.

[40] In light of all of the above, it is reasonable to expand the investigative powers of the Receiver.

[41] It is not up to Xela/Juan Guillermo to dictate how the Receiver, a court officer, should direct its investigation. If, in fact the LISA loan or BDT offer is meaningful, full particulars and terms of payment should be provided. To date this has not occurred.

[42] The EAI and Assignment Transactions are worthy of further investigation, as is the LISA transfer concerning the assessment of LISA’s interest in the Avicola Group to BDT.

Disposition

[43] Accordingly, I am authorizing the relief sought in paragraph 1(a)(i)-(ii) of the Notice of Motion.

[44] I am not, at this time, authorizing examinations under oath of any person as requested in subpara (iii). If problems arise concerning co-operation of witnesses I can be spoken to. Subpara (ii) provides for the ability to conduct interviews.

[45] I am also authorizing that the information sought in subpara 1(f) be granted. It is consistent with my previous orders and Gabinvest, a Xela subsidiary, wholly-owns LISA.

[46] For similar reasons, I am granting the relief sought in subpara 1(g). AFRA was LISA’s/Gabinvest’s registered agent in Panama until February 2020. It maintained those companies’ share registers and other information. They have advised that they require a Court order to release the information.

[47] In my view, the above expanded powers are reasonable, fair and the Receiver has demonstrated that there is sufficient reason to believe that a financial benefit will be gained. The expansion, therefore, is consistent with the CA jurisprudence in *Weig v. Weig*, 2012 ONSC 7262 and *Akagi v. Synergy Group* (2000), 2015 ONCA 368.

[48] Overall, I am satisfied that the extensive inter-corporate transactions involving Xela related companies warrant further investigation, particularly where there is evidence in the record of ongoing participation by Juan Guillermo and his family in those companies.

Foreign Recognition Order

[49] I am also satisfied that a foreign recognition order is fair and reasonable particularly in light of what transpired in Panama with respect to the Receiver’s agents.

[50] Neither Juan Guillermo nor ATS strenuously object although they submit that one should have been sought earlier. That may be the case, but the Receiver cannot be faulted for not anticipating the problems that have developed in his Receivership, which now warrant such an Order.

The Fees of the Receiver and Counsel

[51] The Fees of the Receiver and its counsel. In my view, they should be approved.

[52] I have considered the relevant factors: *CIBC v. Urbancorp*, 2017 ONSC 4205 at para 57; *Re Nortel*, 2017 ONSC 673 at paras 14-15.

[53] The Receiver's undertaking is a significant one given the complicated structure of the Xela-related corporations, the after judgment transactions and LISA's Avicola interest.

[54] I also agree that the Receiver has faced a number of hurdles in dealing with Juan Guillermo, the Xela subsidiaries and Hals.

[55] While I am concerned about the amounts expended, I am not of the view that the Receiver or its counsel has acted in anything other than a neutral position, to date. In this regard, I rely on my comments above, particularly concerning the alleged LISA loan and **BTS [BDT]** settlement offer.

[56] I also reject Juan Guillermo's submissions that the costs issue should be directed to a reference. This would only add more costs and delay to an already complicated situation.

Orders Sought

[57] I agree that Duff & Phelps be replaced with Epiq Global. This relief is unopposed and settles a debate over whether Duff & Phelps had a conflict of interest, which was denied.

[58] There were a number of orders included in the Receiver's materials. The order beginning at p. A183 of the materials, requesting assistance, appears to accord with this endorsement. I am prepared to sign it unless parties wish to make submissions as to form and content.

[59] The order beginning at p. A176 deals with a number of issues [and] also appears to accord with this endorsement. Again, I am prepared to sign it subject to submissions as to form and content.

[60] Last, the order beginning at p. A1626 deals with the replacement of Duff & Phelps. It should go as it is unopposed, subject to submissions as to form and content.

[61] I stress, however, that the review of the orders is not an invitation to relitigate issues that have been before me, and decided upon, on at least one occasion.

[62] If the parties cannot agree on costs I can be spoken to.

Justice Thomas J. McEwen

Date: March 25, 2021

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

THURSDAY , THE 25TH
DAY OF MARCH , 2021

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.

ORDER

THIS MOTION, made by KSV Restructuring 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 of Xela Enterprises Ltd. (the “**Company**”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

WHEREAS, on October 27, 2020, this Court made an Order authorizing Duff & Phelps to make a single disk image of certain servers under the control of Arturo’s Technical Services Ltd. (“**ATS**”) (the “**ATS Order**”),

WHEREAS, on October 27, 2020, this Court made an Order authorizing Duff & Phelps to make a single forensic image of Juan Guillermo Gutierrez’s (“**Juan Guillermo**”) devices (the “**Juan Guillermo Imaging Order**”),

ON READING the material filed by the parties, and on hearing the submissions of the lawyers for the Receiver and such other counsel as were present and listed on the Counsel Slip.

SERVICE

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

INVESTIGATIVE POWERS

2. **THIS COURT ORDERS** that the Receiver is granted expanded investigative powers, including the authority to:

(a) investigate, identify, quantify and take all steps necessary, in the opinion of the Receiver, to review:

(i) the sale, conveyance or transfer in 2016 by Empress Arturo International (“**EAI**”) of the shares of BDT Investments Ltd. (“**BDT**”) and Corporacion Arven, Limited (“**Arven**”) to Juan Arturo Gutierrez, and then from Juan Arturo Gutierrez to the ARTCARM Trust, a Barbados domiciled trust;

- (ii) the assignment in January 2018 by Lisa, S.A. (“**Lisa**”) of the proceeds from the litigation arising from shareholder disputes involving the Avicola Group (the “**Avicola Litigation**”) to BDT (“**Assignment Transaction**”);
- (iii) the sale, conveyance, transfer or assignment of Lisa’s interest in the Avicola Group to BDT in early 2020 (the “**Lisa Transfer**”);
- (iv) the assignment of the right to control the Avicola Litigation (“**Litigation Assignment**”);

(collectively, the “**Reviewable Transactions**”), and to conduct such review and investigation of the Reviewable Transactions that the Receiver deems necessary;

- (b) conduct such additional review and investigation of the business and affairs of the Company and its current and former direct and indirect subsidiaries, affiliates, customers, directors, officers and employees as it deems necessary (collectively the “**Investigation**”); and
- (c) take any steps reasonably incidental to the exercise of these powers.

IMAGING ORDERS

3. **THIS COURT ORDERS** that Duff & Phelps shall forthwith deliver to Epic Global, the Images made and the Schedule B Servers held pursuant to the ATS Order (the “**ATS Images and Servers**”) and the hard-drives held and images made pursuant to the Juan Guillermo Imaging Order (the “**Juan Guillermo Images**”), together with a copy of any chain of custody information.

4. **THIS COURT ORDERS** that following the transfer of the ATS Images and the Juan Guillermo Images (collectively, the “**Images**”) to Epic Global, Duff & Phelps shall have no further

responsibility for or access to the Images pursuant to the ATS Order or the Juan Guillermo Imaging Order.

5. **THIS COURT ORDERS** that Epiq Global shall replace Duff & Phelps for the purposes of carrying out the ATS Order and the Juan Guillermo Imaging Order and shall have all the powers, rights and obligations of Duff & Phelps as set out in those Orders.

JUAN GUILLERMO DEVICES

6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall immediately provide the Receiver and Epiq Global with all encryption codes, keys, passwords or any other such information or knowledge necessary to unlock and access the data on the Juan Guillermo Images, including but not limited to the DataShield Fantom Drive.

COMPANY RECORDS

7. **THIS COURT ORDERS** that, within five days of this Order, ATS shall identify the location of the images of the “Blue Network Servers” (as identified by Julio Fabrini in his interview dated November 26, 2020) on the ATS Images by identifying the file names, paths, and any other information necessary to identify the Blue Network Server images.

8. **THIS COURT ORDERS** that Epiq Global and the Receiver shall, without any limitation whatsoever, be authorized and permitted to copy, analyze, access and review the Blue Network Servers on the ATS Images including any content of the images.

9. **THIS COURT ORDERS** that Epiq Global shall otherwise maintain and preserve the ATS Images until further order of this Court or written consent of the Receiver and ATS.

10. **THIS COURT ORDERS AND DECLARES** that, within 14 days of this Order, ATS shall provide the Receiver with an electronic copy of all emails sent or received by Juan Guillermo (regardless of the email address to which it was forwarded and regardless of whether the email was sent directly to him or it was one on which he was copied) at any email address maintained on the ATS servers to the date of this Order, along with any encryption codes, keys or passwords used to secure the emails.

11. **THIS COURT ORDERS AND DECLARES** that, within 30 days of this Order, Harald Johannessen Hals, Calvin Shields and Lester C. Hess Jr. shall provide the Receiver with all available information or documents in their control relating to:

(a) shares, share registers, accounting, correspondence and related information of Lisa;
and

(b) the Reviewable Transactions.

12. **THIS COURT ORDERS AND DECLARES** that, within 30 days of this Order, Harald Johannessen Hals, Jose Eduardo San Juan and David Harry shall provide the Receiver with all available information or documents in their control relating to:

(a) shares, share registers, accounting, correspondence and related information of Gabinvest, S.A. ("**Gabinvest**"); and

(b) the Reviewable Transactions.

13. **THIS COURT ORDERS AND DECLARES** that the Receiver and its agents in Panama, Hatstone Abogados ("**Hatstone**"), are authorized to take any steps reasonably required in relation to Alfaro, Ferrer & Ramirez Abogados ("**AFRA**"), as former resident agent of Gabinvest and Lisa in Panama, to arrange for AFRA to deliver to the Receiver their entire file, including but not limited

to, all information related to the constitution, shares issued, KYC (know your client), correspondence, instructions given to AFRA and all information related to Gabinvest and Lisa.

14. **THIS COURT ORDERS AND DECLARES** that the Receiver and its agents in Panama, Hatstone, are authorized to take any steps reasonably incidental to the recognition and enforcement of this Order and any other Orders issued by this Court in this matter in Panama.

APPROVAL OF FEES AND DISBURSEMENTS

15. **THIS COURT ORDERS AND DECLARES** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$282,961.50 (excluding HST) as set out in the Affidavit of Noah Goldstein, sworn January 18, 2021, are hereby approved.

16. **THIS COURT ORDERS AND DECLARES** that the fees and disbursements of the Receiver's legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$192,792.36 (excluding HST) as set out in the Affidavit of Sam Babe, sworn January 18, 2021, are hereby approved.

17. **THIS COURT ORDERS AND DECLARES** that the fees and disbursements of the Receiver's legal counsel, Lenczner Slaght Royce Smith LLP, being fees and disbursements totalling \$235,218.33, plus HST of \$30,528.35, totalling \$265,746.68 as set out in the Affidavit of Monique J. Jilesen, sworn January 18, 2021, are hereby approved.

RECOGNITION BY FOREIGN JURISDICTIONS

18. **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, Republic of Colombia 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.

A handwritten signature in black ink, appearing to read 'McE T.', written above a horizontal line.

(Signature of Judge)

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

ORDER

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

Barristers
130 Adelaide Street West, Suite 2600
Toronto ON M5H 3P5
Peter H. Griffin (19527Q)
pgriffin@litigate.com
Tel: (416) 865-2921
Monique J. Jilesen (43092W)
mjilesen@litigate.com
Tel: (416) 865-2926
Derek Knoke (75555E)
dknoke@litigate.com
Tel: (416) 865-3018

AIRD & BERLIS LLP

Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9
Kyle Plunkett
Email: kplunkett@airdberlis.com
Sam Babe
Email: sbabe@airdberlis.com
Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Receiver

Court File Number: CV-11-9062-0001

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprises Ltd. et al
Defendant(s)

Case Management Yes No by Judge: McEwen J

Counsel	Telephone No:	Facsimile No:
<u>(see Counsel Slip)</u>		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: _____
- Time Table approved (as follows): _____

This endorsement deals with the issue of costs with respect to my March 25/21 order.

I have reviewed the written submissions filed by the parties to the motion.

The Receiver, who was largely successful at the motions, seeks costs on a substantial indemnity

28 July 21
Date

McEwen J
Judge's Signature

Additional Pages thirteen

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

basis against Juan Guillermo Gutierrez ("Juan Guillermo") and Arturo's Technical Services Ltd. ("ATS").

In this regard, the Receiver seeks fees expended to its counsel in these proceedings, its counsel in Panama ("Hastings") and its own fees with respect to steps taken to obtain various Court orders - totalling \$319,599.²³

Juan Guillermo and ATS deny that any costs should be paid and, if so, the amount should be nominal - \$5,000.⁰⁰.

I will start with the issue of jurisdiction. Juan Guillermo and ATS contend that I cannot award costs to the Receiver since there was no request for costs in the first two notices of motion. They rely on the case of *Pelletier v Canada* [2006]

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

F.C.T No. 1884 (C.A.)

I do not agree with their submission and accept the submission of the Receiver that costs can be awarded in these circumstances based on the decision of the Court of Appeal in *Atapi v. Synony Corp (2000) Inc* 2015 ONCA 771 at para 14 where the Court squarely dealt with this issue.

Pelletier is distinguishable, wherein no costs were requested in oral argument. This was not the case in the matter before me where costs were requested and I requested submissions.

The second issue to consider is the scale upon which costs ought to be awarded.

In my view, costs ought to be

Court File Number: _____

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

awarded on a substantial indemnity basis with respect to the following:

- ① Against Juan Guillermo with respect to his failure to deliver his electronic devices for analysis contrary to my orders of Aug 28/20 and Oct 27/20.
- ② Against ATS with respect to its failure to allow the Receiver access to certain computer servers contrary to the above-noted Orders.

In both cases as I noted in my March 25/21 endorsement, Juan Guillermo and ATS failed to comply with prior orders. I do not propose to restate my other findings which were critical of both of them.

In the circumstances of the case substantial indemnity is warranted on these two issues. Court order, particularly in acrimonious litigation

Court File Number: _____

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Such as Mine, cannot be ignored without consequence. I do not agree with the position taken by ATS that costs of motion cannot be recovered where fees are provided for in an Appointment order or Juan Guillermo's submission that Receiver's ought not receive costs. If Mine was true in either case it ^{at} would allow parties and stakeholders to ignore Court orders with impunity.

Given the failure to comply with clear orders of the Court and my other criticisms contained in the March 25/21 endorsement I am of the view that Mine is one of those rare cases where substantial indemnity costs are warranted. The actions of Juan Guillermo and ATS are worthy of sanction.

With respect to the remaining

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

Orders in my March 25/21 endorsement
I make the following orders:

(1) With respect to the Receiver's motion to expand its powers I award costs on a partial indemnity basis. Although the motion was opposed by Juan Guillermo and AIS I do not find that their opposition warrants heightened costs. It remains to be seen what the investigations will uncover.¹

(2) I make no order as to costs with respect to the Foreign recognition order; the order concerning fees of the Receiver and Corwell; or, the order replacing Duff & Phelps with Epig Global. None of these orders were strenuously opposed (the last one was unopposed). Thus, no costs are warranted.

Page 6 of 13Judges Initials TM

i. I considered awarding substantial indemnity costs given the criminal proceedings commenced in Panama, but did not since Juan Guillermo thereafter co-operated and the expansion of powers deals with a number of issues/investigations - the results of which are yet unknown.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

This brings me to the issue of quantum and what costs ought to be awarded.

The Receiver seeks its legal costs, along with costs incurred by the Receiver in obtaining orders, and costs of the Hatstone firm in Panama with respect to its involvement in issues surrounding the motion.

Juan Guillermo and AIS oppose any costs being awarded to Hatstone or the Receiver.

I disagree.

Hatstone is one of the Receiver's law firms. Given the actions of Juan Guillermo, as set out in my March 25/21 endorsement, it was reasonable and necessary to seek their assistance at the return of the motion.

Similarly, I agree that the

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Receiver incurred unnecessary and additional costs in responding to the non-compliance and allegations of Juan Guillermo and ATIS. In my view, such costs are compensable as being "incidental" to a step in the proceeding, i.e. the motion *ex parte* s. 13(1) of the Courts of Justice Act. Such relief is particularly sensible where the Court seeks to prevent abuses of the Court's procedure - in this case non-compliance with Court orders and the commencement of the proceedings in Panama against Hotstare which was supported by Juan Guillermo.

Based on the above analysis and considering the criteria set out in Rule 5701, considering the factors in *Boucher v Public Accountants Council*

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

For the Province of Ontario, 2004 CanLii 14579
(ONCA) and taking a holistic view
I have reviewed the submissions on
quantum vis a vis the Receiver, its counsel
and Hatstone.

I note that the objective in fixing costs
is to arrive at an amount that is
fair and reasonable for the unsuccessful
party to pay in the particular
circumstances of this case, rather than
the fixed amount of actual costs
incurred by the successful party.

In this regard, I do not propose
to analyse each item and conduct
what amounts to an assessment.
Instead, I will fix costs keeping
in mind the principle of proportionality
and the factors noted above.

I have reviewed the objections of
Juan Guillermo and ATS. Some I

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

have dealt with above.

They have raised certain issues that have already been litigated and dealt with in my previous endorsements and I do not propose to repeat them again.

I agree with them that amounts overall sought by the Receiver are high and there has been some duplication.

On the other side of the coin, the Receiver was put to extra expense as a result of the failure of Juan Guillermo and ATS to comply with my aforementioned order and ^{their} other actions referred to in my Feb 10/21 and March 25/21 endorsements.

I do not agree with ATS that the Rules preclude the Receiver from obtaining costs regarding cross-

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

examinations and prefer the Receiver's submission in this regard.

As noted above, I have also rejected the argument that the Receiver is not allowed reimbursement for steps taken to attempt compliance with Order. In addition to what I have outlined this would be unfair to stakeholders and saddle them with costs that ought not to have been incurred.

Taking all of the submissions into account, therefore, I make the following costs orders:

- ① With respect to Juan Guillen's failure to deliver his electronic devices he shall pay the Receiver, on a substantial indemnity basis the following fees:

Lencner Slayht LLP - \$50,000 plus HST

KSV Restructuring Inc - \$30,000 plus

HST.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

② With respect to ATS's failure to allow the Receiver access it shall pay the Receiver, on a substantial indemnity basis the following fees:

Lenczner Slaght LLP - \$30,000 plus HST

KSV Restructuring Inc - \$15,000 plus HST

③ With respect to the Receiver motion to expand its power, Juan Guillermo and ATS, on a joint and several basis, shall pay the Receiver the following fees:

Lenczner Slaght LLP - \$15,000 plus HST

KSV Restructuring Inc - \$7,500 plus HST

Hatstone - \$7,500 plus HST

④ Disbursements shall be paid to the Receiver by Juan Guillermo and ATS on a joint and several basis, with Juan Guillermo paying 67% and ATS paying 33%.

Given my previous findings in prior endorsements and the within

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Costs award I have determined that
while I will continue to manage
this matter, it would be preferable
if another judge conducted the
contempt hearing - which is a quasi-
criminal proceeding

I will assure that it is reassigned
and the dates are kept.

Costs are to be paid within 60 days.

McE...

COURT FILE NO.: Court File No. CV-11-9062-00CL

DATE: February 10, 2021

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

RE: 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

BEFORE: The Honourable Justice McEwen

COUNSEL: Monique Jilesen for KSV Restructuring Inc., the Receiver

Chris MacLeod for Juan Guillermo Gutierrez

Philip Cho for Arturo's Technical Services Ltd. And BDT Investments Inc.

Jeffrey Leon and Jason Woychesyn for Margarita Castillo

Aaron Kreaden for the Avicola Group and each of Juan Luis Bosch Gutierrez, Felipe Antonio Bosch Gutierrez, Dionisio Gutierrez Mayorga, and Juan Jose Gutierrez Moyorga

ALSO PRESENT: Bobby Kofman, KSV Restructuring Inc., the Receiver

Carl O'Shea and Alvaro Almengor, Hatstone, Panamanian Counsel to the Receiver

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

DATE: July 28, 2021

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

RE: 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

BEFORE: The Honourable Justice Thomas J. McEwen

COUNSEL: (see Counsel Slip)

HEARD IN WRITING

COSTS ENDORSEMENT

This endorsement deals with the issue of costs with respect to my March 25/21 [March 25, 2021] order.

- [1] I have reviewed the written submissions filed by the parties to the motion.
- [2] The Receiver, who was largely successful at the motions, seeks costs on a substantial indemnity basis against Juan Guillermo Gutierrez (“**Juan Guillermo**”) and Arturo’s Technical Services Ltd. (“**ATS**”).
- [3] In this regard, the Receiver seeks fees expended by its counsel in these proceedings, its counsel in Panama (“**Hatstone**”) and its own fees with respect to steps taken to obtain various Court Orders – totalling \$319,599.23.
- [4] Juan Guillermo and ATS deny that any costs should be paid and, if so, the amount should be nominal - \$5,000.00.
- [5] I will start with the issue of jurisdiction. Juan Guillermo and ATS contend that I cannot award costs to the Receiver since there was no request for costs in the first two notices of motion. They rely on the case of *Pelletier v. Canada*, [2006] F.C.J. No. 1884 (C.A.).
- [6] I do not agree with their submission and accept the submission of the Receiver that costs can be awarded in these circumstances based on the decision of the Court of Appeal in *Akagi v.*

Synergy Corp. (2000) Inc., 2015 ONCA 771 at para. 14 where the Court squarely dealt with this issue.

- [7] *Pelletier* is distinguishable, wherein no costs were requested in oral argument. This was not the case in the matter before me where costs were requested, and I requested submissions.
- [8] The second issue to consider is the scale upon which costs ought to be awarded.
- [9] In my view, costs ought to be awarded on a substantial indemnity basis with respect to the following:
- (1) Against Juan Guillermo with respect to his failure to deliver his electronic devices for analysis contrary to my orders of Aug. 28/20 and Oct. 27/20.
 - (2) Against ATS with respect to its failure to allow the Receiver access to certain computer servers contrary to the above-noted Orders.
- [10] In both cases, as I noted in my March 25/21 endorsement, Juan Guillermo and ATS failed to comply with prior orders. I do not propose to restate my other findings which were critical of both of them.
- [11] In the circumstances of this case substantial indemnity is warranted on these two issues. Court orders, particularly in acrimonious litigation such as this, cannot be ignored without consequence. I do not agree with the position taken by ATS that costs of motions cannot be recovered where fees are provided for in an Appointment Order or Juan Guillermo's submission that Receivers ought not receive costs. If this was true in either case it would allow parties and stakeholders to ignore Court Orders with impunity.
- [12] Given the failure to comply with clear orders of the Court and my other criticisms contained in the March 25/21 endorsement I am of the view that this is one of those rare cases where substantial indemnity costs are warranted. The actions of Juan Guillermo and ATS are worthy of sanction.
- [13] With respect to the remaining Orders in my March 25/21 endorsement I make the following orders:
- (1) With respect to the Receiver's motion to expand its powers, I award costs on a partial indemnity basis. Although the motion was opposed by Juan Guillermo and ATS I do not find that their opposition warrants heightened costs. It remains to be seen what the investigations will uncover.¹
 - (2) I make no order as to costs with respect to the foreign recognition order; the order concerning fees of the Receiver and counsel; or, the order replacing Duff & Phelps with Epiq Global. None of these orders were strenuously opposed (the last one was unopposed). Thus, no costs are warranted.

¹ I considered awarding substantial indemnity costs given the criminal proceedings commenced in Panama, but did not since Juan Guillermo thereafter cooperated and the expansion of powers deals with a number of issues/investigations – the results of which are yet unknown.

- [14] This brings me to the issue of quantum and what costs ought to be awarded.
- [15] The Receiver seeks its legal costs, along with costs incurred by the Receiver in obtaining orders, and costs of the Hatstone firm in Panama with respect to its involvement in issues surrounding the motion.
- [16] Juan Guillermo and ATS oppose any costs being awarded to Hatstone or the Receiver.
- [17] I disagree.
- [18] Hatstone is one of the Receiver's law firms. Given the actions of Juan Guillermo, as set out in my March 25/21 endorsement, it was reasonable and necessary to seek their assistance at the return of the motion.
- [19] Similarly, I agree that the Receiver incurred unnecessary and additional costs in responding to the non-compliance and allegations of Juan Guillermo and ATS. In my view, such costs are compensable as being "incidental" to a step in the proceeding i.e., the motions as per s. 13(1) of the *Courts of Justice Act*. Such relief is particularly sensible where the Court seeks to prevent abuses of the Court's procedure – in this case non-compliance with Court Orders and the commencement of the proceedings in Panama against Hatstone, which was supported by Juan Guillermo.
- [20] Based on the above analysis and considering the criteria set out in Rule 57.01, considering the factors in *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ONCA) and taking a holistic view, I have reviewed the submissions on quantum *vis a vis* the Receiver, its counsel and Hatstone.
- [21] I note that the objective in fixing costs is to arrive at an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of this case, rather than the fixed amount of actual costs incurred by the successful party.
- [22] In this regard, I do not propose to analyse each item and conduct what amounts to an assessment. Instead, I will fix costs, keeping in mind the principle of proportionality and the factors noted above.
- [23] I have reviewed the objections of Juan Guillermo and ATS. Some I have dealt with above.
- [24] They have raised certain issues that have already been litigated and dealt with in my previous endorsements and I do not propose to repeat them again.
- [25] I agree with them that amounts, overall, sought by the Receiver are high and there has been some duplication.
- [26] On the other side of the coin, the Receiver was put to extra expense as a result of the failure of Juan Guillermo and ATS to comply with my aforementioned orders and their other actions referred to in my Feb. 10/21 and March 25/21 endorsements.
- [27] I do not agree with ATS that the *Rules* preclude the Receiver from obtaining costs regarding cross-examinations and prefer the Receiver's submission in this regard.

[28] As noted above, I have also rejected the argument that the Receiver is not allowed reimbursement for steps taken to attempt compliance with Orders. In addition to what I have outlined, this would be unfair to stakeholders and saddle them with costs that ought not to have been incurred.

Disposition

[29] Taking all of the submissions into account, therefore, I make the following costs orders:

(1) With respect to Juan Guillermo's failure to deliver his electronic devices he shall pay the Receiver, on a substantial indemnity basis, the following fees:

- a. Lenczner Slaght LLP - \$50,000 plus HST
- b. KSV Restructuring Inc. - \$30,000 plus HST

(2) With respect to ATS' failure to allow the Receiver access it shall pay the Receiver, on a substantial indemnity basis, the following fees:

- a. Lenczner Slaght LLP - \$30,000 plus HST
- b. KSV Restructuring Inc. - \$15,000 plus HST

(3) With respect to the Receiver's motion to expand its powers, Juan Guillermo and ATS, on a joint and several basis, shall pay the Receiver the following fees:

- a. Lenczner Slaght LLP - \$15,000 plus HST
- b. KSV Restructuring Inc. - \$7,500 plus HST
- c. Hatstone - \$7,500 plus HST

(4) Disbursements shall be paid to the Receiver by Juan Guillermo and ATS, on a joint and several basis, with Juan Guillermo paying 67% and ATS paying 33%.

[30] Given my previous findings in prior endorsements and the written costs award, I have determined that, while I will continue to manage this matter, it would be preferable if another judge conducted the contempt hearing – which is a quasi-criminal proceeding.

[31] I will assume that it is reassigned and the dates are kept.

[32] Costs are to be paid within 60 days.

McEwen J.

Date: July 28, 2021

CITATION: Castillo v. Xela Enterprises Ltd., 2021 ONSC 4860
DIVISIONAL COURT FILE NO.: 279/21 and 314/21
DATE: 2021/07/09

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: 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

BEFORE: McWatt ACJSCJ, Sachs and Penny JJ.

COUNSEL: *Christopher MacLeod* and *N. Joan Kasozi*, for the Moving Party, Juan Guillermo Gutierrez

Philip Cho and *Michael Ly*, for the Moving Party, Arturo’s Technical Services Inc.

Peter H. Griffin, *Monique J. Jilesen* and *Derek Knoke*, *Kyle Plunkett*, for the Receiver, Responding Party

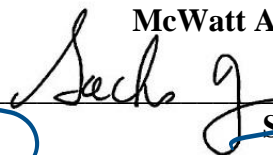
HEARD at Toronto: In writing

ENDORSEMENT

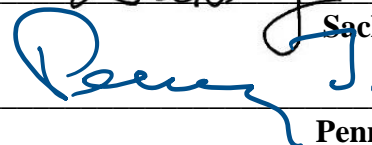
[1] This motion for leave to appeal the Orders of McEwen J. dated March 25, 2021 is dismissed with costs to the Receiver fixed in the amount of \$5000.00, all inclusive.



McWatt ACJSCJ



Sachs J.



Penny J.

Date: July 9, 2021

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

In the matter of Xela Enterprises Ltd.
Plaintiff(s)

AND

Defendant(s)

Case Management Yes No by Judge: McBwen

Counsel	Telephone No:	Facsimile No:
(see 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):

The scheduled motion did not proceed. Instead a case conference was held.

The long anticipated Funds from Mr. Volgenant have still not arrived. This matter must move along for this reason and a number of other reasons set out in the Receiver's fifth report (see in

2 March 22
Date

McBwen
Judge's Signature

Additional Pages two

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

particular page 3 para 3; pp 13-14).

Undertaking, any outstanding, are to be answered immediately. Productions are to be made to the Receiver and its Counsel on an "eyes only" basis and not distributed before any issues concerning privilege are agreed upon or determined by the Court

The Contempt hearing is now scheduled to be heard May 30, 2022

McCourt

p)

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, as Executor of the Estate of
Juan Arturo Gutierrez

Respondents

**NOTICE OF MOTION
[Injunctive Relief]**

The Respondent Juan Guillermo Gutierrez, will make a Motion to a Judge presiding over the Commercial List on Wednesday, March 30, 2022 at 10:00 a.m., or as soon after that time as the Motion can be heard.

PROPOSED METHOD OF HEARING: The Motion is to be heard

By video conference.

at the following location

THE MOTION IS FOR

1. An interim Order staying the enforcement of all Orders for disclosure of Juan Guillermo Gutierrez's emails and information on the Personal Devices (defined below)

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and the ATS Server Emails (defined below), including without limitation the Orders of Justice McEwen dated October 27, 2020 and March 25, 2021, and any endorsements made in respect thereof (collectively the “**Discovery Orders**”), for a period of 60 days, subject to further extension for good cause shown;

2. the Costs of this motion, if opposed; and
3. such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

a) The Discovery Orders require Mr. Gutierrez to permit all of the data on a personal iPad and a personal iPhone (the “**Personal Devices**”) to be uploaded to a Relativity database maintained by Epiq, an IT consultant unilaterally identified and retained by the Receiver. The Personal Devices have been imaged, and all of the data currently resides on a hard drive in Epiq’s possession, locked with a passcode known only to Mr. Gutierrez.

b) The Discovery Orders also require Arturos Technical Services (“**ATS**”) – the third-party data storage provider that maintains all emails to or from Mr. Gutierrez with an @xela.com or an @arturos.com domain (the “**ATS Server Emails**”) – to be uploaded to Epiq’s Relativity database. The ATS Server Emails include *all* emails involving Mr. Gutierrez between [date] and [date], representing more than 70 gigabytes of data.

n)

- c) The Discovery Orders contemplate that Mr. Gutierrez conduct advance review of the Personal Devices and the ATS Server Emails by examining the data on Epiq's Relativity platform for issues of privilege and other potential objections to disclosure, whereupon any disputes would be resolved by the Court and, if applicable, the resulting discoverable data would be supplied to the Receiver.
- d) Mr. Gutierrez's family – through LISA, S.A. ("**LISA**"), an indirect Panamanian subsidiary of Xela – are the ultimate beneficiaries of a 1/3 stake in a lucrative poultry conglomerate in Guatemala (the "**Avicola Group**"). The majority shareholders (the "**Nephews**") have improperly withheld hundreds of millions of U.S. dollars in corporate dividends from Mr. Gutierrez's family since 1998 (the "**Unpaid Dividends**"), while continuing to pay dividends to themselves. Mr. Gutierrez and his family have been involved in bitterly contentious, multi-jurisdictional litigation with the Nephews for more than two decades in an effort to recover the Unpaid Dividends.
- e) The Nephews have historically engaged in and/or benefited from corporate espionage to the prejudice of Mr. Gutierrez and his family. Specifically, in 2011, they used stolen confidential/privileged documents from Xela's computer servers – with the complicity of the Applicant, who sponsored the theft and placed the documents in the public record by appending them to an unrelated lawsuit – as bases for frivolous legal actions and improper corporate resolutions in Guatemala and Panama, all designed to
- n)

-4-

misappropriate LISA's shares in the Avicola Group. Those actions have all been resolved in LISA's favor, at great cost and expense, over a period of some ten years.

- f) Facts have emerged over the past two days, relating to criminal proceedings against the Nephews in Panama (outlined further below), to suggest a very high risk that the Nephews will engage in new malfeasance and corporate espionage to try to obtain copies of the Personal Devices and the ATS Server Emails. Should those data fall into the Nephew's hands, – Mr. Gutierrez's family would suffer overwhelming, irreparable injury.
- g) There is a historical mistrust of the Receiver in the conduct of this receivership grounded in, among other things:
1. the appearance that the Receiver is being funded by the Nephews;
 2. the appearance that the Receiver is coordinating with the Nephews – based upon, *inter alia*, billing records submitted by the Receiver that suggest ongoing strategic discussions between the Receiver's counsel and the Nephews' lawyers – to use this receivership as a vehicle to prejudice the recovery of Unpaid Dividends rather than to pursue monies that might satisfy the judgment herein (the “**Castillo Judgment**”);
- n)

3. the propensity of the Receiver to dismiss legitimate concerns about the confidentiality, privilege, privacy and security of the ATS Server Emails and the data on the Personal Devices;
 4. the propensity of the Receiver to publish on its website, without any apparent reason or any articulated justification, massive amounts of Xela data and other information that Mr. Gutierrez would consider confidential and inappropriate for public disclosure;
 5. the appearance that the Receiver is actively seeking to prevent a discharge of this receivership by interfering with third-party funding that would satisfy the Castillo Judgment and approved receivership expenses.
- h) Mr. Gutierrez has secured a third-party loan sufficient to satisfy the Castillo Judgment in its entirety, along with the approved receivership costs (the “**Loan**”). The lender has transferred the full amount of the Loan proceeds to the client trust account of Mr. Gutierrez’s counsel for deposit with the Court pending consideration of a motion to discharge the receivership. The Loan proceeds reached Canada in February 2022 but were returned to the lender bank because the funds were inadvertently transferred to counsel’s Canadian-dollar-denominated trust account rather than its U.S.-dollar-denominated account. The Loan proceeds were transferred a second time to Mr. Gutierrez’s counsel, in February 2022; however – after the Receiver inexplicably published on its website the SWIFT banking confirmation for the
- n)

second transfer, which Mr. Gutierrez had provided to the Court as a courtesy – the intermediary bank in the U.S. undertook to conduct additional due diligence, which is presently in process.

- i) The Nephews (and others) have been under criminal investigation and prosecution in Panama on charges of, among other things, embezzling and laundering Unpaid Dividends. Social media reports indicate that within the past two days, those criminal proceedings have entered a new phase. Specifically, it has been reported that the Nephews were required to make personal appearances in Panama in connection with the criminal charges, and that the Panamanian Court thereafter arrested their return to Guatemala and is barring them from departing Panama. Those recent developments exponentially increase the risk of malfeasance and corporate espionage in retaliation against Mr. Gutierrez.
- j) The progress of the criminal proceedings in Panama raises the question whether the Nephews may already have misused the SWIFT transfer confirmations published by the Receiver on its website.
- k) The Receiver has refused to cooperate with good-faith attempts by both Mr. Gutierrez and ATS to discuss a reasonable and satisfactory method to upload the ATS Server Emails and the data on the Personal Devices to Epiq's Relativity platform while preserving appropriate security. In that regard, the Receiver has shown a complete lack of consideration for the safety of Mr.
- n)

Gutierrez's data, which concerns are magnified in light of the recent developments in the criminal proceedings against the Nephews in Panama.

l) Moreover, the Receiver has consistently mischaracterized Mr. Gutierrez's level of cooperation, as well as ATS's cooperation, in the receivership, placing Mr. Gutierrez in a false light. Most recently, on 23 March 2022, the Receiver falsely represented that Mr. Gutierrez and ATS were in non-compliance with the Discovery Orders, when in fact counsel for ATS were in the midst of discussions with the Receiver's counsel and the experts retained by Mr. Gutierrez were in the midst of discussions with the with Epiq in an effort to address Mr. Gutierrez's legitimate concerns over the safety and security of the data on the Personal Devices and the ATS Server Emails. Indeed, it was the Receiver that failed reasonably to cooperate in the process to protect Mr. Gutierrez's legitimate privacy concerns. The Receiver's failure to provide objective reporting to this Court concerning Mr. Gutierrez's cooperation as it relates to the data in question signals a further red flag.

m) Indeed, the tendency of the Receiver to misreport the facts has been manifest from the outset of the receivership. Every official report submitted by the Receiver has been replete with inaccuracies and omissions of material fact, all with an unreasonably biased tone against Mr. Gutierrez designed to cast him as uncooperative. Moreover, the Receiver has refused to acknowledge the inaccuracies when the facts are clarified by Mr. Gutierrez, or to correct the record. Further, the Receiver has twice sought contempt against

n)

Mr. Gutierrez, but on both previous occasions adjourned the contempt motions *sine die* when faced with the prospect of cross-examination.

- n) The Receiver has incurred more than a million dollars in fees in the receivership without recovering one single dollar toward satisfaction of the Castillo Judgment. Neither has the Receiver ever identified any rational relationship between the data in question and any potential recovery of funds toward satisfaction of the Judgment. Equally as important, the cost implications of proceeding under the Orders is staggering; the ATS Server Emails alone represent some 70 gigabytes of data, largely in Spanish, without any articulated urgency.
- o) There will be no prejudice to the Receiver or any other person if a stay of the Discovery Orders is ordered for a period of 60 days, subject to extension for good cause shown.
- p) The circumstances constitute grounds for an interim Order suspending the Discovery Orders for a reasonable period of time, to permit the Loan proceeds to clear the international banking system and be deposited with the Court for satisfaction of the Castillo Judgment and approved receivership expenses.
- q) Sections 101 and 106 of the *Courts of Justice Act*, RSO 1900, c C43, as amended;
- r) Rule 40 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended;
- n)

- s) Such further and other grounds as the lawyers may advise.

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

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

March 25, 2022

CAMBRIDGE LLP
333 Adelaide Street West
4th Floor
Toronto, Ontario
M5V 1R5

Christopher MacLeod (LSO# 45723M)

Tel: 647.346.6696 (Direct Line)
cmacleod@cambridgellp.com

N. Joan Kasozi (LSO# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

n)

TO: **BENNETT JONES LLP**
Barristers and Solicitors
1 First Canadian Place
Suite 3400
P.O. Box 130
Toronto, Ontario
M5X 1A4

Jason Woycheshyn
woycheshynJ@bennettjones.com

Sean Zweig
ZweigS@bennettjones.com

Jeffrey Leon
LeonJ@bennettjones.com

William Bortolin
bortolinw@bennettjones.com

Tel: 416.863.1200

Fax: 416.863.1716

Lawyers for the Applicant
Margarita Castillo

AND TO: Lenczner Slaght Royce Smith Griffin LLP
2600 -130 Adelaide Street West
Toronto, Ontario
M5H 3P5

Derek Knoke (LSO 75555E)
jknoke@litigate.com

Monique Jilesen (LSO 43092W)
mjilesen@litigate.com

Lawyers for the Receiver

AND TO: **DEPARTMENT OF JUSTICE CANADA**
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, Ontario
M5H 1T1

Diane Winters
DianeWinters@Justice.gc.ca

Lawyers for Canada Revenue Agency

n)

AND TO: Stikeman Elliott LLP
Suite 5300, Commerce Court West
199 Bay Street
Toronto, Ontario
M5L 1B9

Katherine Kay
kkay@stikeman.com
Aaron Kreaden
akreaden@stikeman.com
Tel: 416.869.5507
Fax: 416.618.5537

Lawyers for Avicola Group and each Juan Luis Bosch Gutierrez, Felipe Antonio Bosch Gutierrez, Dionisio Gutierrez, Mayorga and Juan Jose Gutierrez Mayorga

AND TO: **THE ARTCARM TRUST**
c/o Alexandria Trust Corporation
Suite 3, Courtyard Building, The Courtyard
Hastings Main Road
Christ Church BARBADOS BB156

Robert Madden
Robertmadden@alexandriabancorp.com
Debbie McDonald
Mcdonald@alexandriabancorp.com

Tel: 246.228.8402
Fax: 246 228. 3847

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO
AS REPRESENTED BY THE MINISTER OF FINANCE**

Legal Services, 11th Floor, 777 Bay Street
Toronto, Ontario
M5G 2C8

Kevin J. O'Hara
kevin.ohara@ontario.ca
Tel: 416.327.8463
Fax: 416.325.1460

AND TO: **CORPORACION AVERN LIMITED**

First Floor
Hastings House, Balmoral Gap
Hastings, Christchurch
BARBADOS

Patrick A. Doig
pdoig@bdinvestments.com

Tel: 246.434.2640
Fax: 246.435.0230

AND TO: Reginald M. McLean
1035 McNicoll Ave
Scarborough, Ontario
M1W 3W6

maclaw@bellnet.ca

Lawyer for BDT Investments Inc.

AND TO: **EMPRESAS ARTURO INTERNATIONAL LIMITED**
First Floor, Hastings House
Balmoral Gap
Hastings, Christ Church
BARBADOS

Patrick A. Doig
pdoig@bdinvestments.com
Tel: 246.434.2640
Fax: 246.435.0230

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MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al.
Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

CAMBRIDGE LLP

333 Adelaide Street West
4th Floor
Toronto, Ontario
M5V 1R5

Christopher MacLeod (LSO# 45723M)

cmacleod@cambridgellp.com
Tel: 647.346.6696

N. Joan Kasozi (LSO# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

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: McBrent

Counsel	Telephone No:	Facsimile No:
<u>see counsel slip</u>		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: _____
- Time Table approved (as follows):

A Further case conference was convened today at my request to deal with the ongoing and protracted dispute concerning compliance with my earlier orders of Aug 28/20, Oct 27/20 (two orders) and March 25/21.

As I have previously noted the first three orders were

25 March 22

Date

McBrent

Judge's Signature

Additional Pages twelve

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

granted on consent. The last order, March 25/21, resulted from a contested motion and leave to appeal was denied.

Since then Mr. Gutierrez has raised several objections concerning the methods that should be used with respect to the provision of his passwords to Epic. As a result ATS has also not provided the emails that I have ordered be produced.

I convened the case conference today to rule on the protocol given Mr. Gutierrez's most recent objections.

At today's case conference counsel for Mr. Gutierrez advised that they wished me to debate the issues concerning access and production as they wished to

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

bring a motion for injunctive relief staying the enforcement of my abovementioned order based on a draft Notice of Motion provided shortly before the case conference began.

The draft Notice of Motion generally speaking, repeats historical complaints Mr Gutierrez has raised against the Receiver, and the "appearance" that the Receiver is being "sued" by "the Nephews" with whom Mr Gutierrez has been locked in litigation outside Canada for several years.

Further, once again, Mr Gutierrez submitted that he has secured funding to satisfy the Castillo judgment, which has now been held up given recent actions

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

of the Receiver - generally involving information published on its website.

Mr Gutierrez also raises other issues in the draft Notice of Motion concerning the Receiver's recent conduct concerning the access/production issues. He alleges they have failed to cooperate with him.

Overall amongst other things, Mr Gutierrez submits there is reason to believe that if access to passwords and documents is ordered as per the protocol suggested by Epic, it could fall into "The Nephews" hands, thus causing him great prejudice. This is particularly so says Mr. Gutierrez given recent developments concerning "The Nephews" in Panama.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

where Mr Gutierrez alleges they face criminal charges that are escalating in significance.

As I advised the parties at the case conference I am not prepared to defer the access/productions any further, and I ordered at the case that the passwords and emails referenced in my earlier orders and endorsements (and specifically my endorsement of March 17/22) be provided to ~~the~~^{Mr} Epicq no later than Monday March 28/22 @ 5 p.m.

I made the above order for a number of reasons.

First the Receiver is an officer of the Court and Epicq operates under the Receiver's mandate thus making it accountable to

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

this Court.

Epig has proposed a sensible and secure manner to secure the passwords and ATS's documents.

Second, there is no reasonable basis to suggest that the Receiver has in some way colluded with "the Nephews" or that "the Nephews" can somehow engage in "corporate espionage" to secure the data that Epig will secure. Mr Gutierrez, in some fashion or another, for some time has made these allegations without proof. In his report it bears noting that the Receiver has consistently denied these long standing allegations.

Third, it bears noting that Mr Gutierrez has for several months contested production of

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

The passwords. Notwithstanding the three consent orders of Aug/20 and Oct 27/20 (2) Mr Gutierrez did not make any production or provide passwords. This lead to the March ~~15/21~~^{15/21} order where I again ordered the disclosure of Mr. Gutierrez' passwords (amongst other things). Again, there has not been compliance.

Fourth, it bears noting that the Oct 27/20 order has a built in protocol that allows only Mr. Gutierrez access to the Platform to allow him the opportunity to review the documents and assert any objections to disclosure.

Until that occurs, no one else, (not Epic, the Receiver, or the Applicant, or any other person) can

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

have access. The protocol was well thought out, negotiated and addressed Mr. Gutierrez's concerns at the time.

Fifth, Compliance with my aforementioned Order took a backseat in the fall of 2021 when Mr Gutierrez claimed to have financing to pay the Castillo judgment. I passed the access/production issue to determine if the funding could lead to resolution.

Many months have passed with Mr Gutierrez offering various excuses as to why payment has not been made and financing not secured. The latest blames the actions of the Receiver in Feb /22, but several months passed before that date

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

without the promised funding arriving - which was first promised in Sept/21.

It also bears noting that Mr. Gutierrez also proposed in March/21, when the motion wasTM argued, that the motion concerning access/production should not be pursued as the Receiver had received a settlement offer. I rejected that submission as the offer in my view for the reasons given, was no offer at all. ✓

It may be that the currently promised financing may arrive, but that cannot form the basis of a stay given the above.

Sixth, I have made no finding of any misconduct against the Receiver. I have however been critical of Mr Gutierrez

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

particularly with respect to the initiation of a criminal complaint in Panama against the Receiver's agents which I ordered be withdrawn. Mr Gutierrez's involvement in the Panama matter was initiated without his Canadian solicitor's knowledge and I was of the view that the criminal complaint was a prima facie attack on my previous order in which specific rights were granted to the Receiver concerning the Panamanian company Gabinvest S.A.

Seventh, it was only today that Mr Gutierrez raised the issue of an injunction, after previous attempts to restrict Epic's access failed. None of the issues raised in the draft Notice of Motion

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

were mentioned in the earlier TM only TM
conferences. Of all the issues ~~of~~ the
elevated criminal charges against
"the Nephews" has surfaced in the
past few days.

In my view given all of
the above, I believe that the
latest proposed motion is an
attempt ~~to~~ further delay the
compliance with my earlier orders
concerning access/production.

The protocol suggested by Epig,
as set out in Mr Knoles' email
of March 23/22 @ 5:22 pm is
fair and reasonable and shall be
followed by Mr Gutierrez and
ATS - and completed as noted,
by March 28/22 @ 5 p.m.

Therefore, in accordance with Mr.
Knoles' email the following shall

Court File Number: _____

Superior Court of Justice
Commercial List

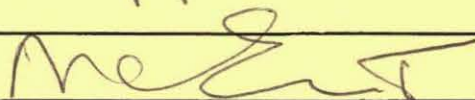
FILE/DIRECTION/ORDER

Judges Endorsment Continued

occur:

① Mr Gutierrez and/or his solicitors shall attend a videoconference with Epiq (with the Receiver and counsel absent) and provide the passwords to Epiq. After which Epiq will re-lock the hard drive.

② ATS will provide Epiq with Mr Gutierrez's email using Epiq's secure-FTP. Thereafter the data will be subject to the abovementioned privilege protocol (as will the data in ① above) set out in my Oct 27/20 order. Last, I am releasing this endorsement today via a handwritten endorsement given the timeline imposed and Mr Gutierrez's counsel's comments about considering an appeal.



COUNSEL SLIP

COURT FILE

NO.: CV-11-00009062-00CLDATE: March 25, 2022NO. ON LIST 6TITLE OF
PROCEEDING

CASTILLO v. XELA ENTERPRISES LTD et al

COUNSEL FOR: PLAINTIFF(S) APPLICANT(S) PETITIONER(S)NAME Jeffrey Leon & Jason WoycheshynFAX N/AEMAIL leonj@bennettjones.com
jwoycheshyn@stewartmckelvey.comCOUNSEL FOR: DEFENDANT(S) RESPONDENT(S)NAME Monique Jilesen, Derek Knoke,
Sarah Millar, Carl O'Shea &
Alvaro AlmengorFAX N/AEMAIL mjilesen@litigate.com
dknoke@litigate.com
smillar@litigate.com
carl.oshea@hatstone.com
alvaro.almengor@hatstone.comOTHER:Chris MacLeod, Joan Kasozi & Brian Greenspan
Counsel for Juan Guillermo GutierrezE: cmacleod@cambridgellp.com ,
jkasozi@cambridgellp.com & BGH@15bedford.comPhilip Cho & Michael Ly
Counsel for Arturo's Technical Services Ltd.
E: pcho@weirfoulds.com & mly@weirfoulds.comAaron Kreaden
Counsel for Acicola
E: akreaden@stikeman.comJUDICIAL NOTES:

COURT FILE NO.: CV-11-9062-0CL

DATE: March 25, 2022

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RE: 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

BEFORE: The Honourable Justice Thomas J. McEwen

COUNSEL: (see Counsel Slip)

ENDORSEMENT

- [1] A further case conference was convened today at my request to deal with the ongoing and protracted dispute concerning compliance with my earlier orders of Aug 28, 2020, Oct 27, 2020 (two orders) and March 25, 2021.
- [2] As I have previously noted the first three orders were granted on consent. The last order, March 25, 2021, resulted from a contested motion and leave to appeal was denied.
- [3] Since then Mr. Gutierrez has raised several objections concerning the methods that should be used with respect to the provision of his passwords to Epiq. As a result ATS has also not provided the emails that I have ordered be produced.
- [4] I convened the case conference today to role on the protocol given Mr. Gutierrez's most recent objections.
- [5] At today's case conference counsel for Mr. Gutierrez advised that they wished me to defer the issues concerning access and production as they wished to bring a motion for injunctive relief

staying the enforcement of my aforementioned orders, based on a draft Notice of Motion provided shortly before the case conference began.

- [6] The draft Notice of Motion generally speaking, repeats historical complaints Mr. Gutierrez has raised against the Receiver, and the “appearance” that the Receiver is being funded by “the Nephews” with whom Mr. Gutierrez has been locked in litigation outside Canada for several years.
- [7] Further, and again, Mr. Gutierrez submits that he has secured funding to satisfy the Castillo judgment, which has now been held up given recent actions of the Receiver generally involving information published on its website.
- [8] Mr. Gutierrez also raises other issues in the draft Notice of Motion concerning the Receiver’s recent conduct concerning the access/production issues. He alleges they have failed to cooperate with him.
- [9] Overall, amongst other things, Mr. Gutierrez submits there is reason to believe that if access to passwords and documents is ordered as per the protocol suggested by Epiq it could fall into “thee Nephews” hands, thus causing him great prejudice. This is particularly so, says Mr. Gutierrez given recent developments concerning “the Nephews” in Panama where Mr. Gutierrez alleges they face criminal charges that are escalating in significance.
- [10] As I advised the parties at the case conference I am not prepared to defer the access/productions any further, and I ordered at the case that the passwords and emails referenced in my earlier orders and endorsements (and specifically my endorsement of March 17/22) be provided to Epiq no later than Monday, March 28/22 @ 5 p.m.
- [11] I made the above order for a number of reasons.
- [12] First, the Receiver is an officer of the Court and Epiq operates under the Receiver’s mandate thus making it accountable to this Court.
- [13] Epiq has proposed a sensible and secured manner to secure the passwords and ATS’s documents.
- [14] Second, there is no reasonable basis to suggest that the Receiver has in some way colluded with “the Nephews” or that “the Nephews” can somehow engage in “corporate espionage”. To secure the data that Epiq will secure. Mr. Gutierrez, in some fashion or another, for some time has made these allegations without proof. In this ● it bears nothing that the Receiver has consistently denied these longstanding allegations.
- [15] Third, it bears noting that Mr. Gutierrez has for several months contested production of the passwords. Notwithstanding the three consent orders of Aug/20 and Oct 27/2020(2) Mr. Gutierrez did not make any production or provide passwords. This lead to the March 25/21 order where I again, ordered the disclosure of Mr. Gutierrez’s passwords (among other things). Again, there has not been compliance.

- [16] Fourth, it bears noting that the Oct 27/20 order has a built in protocol that allows only Mr. Gutierrez access to the Platform to allow him the opportunity to review the documents and assert any objections to disclosure.
- [17] Until that occurs, no one else, (not Epiq, the Receiver, or the Applicant, or any other person) can have access. The protocol was well thought out, negotiated and addressed Mr. Gutierrez's concerns at the time.
- [18] Fifth, compliance with my aforementioned Orders take a backseat in the fall of 2021 when Mr. Gutierrez claimed to have financing to pay the Castillo judgment. I paused the access production issues to determine if the funding could lead to resolution.
- [19] Many months have passed with Mr. Gutierrez offering various excuses as to why payment has not been made and financing not secured. The latest blames the action of the Receiver in Feb/22, but several months passed before that date without the promised funding arriving which was first promised in Sept/21.
- [20] It also bears noting that Mr. Gutierrez also proposed in March/21, when the motion was argued, that the motion concerning access/production should not be pursued as the Receiver had received a settlement offer. I rejected that submission as the offer in my view for the reasons given, was no offer at all.
- [21] It may be that the currently promised financing may arrive, but that cannot form the basis of a stay given the above.
- [22] Sixth, I have made no finding of any misconduct against the Receiver. I have however been critical of Mr. Gutierrez particularly with respect to the initiating of a criminal complaint in Panama against the Receiver's agents which I ordered be withdrawn. Mr. Gutierrez's involvement in the Panama matter was initiated without his Canadian solicitor's knowledge and I was of the view that the criminal complaint was a prima facie attach on my previous order in which specific rights were granted to the Receiver concerning the Panamanian company Gabinvest SA.
- [23] Seventh, it was only today that Mr. Gutierrez raised the issue of an injunction, after previous attempts to restrict Epiq's access failed. None of the issues raised in the draft Notice of Motion were mentioned in the earlier conferences. Of al of the issues only the elevated criminal charges against "the Nephews" has surfaced in the past few days.
- [24] In my view, given all of the above, I believe that the latest proposed motion is an attempt to further delay the compliance with my earlier orders concerning access/production.
- [25] The protocol suggested by Epiq as set out in Mr. Knoke's email of March 23/22 @ 5:22 p.m. is fair and reasonable and shall be followed by Mr. Gutierrez and ATS – and completed as noted, by March 22/22 @5 p.m.
- [26] Therefore, in accordance with Mr. Knoke's email the following shall occur:

1. Mr. Gutierrez and/or his solicitors shall attest a videoconference with Epiq (with the Receiver and counsel absent) and provide the passwords to Epiq. After which Epiq will re-lock the hard drive.
2. ATS will provide Epiq with Mr. Gutierrez's email using Epiq's secure ETP. Thereafter the data will be subject to the aforementioned privilege protocol (as will the data in 1 above) set out in my Oct 27/20 order.

[27] Last, I am releasing this endorsement today in a handwritten endorsement given the timeline imposed and Mr. Gutierrez's counsel's comments about considering an appeal.

McEwen J.



Electronically issued : 20-May-2022
 Délivré par voie électronique : 20-May-2022
 Toronto

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE
 JUSTICE McEWEN

)
)
)

FRIDAY, THE 25TH
 DAY OF MARCH, 2022

B E T W E E N:

(Court Seal)

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.

ORDER

THIS CASE CONFERENCE, called by McEwen J. following an email report dated March 23, 2022 (the “**Email Report**”) by KSV Restructuring 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 of Xela Enterprises Ltd. (the “**Company**”) was heard virtually on March 25, 2022 via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario.

WHEREAS on August 28, 2020, this Court made an Order with respect to the Company's documents and devices.

WHEREAS on October 27, 2020, this Court made an Order (the "**ATS Order**") authorizing Duff & Phelps to make a single disk image of certain servers under the control of Arturo's Technical Services Ltd. ("**ATS**").

WHEREAS on October 27, 2020, this Court made an Order (the "**Juan Guillermo Imaging Order**") authorizing Duff & Phelps to make a single forensic image of the devices of Juan Guillermo Gutierrez ("**Juan Guillermo**").

WHEREAS on March 25, 2021, this Court made an order that Juan Guillermo immediately provide the Receiver and Epiq Global ("**Epiq**") with all encryption codes, keys, passwords, or any other such information or knowledge necessary to unlock and access the data on the images of Juan Guillermo's devices, including but not limited to the DataShield Fantom Drive (the "**Hard Drive**").

AND WHEREAS the March 25, 2021 Order also provided, among other things, that within 14 days of the Order, ATS provide the Receiver with an electronic copy of all emails sent or received by Juan Guillermo (regardless of the email address to which it was forwarded and regardless of whether the email was sent directly to him or it was one on which he was copied) at any email address maintained on ATS servers to the date of the Order, along with any encryption codes, keys, or passwords used to secure the emails.

ON READING the Email Report and the material filed by Juan Guillermo, the

August 28, 2020 Order, the October 27, 2020 ATS Order, the October 27, 2020 Juan Guillermo Imaging Order, and the March 25, 2021 Order, and on hearing the submissions of the Receiver, counsel for Juan Guillermo, and counsel for ATS,

1. **THIS COURT ORDERS** that, by March 28, 2022 at 5 pm EST, Juan Guillermo and his solicitors shall attend a videoconference with Epiq Global (with the Receiver and counsel absent) and provide Epiq with all encryption codes, keys, passwords, or any other information necessary to unlock and access the data on the images of Juan Guillermo's devices, including but not limited to the Hard Drive (collectively the "**Hard Drive Data**").
2. **THIS COURT ORDERS** that following Epiq accessing and downloading the Hard Drive Data, Epiq shall re-lock the Hard Drive.
3. **THIS COURT ORDERS** that, by March 28, 2022 at 5 pm EST using Epiq's secure file transfer protocol, ATS shall provide Epiq with an electronic copy of all emails sent or received by Juan Guillermo (regardless of the email address to which it was forwarded, if the email was sent directly to him or if the email was one on which he was copied) at any email address maintained on any ATS server for the period up to March 25, 2021 (the "**ATS Juan Guillermo Emails**"), along with any encryption codes, keys, or passwords used to secure the emails.
4. **THIS COURT ORDERS** that the Hard Drive Data and the ATS Juan Guillermo Emails in Epiq's possession as a result of this Order shall be subject to the privilege protocol set out in the October 27, 2020 Juan Guillermo Imaging Order.

A handwritten signature in black ink, appearing to read 'McE T.', is written above a horizontal line.

(Signature of judge, officer or registrar)

Electronically issued / Délivré par voie électronique : 20-May-2022
 Toronto Superior Court of Justice / Cour supérieure de justice
 MARGARITA CASTILLO

Applicant

-and- Court File No./N° du dossier du greffe: CV-11-00009062-00CL
 XELA ENTERPRISE LTD. et al.
 Respondents

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

20 May 22

I reviewed to order with counsel today. They have agreed on the form and content. The order shall therefore go as of the date noted thereon.

McE T.

**ONTARIO
 SUPERIOR COURT OF JUSTICE
 (COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

ORDER

LENCZNER SLAGHT LLP

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

Peter H. Griffin (19527Q)

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

Monique J. Jilesen (43092W)

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

Derek Knoke (75555E)

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

AIRD & BERLIS LLP

Brookfield Place
 181 Bay Street, Suite 1800
 Toronto, ON M5J 2T9
 Kyle Plunkett
 Email: kplunkett@airdberlis.com
 Sam Babe
 Email: sbabe@airdberlis.com

Tel: (416) 863-1500
 Fax: (416) 863-1515

Lawyers for the Receiver

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

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED,
FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO
GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of
Juan Arturo Gutierrez

Respondents

NOTICE OF MOTION

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

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

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

THE MOTION IS FOR

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

THE GROUNDS FOR THE MOTION ARE:***Background***

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

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

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

The Production Orders

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

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

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

Events Giving Rise to Heightened Concerns

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

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

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

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

March 25, 2022 Case Conference

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

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

Leave to Appeal

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

Need for a Stay

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

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

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

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

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

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

March 28, 2022

CAMBRIDGE LLP
333 Adelaide Street West
4th Floor
Toronto, Ontario
M5V 1R5

Christopher MacLeod (LSO# 45723M)

Tel: 647.346.6696 (Direct Line)
cmacleod@cambridgellp.com

N. Joan Kasozi (LSO# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Respondent

AND TO: BENNETT JONES
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Jeffrey S. Leon
Email: leonj@bennettjones.com

Sean Zweig
Email: zweigs@bennettjones.com

William A. Bortolin
Email: bortolinw@bennettjones.com

Tel: (416) 361-3319
Fax: (416) 361-1530

Counsel for Margarita Castillo

STEWART MCKELVEY
Suite 900, Purdy's Wharf Tower One
1959 Upper Water St.
PO Box 997, Stn. Central
Halifax, Nova Scotia B3J 2X2

Jason Woycheshyn
Email: jwoycheshyn@stewartmckelvey.com

Tel: (902) 420-3200
Fax: (902) 420-1417

Co-Counsel for Margarita Castillo

**AND TO: LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**
Barristers
Suite 2600 130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558

Email: pgriffin@litigate.com

Monique J. Jilesen (43092W)
Tel: (416) 865-2926
Fax: (416) 865-2851
Email: mjilesen@litigate.com

Derek Knoke (75555E)
Tel: (416) 865-3018
Fax: (416) 865-2876
Email: dknoke@litigate.com

Lawyers for the Receiver/Responding Party

AND TO:

WEIRFOULDS LLP

66 Wellington Street West, Suite 4100
Toronto-Dominion Centre, P.O. Box 35
Toronto, ON M5K 1B7

Philip Cho (LSO # 45615U)
pcho@weirfoulds.com

Michael C. Ly (LSO # 74673C)
mly@weirfoulds.com

Tel: 416-365-1110
Fax: 416-365-1876

Lawyers for Arturo's Technical Services Inc

AND TO:

AIRD & BERLIS LLP

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

Kyle Plunkett
Email: kplunkett@airdberlis.com

Sam Babe
Email: sbabe@airdberlis.com

Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Receiver

AND TO: CLARKE GITTENS FARMER
Parker House, Wildey Business Park,
Wildey Road, St. Michael,
Barbados, BB14006

Kevin Boyce
Email: kevin.boyce@clarkes.com.bb

Shena-Ann Ince
Email: shena-ann.ince@clarkes.com.bb

Tel: (246) 436-6287
Fax: (246) 436-9812

Barbados Counsel to the Receiver

AND TO: HATSTONE GROUP
BICSA Financial Center,
Floor 51, Suite 5102,
Panama City, Republic of Panama

Alvaro Almengor
Email: alvaro.almengor@hatstone.com

Carl O'Shea
Email: carl.oshea@hatstone.com

Tel: (507) 830-5300
Fax: (507) 205-3319

Panama Counsel to the Receiver

AND TO: GREENSPAN HUMPRHEY WEINSTEIN LLP
15 Bedford Road
Toronto, Ontario M5R 2J7

Brian H. Greenspan
Email: bhg@15bedford.com

Tel: (416) 868-1755 Ext. 222
Fax: (416) 868-1990

Lawyers for Juan Guillermo Gutierrez

AND TO: DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Diane Winters
Email: Diane.Winters@justice.gc.ca

Tel: (416) 973-3172
Fax: (416) 973-0810

Lawyers for Canada Revenue Agency

AND TO: STIKEMAN ELLIOTT LLP
Suite 5300
Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Katherine Kay
Email: KKay@stikeman.com

Aaron Kreaden
Email: AKreaden@stikeman.com

Tel: (416) 869-5507
Fax: (416) 618-5537

Lawyers for the Avicola Group and each of
Juan Luis Bosch Gutierrez, Felipe Antonio
Bosch Gutierrez, Dionisio Gutierrez
Mayorga, and Juan Jose Gutierrez
Moyorga

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**PROCEEDING COMMENCED AT
TORONTO**

NOTICE OF MOTION

CAMBRIDGE LLP
333 Adelaide Street West
4th Floor
Toronto, Ontario
M5V 1R5

Christopher MacLeod (LSO# 45723M)
Tel: 647.346.6696 (Direct Line)
cmacleod@cambridgellp.com
N. Joan Kasozi (LSO# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED,
FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO
GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of
Juan Arturo Gutierrez

Respondents

NOTICE OF MOTION FOR LEAVE TO APPEAL

The Respondent, Juan Guillermo Gutierrez (“**Mr. Gutierrez**”), will make a Motion to a panel of the Divisional Court to be heard in writing, at 130 Queen Street West, Toronto, Ontario, M5H 2N5, on a date to be fixed by the Registrar from the Order of The Honourable Justice McEwen dated March 25, 2021.

PROPOSED METHOD OF HEARING: The Motion is to be heard in writing as an opposed motion under subrule 62.02(2) or in such other manner as the Court may direct,

THE MOTION IS FOR

- (a) An order granting leave to appeal the Order of the Honourable Justice McEwen dated March 25, 2022 (the “**Compliance Order**”);

- (b) If necessary, an order staying the Orders of the Honourable Justice McEwen dated August 28, 2020, October 27, 2020, and March 25, 2021 and any related case conference endorsements or orders (collectively the “**Production Orders**”), to the extent necessary to suspend any obligation to transfer the Data (as defined hereinafter) to Epiq Systems, Inc. (“**Epiq**”), pending the determination of Mr. Gutierrez’ appeal;
- (c) The costs of this motion, if opposed; and,
- (d) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Background

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

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

The Production Orders

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

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

- (l) On March 17, 2022, at a case conference, the Honourable Justice McEwen ordered that:
- (i) Mr. Gutierrez provide the password to Epiq so that the Images could be uploaded to Relativity subject to the Objections Protocol; and,
 - (ii) The ATS Server Emails be delivered to Epiq to also be uploaded to Relativity subject to the Objections Protocol;

Events Giving Rise to Heightened Concerns

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

McEwen reporting that both Mr. Gutierrez and ATS were not in compliance with the Production Orders.

- (o) Also, between March 17, 2022 and March 23, 2022, Mr. Gutierrez learned through social media reports that the Nephews were recently sanctioned by the Panamanian Court as a result of certain criminal investigations arising out of the Nephews activities indirectly related to these receivership proceedings.
- (p) Mr. Gutierrez has serious and legitimate concerns regarding the safety and security of the data on the Personal Devices and the ATS Server Emails given prior incidents of data breaches and public disclosure of documents that were utilized by the Nephews in other jurisdictions to support spurious litigation against Mr. Gutierrez.
- (q) The Receiver's sudden reporting of non-compliance in the midst of bona fide attempts to arrive at a reasonable, safe and secure method of transferring the data to Epiq, shortly after the recent escalation of sanctions against the Nephews in Panama, gives cause for Mr. Gutierrez to have serious concerns about the risk of malfeasance and corporate espionage as retaliatory actions by the Nephews.
- (r) These concerns are heightened by other actions taken by the Receiver in the weeks leading up to March 23, 2022, including but not limited to, the Receiver inexplicably publishing on its website the confidential banking transaction information of a wire transfer in the amount of \$4.24 million USD

(the “**Loan Proceeds**”) intended to satisfy the Judgment and terminate these Receivership proceedings, knowing that the Nephews have been closely monitoring and participating in these Receivership proceedings.

March 25, 2022 Case Conference

- (s) As a result of the Receiver’s report that Mr. Gutierrez and ATS remained non-compliant, the Honourable Justice McEwen (the “**Case Conference Judge**”) ordered an urgent case conference, which was returnable on March 25, 2022.
- (t) On March 25, 2022, Mr. Gutierrez advised the Case Conference Judge of his concerns arising from recent events and requested a short suspension of all obligations under the Productions Orders to permit Mr. Gutierrez to bring a motion for an interim interlocutory injunction (the “**Injunction Motion**”) to stay the enforcement of the Production Orders for a period of 60 days to allow the Loan Proceeds, sufficient to pay the Judgment and approved receivership fees and expenses to clear through the international SWIFT banking network.
- (u) On March 25, 2022, the Case Conference Judge denied the request for a short suspension and instead ordered compliance with the Production Orders by requiring Mr. Gutierrez to divulge the External Drive password to an Epiq representative via video conference and requiring ATS to deliver the ATS Server Emails by a secure file transfer protocol connection no later than 5:00 p.m. on March 28, 2022 (the “**Endorsement**”).

Leave to Appeal

- (v) Mr. Gutierrez seeks leave to appeal the Endorsement on the question of whether the Case Conference Judge erred:
 - (i) in failing to exercise his discretion to allow for a short suspension of the Production Orders to permit Mr. Gutierrez to seek injunctive relief;
 - (ii) in ordering compliance with the Production Orders by a particular date and time in the circumstances, particularly given the concerns raised by Mr. Gutierrez regarding the Receiver's conduct and the intention to seek injunctive relief;
- (w) At the Case Conference, Mr. Gutierrez filed a draft Notice of Motion for injunctive relief setting out specific the grounds on which relief was sought.
- (x) Notwithstanding, the Case Conference Judge refused to grant a short suspension of the Production Orders and instead issued the Endorsement.
- (y) There appears to be good reason to doubt the correctness of the Endorsement.
- (z) The proposed appeal involves matters relating to privilege, proportionality and preservation of rights in litigation, and are of such importance that leave to appeal should be granted.

Need for a Stay

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

(gg) Rules 62.02 and 63.02 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended.

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

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

- (a) The Endorsement of the Honourable Justice McEwen dated March 25, 2022;
- (b) The Affidavit of Juan Guillermo Gutierrez, and,
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

March 30, 2022

CAMBRIDGE LLP
333 Adelaide Street West
4th Floor
Toronto, Ontario
M5V 1R5

Christopher MacLeod (LSO# 45723M)

Tel: 647.346.6696 (Direct Line)
cmacleod@cambridgellp.com

N. Joan Kasozi (LSO# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

AND TO: BENNETT JONES
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Jeffrey S. Leon
Email: leonj@bennettjones.com
Sean Zweig
Email: zweigs@bennettjones.com
William A. Bortolin
Email: bortolinw@bennettjones.com

Tel: (416) 361-3319
Fax: (416) 361-1530

Counsel for Margarita Castillo

STEWART MCKELVEY
Suite 900, Purdy's Wharf Tower One
1959 Upper Water St.
PO Box 997, Stn. Central
Halifax, Nova Scotia B3J 2X2

Jason Woycheshyn
Email: jwoycheshyn@stewartmckelvey.com

Tel: (902) 420-3200
Fax: (902) 420-1417

Co-Counsel for Margarita Castillo

**AND TO: LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**
Barristers
Suite 2600 130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com

Monique J. Jilesen (43092W)
Tel: (416) 865-2926
Fax: (416) 865-2851
Email: mjilesen@litigate.com

Derek Knoke (75555E)
Tel: (416) 865-3018
Fax: (416) 865-2876
Email: dknoke@litigate.com

Lawyers for the Receiver/Responding Party

AND TO: WEIRFOULDS LLP
66 Wellington Street West, Suite 4100
Toronto-Dominion Centre, P.O. Box 35
Toronto, ON M5K 1B7

Philip Cho (LSO # 45615U)
pcho@weirfoulds.com

Michael C. Ly (LSO # 74673C)
mly@weirfoulds.com

Tel: 416-365-1110
Fax: 416-365-1876

Lawyers for Arturo's Technical Services Inc

AND TO: AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Kyle Plunkett
Email: kplunkett@airdberlis.com

Sam Babe
Email: sbabe@airdberlis.com

Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Receiver

AND TO: CLARKE GITTENS FARMER
Parker House, Wildey Business Park,
Wildey Road, St. Michael,
Barbados, BB14006

Kevin Boyce
Email: kevin.boyce@clarkes.com.bb

Shena-Ann Ince
Email: shena-ann.ince@clarkes.com.bb

Tel: (246) 436-6287
Fax: (246) 436-9812

Barbados Counsel to the Receiver

AND TO: HATSTONE GROUP
BICSA Financial Center,
Floor 51, Suite 5102,
Panama City, Republic of Panama

Alvaro Almengor
Email: alvaro.almengor@hatstone.com

Carl O'Shea
Email: carl.oshea@hatstone.com

Tel: (507) 830-5300
Fax: (507) 205-3319

Panama Counsel to the Receiver

AND TO: GREENSPAN HUMPRHEY WEINSTEIN LLP
15 Bedford Road
Toronto, Ontario M5R 2J7

Brian H. Greenspan
Email: bhg@15bedford.com

Tel: (416) 868-1755 Ext. 222
Fax: (416) 868-1990

Lawyers for Juan Guillermo Gutierrez

AND TO: DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Diane Winters
Email: Diane.Winters@justice.gc.ca

Tel: (416) 973-3172
Fax: (416) 973-0810

Lawyers for Canada Revenue Agency

AND TO: STIKEMAN ELLIOTT LLP
Suite 5300
Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Katherine Kay
Email: KKay@stikeman.com

Aaron Kreaden
Email: AKreaden@stikeman.com

Tel: (416) 869-5507
Fax: (416) 618-5537

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Juan Luis Bosch Gutierrez, Felipe Antonio
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Mayorga, and Juan Jose Gutierrez
Moyorga

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al.
Respondents

Divisional Court file no. 189/22
Court File No. CV-11-9062-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION FOR LEAVE TO APPEAL

CAMBRIDGE LLP

333 Adelaide Street West
4th Floor
Toronto, Ontario
M5V 1R5

Christopher MacLeod (LSO# 45723M)

cmacleod@cambridgellp.com

Tel: 647.346.6696

N. Joan Kasozi (LSO# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

and

XELA ENTERPRISE LTD., JUAN GUILLERMO GUTIERREZ, JUAN
GUILLERMO GUTIERREZ, TROPIC INTERNATIONAL LIMITED, FRESH
QUEST INC., 696096 ALBERTA LTD. and CARMEN S. GUTIERREZ,
Executor of the Estate of Juan Arturo Gutierrez

Defendants

AFFIDAVIT OF GRACE TSAKAS

I, Grace Tsakas, of the City of Richmond Hill, in the Regional Municipality of York,
MAKE OATH AND SAY:

1. I am a law clerk with the law firm of Lenczner Slaght LLP, lawyers for KSV Restructuring Inc. (“**KSV**”), the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all the property, assets, and undertakings of Xela Enterprises Ltd. (“**Xela**”), and, as such, have knowledge of the matters contained in this Affidavit.

2. On July 25, 2017, Juan Guillermo Gutierrez attended an Examination in Aid of Execution. Attached hereto and marked as **Exhibit “A”** are excerpts from the transcript of the examination.

3. On August 30, 2018, Mr. Gutierrez attended a continued Examination in Aid of Execution Attached hereto and marked as **Exhibit “B”** are excerpts from the transcript of the examination.

18. On March 31, 2022, Mr. Gutierrez brought a motion in the Divisional Court for leave to appeal the March 25, 2022 Order. Attached hereto and marked as **Exhibit “K”** is a copy of Mr. Gutierrez’s notice of motion.

19. On April 13, 2022, counsel for Mr. Gutierrez wrote to counsel for the Receiver regarding the review of Xela’s documents. Attached hereto and marked as **Exhibit “L”** is a copy of counsel’s email.

20. I am advised by Mr. Knoke, counsel to the Receiver, and verily believe that, on April 29, 2022, Mr. Gutierrez abandoned his motion in the Divisional Court for leave to appeal the March 25, 2022 Order.

21. I am advised by Mr. Knoke, and verily believe that, on August 30, 2022, Mr. Gutierrez provided the passwords to his devices, pursuant to the March 25, 2021 Order of McEwen J. and the March 25, 2022 Order of McEwen J.

22. On September 12, 2022, Mr. Gutierrez delivered his notice of motion to replace the Receiver (the “**Recusal Motion**”). Attached hereto and marked as **Exhibit “M”** is a copy of Mr. Gutierrez’s September 12, 2022 notice of motion.

23. On November 15, 2022, I conducted real property searches in all counties in Ontario to see if Mr. Gutierrez owns any real property in Ontario. Attached hereto and marked as **Exhibit “N”** is a report of the searches conducted, confirming no direct hits in any counties in Ontario with the exception of Toronto and Parry Sound, which counties have inactive parcel registers in Mr. Gutierrez’ name. Attached as **Exhibit “O”** are copies of the active parcel registers for the Toronto

**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, as Executor of the Estate of Juan Arturo
Gutierrez

Respondents

NOTICE OF CROSS-MOTION

The Respondent Juan Guillermo Gutierrez (“**Mr. Gutierrez**”), will make a Motion to the Honourable Justice McEwen presiding over the Commercial List on _____ at 10:00 a.m., or as soon after that time as the Motion can be heard.

PROPOSED METHOD OF HEARING: The Motion is to be heard

In writing under subrule 37.12.1(1) because it is
[insert on consent, unopposed or made without notice];

In writing as an opposed motion under subrule 37.12.1(4);

In person;

By telephone conference;

[X] By video conference.

at the following location:

330 University Avenue, Toronto, Ontario

THE MOTION IS FOR:

- a) An Order varying the Order dated July 3, 2019 (**the “Appointment Order”**) substituting KSV Restructuring Inc. (**“KSV”**) as receiver, with a Receiver to be determined;
- b) an Order directing KSV in its capacity as court-appointed receiver (the **“Receiver”**) of the assets, undertakings and properties of Xela Enterprises Inc. (the **“Company”**) to return, or direct its agents to return, to Arturo’s Technical Services (**“ATS”**) the hard-drive images (*i.e.*, copies) of the Xela servers previously provided to KSV’s agents, and ordering that no person other than ATS may access the data thereon, until further Order after the conclusion of BDT’s Motion for Full or Partial Discharge of the Receiver (**the “BDT Motion”**);
- c) an Order that no person, including without limitation, the Receiver and/or its agents, shall access the data contained on hard-drive images of Mr. Gutierrez’s personal electronic devices until further Order after the conclusion of the BDT Motion;
- d) an Order directing Duff & Phelps (**“D&P”**) to provide Mr. Gutierrez with copies of the hard-drive images of his personal electronic devices;
- e) an Order suspending the deadlines set out in the Court’s Order dated October 27, 2020, until further Order after the conclusion of the BDT Motion;

- f) an Order compelling the Receiver to substitute D&P with a new IT consultant, to be named on or before the return of this Motion;
- g) an Order compelling KSV to disclose to Mr. Gutierrez: (a) particulars in respect of the funds received for the conduct of this receivership, including sources, dates and amounts; (b) copies of all communications between the KSV and/or its counsel, on the one hand, and the “Cousins” and/or their counsel, on the other hand; and
- h) such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

- i) KSV’s conduct in the receivership has been such that it has become, as a practical matter, impossible under KSV’s authority to achieve the objective of the receivership, which is to satisfy the judgment of Margarita Castillo (**the “Castillo Judgment”**);
- j) KSV’s conduct throughout the course of the receivership has been antagonistic and hostile toward Mr. Gutierrez;
- k) Contrary to what KSV has both asserted and implied – Mr. Gutierrez has fully cooperated with the Receiver;
- l) The only reasonable source of monies to satisfy the Castillo Judgment is litigation in Panama (**the “Panama Litigation”**) to collect tens of millions of U.S. dollars in unpaid dividends owed to LISA, S.A., a Panama corporation and an indirect subsidiary of Xela (**“LISA”**), by Villamorey, S.A., a Panama corporation (**“Villamorey”**), in which LISA holds a 1/3 stake;

- m) The Panama Litigation is being prosecuted by BDT Investments Inc., a Barbados corporation (“**BDT**”), which owns the rights to collect LISA’s unpaid dividends by virtue of a settlement agreement that resolves substantial unpaid debt previously owed by LISA to BDT, dating to 2005;
- n) The Panama Litigation includes an order requiring Villamorey to pay all of LISA’s unpaid dividends, regardless of where in the world they may be held, and that said order is full and final, and in its collection phase;
- o) The Panama Litigation includes a separate action by LISA for damages against Villamorey, including damages stemming from non-payment of dividends, and a default judgment has been entered in LISA’s favor in those proceedings;
- p) Villamorey’s corporate agent in Panama has admitted to Panamanian prosecutors that Villamorey maintains its official books and records in Guatemala, not in Panama as required by Panama law;
- q) Villamorey and its majority shareholders are under criminal investigation in Panama in connection with Villamorey’s non-payment of dividends owed to LISA and their failure to maintain accurate financial records with its corporate agent in Panama;
- r) In the 18 months since its appointment, the Receiver has taken no meaningful steps to pursue the Panama Litigation, or to secure a commitment from BDT regarding the proceeds of the Panama Litigation;
- s) LISA secured a loan commitment in December 2019 sufficient to satisfy the Castillo Judgement in its entirety, along with all receivership expenses;

- t) LISA informed the Receiver in December 2019 about the loan commitment, and requested a payout amount from the Receiver;
- u) Upon learning of the LISA loan commitment that would have resulted in a discharge of the receivership, the Receiver improperly inserted itself into the loan transaction by attempting to reconstitute LISA's board of directors in Panama without taking any steps to cause the Order dated July 3, 2019 (**the "Appointment Order"**) to be recognized in Panama;
- v) the Receiver retained counsel in Panama, without seeking any recognition orders, and instructed it to file documents with the Panama Public Registry to the effect that LISA's board of directors had been properly reconstituted in accordance with Panama law, which was false and misleading;
- w) the Receiver instructed its counsel in Panama to file documents with the Panama Public Registry without first giving its agents a proper power of attorney signed by a person duly authorized and recognized by the Panama courts;
- x) Conduct by the Receiver's agents in Panama has been reported to the criminal authorities in Panama by LISA;
- y) the Receiver has demanded that LISA's president withdraw LISA's criminal complaint against KSV's agents in Panama, which itself calls for LISA to commit a criminal act in Panama in that LISA is under a legal duty to report criminal activity that bears on the administration of governmental matters in Panama;
- z) The conduct of the Receiver's agents in Panama resulted in a refusal by the Panama Public Registry to certify that LISA's board of directors had been reconstituted;

-6-

- aa) When the Receiver learned that its agents in Panama had not succeeded in taking control of LISA's board of directors, the Receiver attempted to secure the same outcome by conditioning meetings with Mr. Gutierrez – which Mr. Gutierrez had been requesting – upon LISA's voluntary accession to the Receiver's demands, despite the fact that Mr. Gutierrez was divested of authority to act on Xela's behalf by virtue of the receivership;
- bb) After failing to reconstitute LISA's board, the Receiver brought a motion for contempt against Mr. Gutierrez for ostensible failure to cooperate with the Receiver, erroneously implying that the Receiver's conduct had been proper and/or that Mr. Gutierrez had improperly instructed LISA not to accede to the Receiver's demands regarding the LISA board;
- cc) The so-called "reviewable transactions" under investigation by the Receiver for the past 18 months have yielding nothing of value and have little promise of leading to collection of any funds that could satisfy the Castillo Judgment, yet those investigations have generated legal and other professional fees of approximately \$1 million, which presumably will be charged to Xela;
- dd) None of the Receiver's reports to this Court contain any mention of the [status of?] Panama Litigation;
- ee) the Receiver's reports to this Court contain numerous inaccuracies and are incomplete, and the Receiver has failed to correct its reports after being informed of their flaws via sworn affidavits;
- ff) the Receiver's investigative strategy in the receivership is consistent with the strategy of the majority shareholders of Villamorey (**the "Cousins"**) to deplete LISA's resources in order to avoid ever paying the dividends rightfully owed to LISA;

gg) the Receiver has taken no interest in the loan transaction given to Ms. Castillo by a Guatemala Bank friendly to the Cousins (**the “GT Loan”**), which appears to have been secured by LISA unpaid dividends and repaid by foreclosure of the collateral rather than repayment by Ms. Castillo, such that, if true, the Castillo Judgment has long since been satisfied;

hh) the Receiver has never requested a copy of the GT Loan documents from Ms. Castillo, despite repeated requests by Mr. Gutierrez, nor has it mentioned the GT Loan in its reports to this Court;

ii) The Receiver has taken no steps to collect against a promissory note signed by Ms. Castillo’s husband, Roberto Castillo, [who is an Ontario resident,?] in favor of Xela, nor has it mentioned said promissory note in its reports to this Court;

jj) The Receiver has taken no steps to pursue the pending litigation by Xela in Toronto, alleging damages caused by Ms. Castillo, who is an Ontario resident, in an amount that would more than offset the Castillo Judgment, nor has it mentioned said pending litigation in its reports to this Court;

kk) the Receiver’s investigation into the so-called “reviewable transactions” includes recent discovery requests targeting computer servers previously owned by Xela, currently maintained by Arturos Technical Services (“**ATS**”), which contain emails and other sensitive data that would be useful to the Cousins in their improper efforts to avoid payment of dividends owed to LISA, both in Panama and in Guatemala;

ll) the Receiver’s investigation into the so-called “reviewable transactions” also includes recent discovery requests to review Mr. Gutierrez’s personal electronic devices for potential

-8-

documents belonging to Xela – to which Mr. Gutierrez consented in an effort to cooperate with the Receiver – but which necessarily implicates potential exposure of personal, privileged and/or non-Xela documents to which the Receiver is not entitled, and which are sensitive and potentially useful to the Cousins;

mm) the Receiver engaged Duff & Phelps (“D&P”) to copy (*i.e.*, “image”) and to supervise the review of Mr. Gutierrez’s personal devices, as well as the Xela servers now owned by ATS, without disclosing that the work would actually be performed by Kroll, a subsidiary of D&P;

nn) A conflict of interest exists in that Kroll has a long history of working for the Cousins, including conducting investigative surveillance of Mr. Gutierrez and his family, including his children;

oo) the Receiver failed to disclose the relationship between D&P and Kroll;

pp) All data on Xela’s computer servers was previously stolen by a former Xela employee and provided to the Cousins, who improperly used some of the stolen documents to attempt to exclude LISA from Villamorey and from the related poultry group in Guatemala in which LISA also holds a 1/3 stake (**the “Avicolas”**);

qq) Prior to the discovery of D&P’s relationship with Kroll, ATS provided Xela’s servers to Kroll for imaging without any security measures that would prevent Kroll from reviewing or copying the data, despite the fact that neither Kroll nor D&P nor any other person is entitled to access the data at this stage;

rr) Mr. Gutierrez provided images of his personal electronic devices to Kroll on a locked hard drive to which Kroll does not have the passcode;

ss) Mr. Gutierrez has requested duplicates of the images of his personal devices from the Receiver in order to conduct his preliminary review pursuant to the Order dated October 27, 2020 without exposing the data to Kroll, which is not entitled to review the data at this stage;

tt) The Receiver has refused Mr. Gutierrez's request for duplicates of the images of his own personal devices;

uu) Aside from an emergency trip to Guatemala beginning on October 26, 2020 – forced by unexpected cancer surgery and resulting complications with his mother-in-law, who subsequently passed away as a consequence, Mr. Gutierrez has complied with the requirements of the Court's Order dated October 27, 2020;

vv) The data contained on Mr. Gutierrez's personal devices and on the Xela servers maintained by ATS is extensive and requires substantial review and translation prior to any analysis by the Court concerning its discoverability by the Receiver;

ww) The BDT Motion would moot the need for any further investigation by the Receiver into the so-called "reviewable transactions" or any other transaction, including without limitation any pending discovery sought by the Receiver; and

xx) Mr. Gutierrez's counsel has requested on multiple occasions copies of all communications between the Receiver and/or its counsel, on the one hand, and the Cousins and/or their counsel, on the other hand;

yy) the Receiver's counsel has not denied that the Receiver has been communicating with the Cousins, but instead flatly refused to acknowledge any duty to disclose communications or provide copies.

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

- (a) Affidavit of Juan Guillermo Gutierrez to be sworn

- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 18, 2021

CAMBRIDGE LLP
333 Adelaide Street West
4th Floor
Toronto, Ontario
M5V 1R5

Christopher MacLeod (LSO# 45723M)

Tel: 647.346.6696 (Direct Line)
cmacleod@cambridgellp.com

N. Joan Kasozi (LSO# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

TO: **BENNETT JONES LLP**
Barristers and Solicitors
1 First Canadian Place
Suite 3400
P.O. Box 130
Toronto, Ontario
M5X 1A4

Jason Woycheshyn
woycheshynJ@bennettjones.com

Sean Zweig
ZweigS@bennettjones.com

Jeffrey Leon
LeonJ@bennettjones.com

William Bortolin
bortolinw@bennettjones.com

Tel: 416.863.1200

Fax: 416.863.1716

Lawyers for the Applicant
Margarita Castillo

AND TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
2600 -130 Adelaide Street West
Toronto, Ontario
M5H 3P5

Derek Knoke (LSO 75555E)
jknokel@litigate.com

Monique Jilesen (LSO 43092W)
mjilesen@litigate.com

Lawyers for the Receiver

AND TO: **WEIRFOULDS LLP**
Barristers & Solicitors
66 Wellington Street West, Suite 4100
Toronto-Dominion Centre, P.O. Box 35
Toronto, ON M5K 1B7

Philip Cho (LSO # 45615U)

Tel: 416-365-1110

Fax: 416-365-1876

Lawyers for BDT Investments Inc. and
Arturo's Technical Services Inc.

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**PROCEEDING COMMENCED AT
TORONTO**

NOTICE OF CROSS-MOTION

CAMBRIDGE LLP
333 Adelaide Street West
4th Floor
Toronto, Ontario
M5V 1R5

Christopher MacLeod (LSO# 45723M)
cmacleod@cambridgellp.com
Tel: 647.346.6696
N. Joan Kasozi (LSO# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez



SUPERIOR COURT OF JUSTICE

COUNSEL SLIPCOURT FILE NO.: CV-11-00009062-00CL DATE: 22 July 2022NO. ON LIST: 03TITLE OF PROCEEDING: CASTILLO V XELA et alBEFORE JUSTICE: MCEWEN**PARTICIPANT INFORMATION****For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
Monique Jilesen	KSV the Receiver	mjilesen@litigate.com
Derek Knoke		dknoke@litigate.com
Carl O'Shea		carl.oshea@hatstone.com
Alvaro Almengor		alvaro.almengor@hatstone.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Joan Kasozi Chris MacLeod Brian Greenspan	Juan Gutierrez	jkasozi@cambridgellp.com cmacleod@cambridgellp.com BHG@15bedford.com
Aaron Kreaden	Avicola Group	akreaden@stikeman.com
Michael Ly Philip Cho	Arturo's Technical	mly@weirfoulds.com pcho@weirfoulds.com

ENDORSEMENT OF JUSTICE MCEWEN:

25 July 22

I conducted a case conference on July 22/22. At the case conference Mr. Gutierrez sought to schedule a motion to have KSV Restructuring Inc. removed as Receiver.

I declined to schedule the motion. I agree with the Receiver that the motion ought not to be scheduled when current:

- ① Mr Gutierrez has not served a Notice of motion (although he has provided a draft);
 - ② costs remain outstanding (although he has promised to pay);
 - ③ a finding of civil contempt has been made against Mr Gutierrez by Justice Conway by way of her June 29/22 decision; and,
 - ④ significantly Mr Gutierrez has still, inexplicably, failed to comply with my production orders, lay outstanding, nor did he provide any explanation in his case conference brief for failing to do so, or at the hearing for that matter.
- This matter will return before me on Sept. 13/22 to review O/S issues and next steps.
1. As per Rule 60-12-



Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprise Ltd et al
Defendant(s)

Case Management Yes No by Judge: McBew

Counsel	Telephone No:	Facsimile No:
<u>see counsel slip</u>		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: _____
- Time Table approved (as follows):

KSV Restructuring Inc, as the receiver and manager (the "Receiver") of Xela Enterprise Ltd ("Xela") brings this motion seeking security and costs from Juan Guillermo Gutierrez ("Gutierrez") with respect to Gutierrez's motion to replace the Receiver.

The Receiver seeks security for

1 Dec 22
Date

McBew
Judge's Signature

Additional Pages 14 total

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

costs in the amount of \$150,000.00

I have been managing this action for some time and have released several endorsements to date. The facts are well-known to all parties, and the Receiver, and need not be repeated in detail.

Of import with respect to my analysis of this motion is the following:

- The Receiver is not a party in the action and thus is not directly pursuing any claims.
- This motion is being brought with respect to a motion not a proceeding.
- Gutierrez has not delivered any affidavit evidence with respect to the issues on this motion. He relies upon the affidavits of his lawyer's law clerk and

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

David Bell, a digital forensic investigator who provides evidence with respect to the Receiver's handling of Gutierrez's personal data, which Gutierrez alleges has been mishandled.

- The Notice of Motion served by Gutierrez does not make any mention of the above complaint.
- Justice Conway recently found Gutierrez liable in civil contempt - by swearing a Declaration to support a Criminal Complaint made against the Hatstone directors in Panama. The Hatstone directors were appointed by the Receiver (the decision is under appeal).

- Based on evidence filed by the Receiver ⁱⁿ at the motion ⁱⁿ the prosecutor in Panama has closed its case against the Hatstone directors on the basis that

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

"The facts complained are not considered the crime of falsehood accused."

I will now turn to the issues raised on this motion.

(1) Gutierrez submits that the Receiver cannot bring this motion pursuant to Rule 56.01(1) since it is not a party with a claim.

I disagree.

Although the Rule does speak of parties with claims, s. 101 of the Courts of Justice Act provides this Court with jurisdiction to grant receivers orders where it is just or convenient to do so. Further, Rule 56.01(2) expands the provisions of Subrule (1).

A proper reading of s. 101 and Rule 56.01 provides this Court with the necessary

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

jurisdiction. And for that matter Rule 1004(1).
 ✓ I note that Gutierrez also argued at the motion that the Receiver cannot bring this motion against him as he has no claim in the action.

Again, based on the above I disagreed.

✓ Further, if Gutierrez is correct, this would result in a situation where a Court officer (here the Receiver) could face any number of spurious motions brought directly against it and have no recourse to ask for security for costs. Also, since the Receivership is funded by the Applicant such motions will deplete the estate as the Applicant indirectly funds

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

The motions brought by the Receiver.
Surely this cannot be the case
and is neither fair nor just.ⁱⁿ
Last, on this issue, I accept
the Receiver's submission that a
security for costs motion can
be brought with respect to a
pending motion and is not
restricted to a proceeding.

This premise accords with
common sense and has been
accepted clearly by the OCA: see
Di Paolo Re, 2006 CanLII 37117 (ON CA) at
para 12th.

Having determined that I have
jurisdiction and the Receiver is
entitled to bring the motion I
now turn to the other issues raised
on this motion.

(2) Gutierrez submits that since his

Page 6 of 14

Judges Initials TM

1. This conclusion is generally supported by the OCA
in Kramer Henderson Sidlby LLP v. Monteiro 2018 FC 286
at paras 15, 18, 22 and 23.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

unpaid costs relate to Justice
Newbould's order concerning the
Applicant (\$889,858.21) and not the
Receiver, the provisions of Rule 56.01(1)
(c) do not apply.

Again I disagree. A proper
reading of the above OCA jurisprudence
and s.101 of the CTA lead to
a conclusion that the Receiver ought
to be able to rule on subrule (1)(c).

Gutierrez is a judgment debtor to
the Applicant who is funding this
receivership. He ought not be able
to bring this motion in these
circumstances without paying
security for costs.

③ The Receiver also brings this
motion pursuant to Rule 56.01(1)(e)
submitting that there is good
reason to believe that the motion

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

is frivolous and vexatious and Gutierrez has insufficient assets to pay the the costs of the motion.

Gutierrez in his notice of motion makes a number of allegations but again to date has not delivered any supporting affidavit.

Generally, to date the ReceiverTM has not been the subject of any negative judicial comment, unlike Gutierrez who has been found in contempt. The Receiver has not been unsuccessful at any motion.

Further, in a number of my previous endorsements I have commented that many of the complaints Gutierrez now raises have been litigated and/or unsupported by evidence.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Specifically in my March 25/01 Endorsement I noted that the Receiver had been acting in a neutral fashion to that point in time.

With respect to Gutierrez's most significant complaints I note:

- The criminal complaints in Panama, as noted, have ceased and Gutierrez was found in contempt for his participation.

- Again, there is no mention in the noticed motion of complaints concerning computer security and Mr Bellis affidavit wassm served 2 days before this motion.

- I have previously rejected Gutierrez's complaints about the involvement of "The Cousins" and the Receiver's alleged interference with secured funding due to lack of evidence.

Overall, based on the above,

Court File Number: _____

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

I accept that the Receiver has demonstrated that "it appears" that the motion is frivolous and vexatious and "suggests a tentative conclusion of absence of merit": McArthur v Neumann 2020 ONSC 66 at para 17 & 18.

In this regard I note that Gutierrez seeks to have the Receiver replaced with someone of his choosing.

Last, in considering the test I need to determine whether Gutierrez has sufficient assets in Ontario to pay the Receiver's costs. I agree with the Receiver that there is good reason to believe Gutierrez has insufficient assets in Ontario for the reasons set out in para 37 of the Receiver's Factum.

⊗ Gutierrez claims in his Factum that he is impecunious. He has not, however,

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

as noted, delivered any evidence on the motion to support this assertion. Further, according to the Bill Costs filed at his contempt hearing he has paid Mr. Greenspan \$150,000.00 between April - September 2022. He continues to be represented by two sets of counsel. Also, it appears from Gutierrez's litigation conduct to date and moving forward with his motion, that he has not been deterred by legal costs.

I am also satisfied, based on the above, that this motion is not being used as a litigation tactic to prevent the motion from being heard on its merits.

(4) Gutierrez also submits that this motion ought to be dismissed since the Receiver delayed in bringing this motion.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

This argument has to merit. The motion to replace the Receiver and this motion were scheduled at the same time. Since then Gutierrez has been found in contempt.

The fact that the Notice of Motion was served approximately one year ago is immaterial as I only agreed to schedule it and this motion in the fall of this year.

⑤ Insofar as quantum is concerned I agree with Gutierrez that the amount sought is high. Having reviewed the nature of the motion and the steps likely required up to and including the motion, I am satisfied that \$100,000.00 is fair and reasonable on a partial indemnity basis after reviewing the Receiver's draft Bill of Costs.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Based upon foregoing I do order that security for costs be paid in the amount of \$100,000. This includes some costs vis a vis the Receiver, as per my Jul, 2021 decision where I allowed these costs pursuant to s.131(1) of the CTA on the basis that stakeholders ought not be saddled with costs they ought not have to incur.

Insofar as costs of this motion are concerned I have reviewed the parties' draft Bill of Costs. Since the Receiver was successful it ought to receive its costs on a partial indemnity basis in the amount of \$30,092.10 inclusive as allowed. This amount is fair & reasonable.

McE...

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Addendum

Since preparing this endorsement I have concluded that, given my findings concerning sub 5d.01(i)(e), it would be appropriate to have another judge on the Commercial List hear the motion to replace the Receiver.

[Handwritten signature]

**COUNSEL SLIP**COURT FILE NO. CV-11-9062-CLDATE: Thursday, November 24, 2022THE HONOURABLE: MISTER JUSTICE MCEWENNo. ON LIST: 10am
COURTROOM: 330 UA

TITLE OF PROCEEDING

CASTILLO v XELA ENTERPRISES LTD et al

RESPONDENT COUNSEL: Chris Macleod
Email: cmacleod@cambridgellp.com**RESPONDENT COUNSEL: N. Joan Kasozi**
Email: jkasozi@cambridgellp.com

RECEIVER COUNSEL: Monique Jilesen
Email: mjilesen@litigate.com**RECEIVER COUNSEL: Derek Knoke**
Email: dknoke@litigate.com**COUNSEL: Brendan Peters**
Email: bpeters@stewartmckelvey.com

COURT FILE NO.: CV-11-9062-0CL

DATE: December 1, 2022

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RE: 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

BEFORE: The Honourable Justice Thomas J. McEwen

COUNSEL: (see Counsel Slip)

ENDORSEMENT

[1] KSV Restructuring Inc., as the receiver and manager (the “Receiver”) of Xela Enterprises Ltd. (“Xela”) brings this motion seeking security for costs from Juan Guillermo Gutierrez (“Gutierrez”) with respect to Gutierrez’s motion to replace the Receiver.

[2] The Receiver seeks security for costs in the amount of \$150,000.00.

[3] I have been managing this action for some time and have released several endorsements to date. The facts are well-known to all parties, and the Receiver, and need not be repeated in detail.

[4] Of import with respect to my analysis of this motion is the following:

- The Receiver is not a party in the action and thus is not directly pursuing any claims.
- This motion is being brought with respect to a motion not a proceeding.

- Gutierrez has not delivered any affidavit evidence with respect to the issues on this motion. He relies upon the affidavits of his lawyer's law clerk and David Bell, a digital forensic investigator who provides evidence with respect to the Receiver's handling of Gutierrez's personal data, which Gutierrez alleges has been mishandled.
- The Notice of Motion served by Gutierrez does not make any mention of the above complaint.
- Justice Conway recently found Gutierrez liable in civil contempt – by swearing a Declaration to support a Criminal Complaint made against the Hatstone directors in Panama. The Hatstone directors were appointed by the Receiver (the decision is under appeal).
- Based on evidence filed by the Receiver at the motion the Prosecutor in Panama has closed its case against the Hatstone directors on the basis that “the facts complained are not considered the crime of falsehood accused.”

[5] I will now turn to the issues raised on this motion.

[6] (1) Gutierrez submits that the Receiver cannot bring this motion pursuant to Rule 56.01(1) since it is not a party with a claim.

[7] I disagree.

[8] Although the Rule does speak of parties with claims, s. 101 of the *Courts of Justice Act* provides this Court with jurisdiction to grant receivers orders where it is just or convenient to do so. Further, Rule 56.01(2) expands the provisions of Subrule (1).

[9] A purposeful reading of s. 101 and Rule 56.01 provides this Court with the necessary jurisdiction (and for that matter Rule 1.04(1)).

[10] I note that Gutierrez also argued at the motion that the Receiver cannot bring this motion against him as he has no claim in the action.

[11] Again, based on the above I disagree.

[12] Further, if Gutierrez is correct, this would result in a situation where a Court officer (here the Receiver) could face any number of spurious motions brought directly against it and have no recourse to ask for security for costs. Also, since the Receivership is funded by the Applicant such motion will deplete the estate as the Applicant indirectly funds the motions brought by the Receiver. Surely this cannot be the case and is neither fair nor just.¹

¹ This conclusion is generally supported by the OCA in *Kramer Henderson Sidlofsky LLP v. Monteiro*, 98 OR (3d) 286 at paras. 15, 18, 22 and 23.

- [13] Last, on this issue, I accept the Receiver's submission that a security for costs motion can be brought with respect to a pending motion and is not restricted to a proceeding.
- [14] This premise accords with common sense and has been accepted clearly by the OCA: see *Di Paola, Re*, 2006 CanLII 37117 (ON CA) at para 12.
- [15] Having determined that I have jurisdiction and the Receiver is entitled to bring the motion I now turn to the other issues raised on this motion.
- [16] (2) Gutierrez submits that since his unpaid costs relate to Justice Newbould's order concerning the Applicant (\$889,858.21) and not the Receiver, the provisions of Rule 56.01(1)(c) do not apply.
- [17] Again I disagree. A purposeful reading of the above OCA jurisprudence and s. 101 of the *CJA* lead to a conclusion that the Receiver ought to be able to rule on subrule (1)(c). Gutierrez is a judgment debtor to the Applicant who is funding this receivership. He ought not be able to bring this motion, in these circumstances, without paying security for costs.
- [18] (3) The Receiver also brings this motion pursuant to Rule 56.01(1)(e) submitting that there is good reason to believe that the motion is frivolous and vexatious and Gutierrez has insufficient assets to pay the costs of the motion.
- [19] Gutierrez in his notice of motion makes a number of allegations, but again to date has not delivered any supporting affidavit.
- [20] Generally, to date the Receiver has not been the subject of any negative judicial comment, unlike Gutierrez who has been found in contempt. The Receiver has not been unsuccessful at any motion.
- [21] Further, in a number of my previous endorsements I have commented that many of the complaints Gutierrez has raised have been litigated and/or unsupported by evidence.
- [22] Specifically, in my March 25/01 Endorsement I noted that the Receiver had been acting in a neutral fashion to that point in time.
- [23] With respect to Gutierrez's most significant complaints I note:
- The criminal complaints in Panama, as noted, have ceased and Gutierrez was found in contempt for his participation.
 - Again, there is no motion in the notice of motion of complaints concerning computer security and Mr. Bell's affidavit was served 2 days before this motion.
 - I have previously rejected Gutierrez's complaints about the involvement of "the Cousins" and the Receiver's alleged interference with secured funding due to lack of evidence.

- [24] Overall, based on the above, I accept that the Receiver has demonstrated that “it appears” that the motion is frivolous and vexatious and “suggests a tentative conclusion of absence of merit”: *McArthur v Neumann* 2020 ONSC 66 at para 17&18.
- [25] In this regard I note that Gutierrez seeks to have the Receiver replaced with someone on his choosing.
- [26] Last, in considering the test I need to determine whether Gutierrez has sufficient assets in Ontario to pay the Receiver’s costs. I agree with the Receiver that there is good reason to believe Gutierrez has insufficient assets in Ontario for the reasons set out in para 37 of the Receiver’s factum.
- [27] Gutierrez claims in his factum that he is impecunious. He has not, however, as noted, delivered any evidence on this motion to support this assertion. Further, according to the Bill Costs [sic] filed at his contempt hearing he has paid Mr. Greenspan \$150,000.00 between April - September 2022. He continues to be represented by two sets of counsel. Also, it appears from Gutierrez’s litigation conduct to date and moving forward with his motion, that he has not been deterred by legal costs.
- [28] I am also satisfied, based on the above, that this motion is not being used as a litigation tactic to prevent the motion from being heard on its merits.
- [29] (4) Gutierrez also submits that this motion ought to be dismissed since the Receiver delayed in bringing this motion.
- [30] This argument has no merit. The motion to replace the Receiver and this motion were scheduled at the same time. Since then, Gutierrez has been found in contempt.
- [31] The fact that the Notice of Motion was served approximately one year ago is immaterial as I only agreed to schedule it and this motion in the fall of this year.
- [32] (5) Insofar as quantum is concerned I agreed with Gutierrez that the amount sought is high. Having reviewed the notice of motion and the steps likely required up to and including the motion, I am satisfied that \$100,000.00 is fair and reasonable on a partial indemnity basis after reviewing the Receiver’s draft Bill of Costs.
- [33] Based upon foregoing I therefore order that security for costs be paid in the amount of \$100,000.00. This includes some costs vis a vis the Receiver, as per my July 2021 decision where I allowed these costs pursuant to s. 131(1) of the *CJA* on the basis that stakeholders ought not be saddled with costs they ought not have to incur.
- [34] Insofar as costs of this motion are concerned I have reviewed the parties’ draft Bills of Costs. Since the Receiver was successful it ought to receive its costs on a partial indemnity basis in the amount of \$30,092.10 inclusive as claimed. This amount is fair and reasonable.

McEwen J.

(see over)

Addendum

[35] Since preparing this endorsement have concluded that, given my findings concerning Rule 56.01(1)(e), it would be appropriate to have another judge on the Commercial List hear the motion to replace the Receiver.

McEwen J.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)
)
JUSTICE MCEWEN)

FRIDAY, THE 28TH
DAY OF AUGUST, 2020

B E T W E E N:

(Court Seal)

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.

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 of Xela Enterprises Ltd. (the “**Company**”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

ON READING the material filed by the parties, including, but not limited to, the Motion Record of the Receiver and the Responding Motion Record of Cambridge LLP, and on hearing the submissions of the lawyers for the Receiver and such other counsel as were present and listed on the Counsel Slip.

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.

THE COMPANY'S DOCUMENTS and DEVICES

2. **THIS COURT ORDERS** that Juan Guillermo Gutierrez ("**Juan Guillermo**") shall provide the Receiver forthwith and no later than within 7 days of this Order, the municipal address, business name and all contact information related to any storage unit or other premises previously or currently used by the Company to store documents, electronic devices or data including but not limited to the location of the Company's current and former servers including any server hosting Juan Guillermo's xela.com email address (the "**Premises**").

3. **THIS COURT ORDERS THAT** Juan Guillermo and any current or former officers, directors, servants, agents, employees of the Company ("**Company Agents**") and any person appearing to be in charge of the Premises shall forthwith permit entry into the Premises to the Receiver, its counsel, the Receiver's agent, or anyone so authorized by the Receiver ("**Authorized Persons**") for the purposes of searching for, identifying, inspecting, preserving, reproducing, and removing into the custody of the Receiver any and all Company documents, items, devices, computers, servers, iPads, Tablets, magnetic tapes or disks, DVDs, CDs, USB devices, cell phones,

or any other electronic storage or media device, including cloud-based storage belonging to the Company and any component of any of the foregoing (“**Company Documents and Devices**”).

4. **THIS COURT ORDERS** that Arturo’s Technical Services its officers, directors, servants, agents, employees, and anyone else acting on its behalf (“**ATS**”) and any person(s) appearing to be in charge of the premises known municipally as 3-100 Leek Crescent, Richmond Hill, ON L4B3E6 (the “**Old Server Premises**”) shall, upon five days’ notice from any Authorized Person, permit entry or re-entry into the Old Server Premises to the Authorized Persons for the purposes of searching for, identifying, inspecting, preserving, reproducing, and removing into the custody of the Receiver the Company Documents and Devices.

5. **THIS COURT ORDERS** that forthwith upon service of the Order, Juan Guillermo, any Company Agents and any other person(s) upon whom the Order is served, shall forthwith disclose to the Receiver and grant access and deliver up to the Receiver or any Authorized Persons any and all Company Documents and Devices wherever situate including without limitation any on-line internet or cloud based e-mail or other accounts or remotely accessed computers where information related to the Company may be stored, provide all means of accessing these documents, accounts or devices and allow the Receiver or such Authorized Persons to change the access to these accounts to allow the Receiver an adequate opportunity to secure the information contained on these accounts or computers.

6. **THIS COURT ORDERS AND DECLARES** that the Receiver is authorized to obtain from anyone in possession or control of the Premises or Old Server Premises, with entry and exit records, dating back to July 5, 2019, with respect to the storage unit(s) rented and/or occupied by the Company, Juan Guillermo Gutierrez, Company Agents, or anyone acting on their behalf.

7. **THIS COURT ORDERS AND DECLARES** that Receiver is authorized to retain a forensic specialist, who shall be an Authorized Person under this order. The Forensic Specialist shall be entitled to take an image of the data on the Company Documents and Devices. The Forensic Specialist shall be permitted to conduct such forensic examinations of Company Documents and Devices as directed by the Receiver.

8. **THIS COURT ORDERS AND DECLARES** that Juan Guillermo, the Company Agents, ATS and anyone else acting on their behalf, and any person(s) appearing to be in charge of the Premises or Old Server Premises shall allow the Authorized Persons to remain on the Premises or Old Server Premises to exercise their rights and discharge their duties as set out in this Order.

OBLIGATIONS OF PERSONS ON NOTICE OF ORDER

9. **THIS COURT ORDERS AND DECLARES** that upon notice of this Order, unless otherwise ordered by this Court or directed by the Receiver, no person shall, directly or indirectly, by any means whatsoever:

- (a) Remove, destroy, erase, delete alter, deface, discard, conceal, or destroy, in any manner, any Company Documents or Devices; and
- (b) Touch, activate, or operate any of the Company Documents and Devices either locally or remotely from any location, or access or alter any text, graphics, electronic data, information, or other content of any web site or its databases or any electronic mail, newsgroup or Internet relay chat communications, or other information, instructions or data stored in any location remote from the Premises that may contain or constitute the Company's information.

10. **THIS COURT ORDERS AND DECLARES** that, in order to give effect to the Order, any person who is ordered not to do something shall not do it personally, through others acting on his/her behalf, or on his/her instructions, or with his/her encouragement or acquiescence, or in any other way.

11. **THIS COURT ORDERS** that Juan Guillermo, the Company Agents, ATS, and anyone else acting on their behalf shall forthwith render any necessary assistance to the Receiver and Authorized Persons to enable them to effectively carry out their responsibilities under this Order.

12. **THIS COURT ORDERS** that upon notice of this Order, Juan Guillermo, the Company Agents, ATS and anyone else acting on their behalf shall forthwith render any necessary assistance to the Receiver or Authorized Persons to locate, decode, access, and decrypt the Company Documents and Devices and any and all information or electronic data to which the Authorized Persons may not have ready and immediate access, including the provision of all usernames, accounts, access codes, keys, identification codes, passwords, passphrases, encryption solutions or any other such information or knowledge necessary to achieve access thereto and shall remove and deactivate any other security safeguards existing on Company Documents and Devices.

PRIVILEGE

13. **THIS COURT ORDERS** that Juan Guillermo, or any other person purportedly acting on behalf of the Company or (previously or currently) related to the Company, cannot assert privilege against the Receiver in respect of any of the Company Documents or Devices.

14. **THIS COURT ORDERS** that Juan Guillermo shall give notice of this order to any third parties who may claim privilege over any Company Documents or Devices.

15. **THIS COURT ORDERS** that any third party with notice of this order who asserts or may assert a privilege claim with respect to any Company Documents or Devices may seek to vary or amend this Order on not less than seven (7) days notice to the Receiver and the Service List.

16. **THIS COURT ORDERS** that if, in the process of carrying out its duties, the Receiver or any Authorized Person identifies a documents which may be subject to privilege of a third party, the Receiver shall segregate such document(s) and shall not conduct any further review of such document(s) without further direction of the Court.

17. **THIS COURT ORDERS** that nothing in this order is intended to affect the privilege of any third party.

18. **THIS COURT ORDERS** 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 that is in the possession of Cambridge LLP as a result of their representation of the Company.

19. **THIS COURT ORDERS** that within fourteen (14) days of this Order Cambridge LLP shall produce to the Receiver:

- (a) Any and all corporate documents of the Company and its subsidiaries or affiliates;
- (b) Any documentation and correspondence relevant and relating to its representation of the Company, its subsidiaries or affiliates including but not limited to:
 - (i) Its representation of the Company in these proceedings;
 - (ii) Correspondence with the Company's subsidiaries, its affiliates and any other third parties; and

- (iii) Any and all correspondence respecting the February 2020 transaction with LISA S.A.;
- (c) A list of documents and correspondence over which privilege is claimed; and
- (d) No documents obtained by the Receiver, pursuant to this Order, shall be used for any purpose other than:
 - (i) Discharging the Receiver's obligations under the Appointment Order, dated July 5, 2019, as it may be amended from time to time;
 - (ii) The interviewing of Persons, as defined in the Appointment Order; and
 - (iii) Reporting to this Court from time to time.



(Signature of Judge)

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISE LTD. et al.
Respondents

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

28 August 20

Order to go on the consent of the parties as per the draft filed and signed.
This Order is effective from today's date and is enforceable without the
need for entry and filing.



ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

ORDER

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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

Peter H. Griffin (19527Q)
pgriffin@litigate.com
Tel: (416) 865-2921

Monique J. Jilesen (43092W)
mjilesen@litigate.com
Tel: (416) 865-2926

Derek Knoke (75555E)
dknoke@litigate.com
Tel: (416) 865-3018

AIRD & BERLIS LLP

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

Kyle Plunkett
Email: kplunkett@airdberlis.com
Sam Babe
Email: sbabe@airdberlis.com

Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Receiver

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) TUESDAY, THE 27th
)
JUSTICE MCEWEN) DAY OF OCTOBER, 2020

B E T W E E N:

(Court Seal)

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.

ORDER

THIS CASE CONFERENCE, requested by KSV Restructuring 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 of Xela Enterprises Ltd. (the “Company”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

ON READING the material filed by the parties, and on hearing the submissions of the lawyers for the Receiver and such other counsel as were present and listed on the Counsel Slip.

JUAN GUILLERMO'S DEVICES

1. **THIS COURT ORDERS** that within seven (7) business days of the Order, Juan Guillermo Gutierrez (“**Juan Guillermo**”) will provide the Receiver’s Forensic Specialist, Duff & Phelps, with possession of all devices used by him, including, but not limited to, cellphones, iPads, and computers which do or may include Xela information or data (including its subsidiaries, affiliates, or former subsidiaries and affiliates) (the “**Devices**”).
2. **THIS COURT ORDERS** that Juan Guillermo will confirm under oath that the Devices are the only devices in his power, possession, or control which do or may include Xela information or data (including its subsidiaries, affiliates, or former subsidiaries and affiliates).
3. **THIS COURT ORDERS** that Duff & Phelps will be authorized to make a single forensic image of each of the Devices (the “**Images**”) in the presence of Juan Guillermo or his agent and an IT expert of Juan Guillermo’s choice within seven (7) business days of the Order.
4. **THIS COURT ORDERS** that Duff & Phelps shall be permitted to employ whatever methods it deems appropriate to image the Devices without interference by Juan Guillermo or his IT expert.
5. **THIS COURT ORDERS** that forthwith after imaging the Devices, Duff & Phelps shall return the Devices to Juan Guillermo.
6. **THIS COURT ORDERS** that Duff & Phelps will make no additional copies or images of the Devices or any of the data extracted therefrom except as necessary to comply with this Order.

7. **THIS COURT ORDERS** that, at the request of the Receiver, Duff & Phelps will be authorized to conduct forensic analyses of the Images to determine whether, when, and how many files have been deleted from the Devices. Upon completion of the analyses, Duff & Phelps shall be authorized to provide the result of such analyses (but no documents shall be released to the Receiver unless such documents are released pursuant to the protocol below) to the Receiver and Juan Guillermo.

8. **THIS COURT ORDERS** that, at the request of the Receiver, Duff & Phelps will be authorized to load the data onto the Relativity document review platform (the “**Platform**”).

9. **THIS COURT ORDERS** that once the data is loaded onto the Platform, Duff & Phelps shall grant Juan Guillermo and his authorized agents access to the Platform.

10. **THIS COURT ORDERS** that Juan Guillermo, but not the Receiver or its agents, shall have thirty-five (35) days after Duff & Phelps grants Juan Guillermo and his authorized agents access to the Platform to assert any objections to disclosure to the Receiver of any documents on the Platform based on privilege, personal information, or any other reasonable basis (the “**Objections**” or the “**Objections Date**”).

11. **THIS COURT ORDERS** that a motion for an extension of the Objections Date may be made by Juan Guillermo by motion served no less than five days before the Objections Date. Such motion for an extension must be returnable within 7 (seven) days of the Objections Date, subject only to the Court’s availability (collectively, the “**Extension Deadlines**”).

12. **THIS COURT ORDERS** that, after the Objections Date, or if a motion for extension of the Objections Date is made in accordance with the Extension Deadlines, then after the Court’s judgment thereon, the Receiver shall be given access to all the documents on the document review platform except for Objections documents. If the Receiver has not received Objections by the

Objection Date or Juan Guillermo fails to comply with any of the Extension Deadlines, the Receiver will be entitled to review all documents in the document review platform.

13. **THIS COURT ORDERS** that Juan Guillermo, in advance of the Objections date, shall prepare and provide to the Receiver, a list of documents objected to (the “Objections Documents”). The list of all Objections Documents shall include, subject to paragraph 14 below, at a minimum, the following fields: date, date sent, author, sender, all recipients, title and subject.

14. **THIS COURT ORDERS** that Juan Guillermo may assert privilege over portions of the title and/or subject descriptions by the Objections Date. Duff and Phelps shall redact the subject and/or title line in all cases where privilege has been asserted over the title and/or subject. For all claims of privilege over the title or subject, Juan Guillermo shall within 14 days of the Objections Date or extension, provide the Receiver with a basis for the assertion of privilege.

15. **THIS COURT ORDERS** that the Receiver shall be permitted to challenge any of the Objections and claims of privilege. The parties shall attempt to resolve any such challenges within three (3) business days, failing which the Receiver may address any such challenges before the Court. In the event of a challenge, the challenged document shall be provided to the Court for non-public, confidential review outside the presence of any person(s) other than counsel for the Receiver and counsel for Juan Guillermo.

16. **THIS COURT ORDERS** that the Receiver and Duff & Phelps shall not use any files from the Devices for any purpose other than the Receivership.

17. **THIS COURT ORDERS** that the Receiver shall preserve Xela and its subsidiaries privilege, except where the Receiver deems it necessary to fulfill its mandate.

18. **THIS COURT ORDERS** that the Receiver shall not disclose any files from the Devices to anyone other than its agents without approval of the Court, except as necessary to fulfill the Receiver's mandate. Agents include individuals or entities that represent and/or are retained by the Receiver to fulfill its mandate.

19. **THIS COURT ORDERS** that, upon the discharge of this receivership, Duff & Phelps shall delete the subject database in its entirety, and the Receiver shall destroy all documents and/or data retrieved from the Devices.



(Signature of Judge)

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

ORDER

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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

Peter H. Griffin (19527Q)

pgriffin@litigate.com

Tel: (416) 865-2921

Monique J. Jilesen (43092W)

mjilesen@litigate.com

Tel: (416) 865-2926

Derek Knoke (75555E)

dknoke@litigate.com

Tel: (416) 865-3018

AIRD & BERLIS LLP

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

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

27 Oct 20

Order to go on consent as per the draft filed and signed.



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) TUESDAY, THE 27th
)
JUSTICE MCEWEN) DAY OF OCTOBER, 2020

B E T W E E N:

(Court Seal)

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.

ORDER

THIS CASE CONFERENCE, requested by KSV Restructuring 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 of Xela Enterprises Ltd. (the “Company”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

ON READING the material filed by the parties, and on hearing the submissions of the lawyers for the Receiver and such other counsel as were present and listed on the Counsel Slip.

1. **THIS COURT ORDERS** that within seven days of the Order, Arturos Technical Services Ltd. (“ATS”) will schedule a mutually convenient date with Duff & Phelps, the Receiver’s Forensic Specialist, for the purpose of providing the Forensic Specialist access, in accordance with this Order, to certain servers more particularly described in Schedules “A” and “B” (collectively the “Servers”).
2. **THIS COURT ORDERS** that upon being provided with the access contemplated in paragraph 1 of this Order, Duff & Phelps be and is hereby authorized and directed to make a single disk image of each of the Servers listed in Schedule “A” (together, the “Images”) to be held by Duff & Phelps in accordance with the terms of this Order.
3. **THIS COURT ORDERS** that upon being provided with the access contemplated in paragraph 1 of this Order, ATS shall deliver up the Servers at Schedule “B” to Duff & Phelps (the “Schedule B Servers”) to be held by Duff & Phelps in accordance with the terms of this Order.
4. **THIS COURT ORDERS** that Duff & Phelps will make no additional copies or images of the Servers or any of the Images.
5. **THIS COURT ORDERS** that Duff & Phelps shall maintain and preserve the Images and Schedule B Servers until further order of this Court or written consent of the Receiver and ATS.

6. **THIS COURT ORDERS** that Duff & Phelps shall not conduct, or permit any other person to conduct, any analysis or review of the Images or Schedule B Servers or any data contained in the Images or Schedule B Servers, without a further order of this Court or written consent of the Receiver and ATS.

A handwritten signature in cursive script, appearing to read "McE T.", positioned above a horizontal line.

(Signature of Judge)

SCHEDULE "A"

Description of Servers

Servers located at Cogent Canada, Inc., 245 Consumers Rd., Suite 300, North York, ON M2J 1R3:

1. XL88-5, serial number: KQYWHNG
2. XL88-15, serial number: 06KN471
3. XL88-25, serial number: KQ63ZVA
4. XL88-1, serial number: KQYWHNA
5. XL88-20, serial number: KQ6930H
6. XL88-30, serial number: KQ8X0LK
7. XL88-35, serial number: E2BG115

SCHEDULE "B"**Description of Additional Servers described as non-operational**

	Hardware	Serial #
1.	IBM System x 3650 M3 7945-AC1 7945N2U	KQYWHPF
2.	IBM System x3550 7978 7978CCU	99L6433
3.	IBM System x3550 7978 7978CCU	99L6432

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

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

<p>27 Oct 20</p> <p>Order to go on consent as per the draft filed and signed.</p> <p><i>McE...</i></p>	<p>ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)</p> <p>PROCEEDING COMMENCED AT TORONTO</p> <p>ORDER</p> <hr/> <p>LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP Barristers 130 Adelaide Street West, Suite 2600 Toronto ON M5H 3P5</p> <p>Peter H. Griffin (19527Q) pgriffin@litigate.com Tel: (416) 865-2921</p> <p>Monique J. Jilesen (43092W) mjilesen@litigate.com Tel: (416) 865-2926</p> <p>Derek Knoke (75555E) dknoke@litigate.com Tel: (416) 865-3018</p> <p>AIRD & BERLIS LLP Brookfield Place 181 Bay Street, Suite 1800 Toronto, ON M5J 2T9</p> <p>Kyle Plunkett Email: kplunkett@airdberlis.com</p> <p>Sam Babe Email: sbabe@airdberlis.com</p> <p>Tel: (416) 863-1500 Fax: (416) 863-1515</p> <p>Lawyers for the Receiver</p>
--	---

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

2
3 ONTARIO
4 SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

5 B E T W E E N :

6
7 MARGARITA CASTILLO

8 Plaintiff,

9 - and -

10
11 XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED,
12 FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO
GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the
Estate of Juan Arturo Gutierrez

13 Defendants.

14 -----
15 This is the Examination In Aid of Execution of JUAN
16 GUILLERMO GUTIERREZ, a Defendant herein, taken at the
17 offices of Network Court Reporting, 1 First Canadian
Place, 100 King St. West, Suite 3600, Toronto, Ontario,
on July 25, 2017.

18 A P P E A R A N C E S :

19 Jason W.J. Woycheshyn
20 Adam Zur, Summer Student

for the Plaintiff

21 Martin Mendelzon

for the Defendants,
Xela Enterprises Ltd.,
Tropic International
Limited, Fresh Quest,
Inc., Juan Guillermo
Gutierrez and Carmen S.
Gutierrez

22
23
24
25 ALSO APPEARING:
Margarita Castillo

Page 14	Page 16
1 31. Q. And your fax number?	1 A. I don't remember the exact numbers,
2 A. No fax number.	2 but yes.
3 32. Q. Your date of birth is March 1st, 4 1956?	3 41. Q. Okay. And then in March of this 4 year, the Court of Appeal dismissed a motion for
5 A. Yes.	5 leave to appeal and awarded Margarita an
6 33. Q. And your Social Insurance Number is 7 487 192 445?	6 additional cost of \$1,500. Does that sound about 7 right?
8 A. I believe so. I don't know it by 9 memory but if it's in my tax return, it must be 10 it.	8 A. Probably.
11 34. Q. Do you know your Driver's Licence 12 number?	9 42. Q. And then most recently, there was a 10 motion for a stay of execution in front of
13 A. No, I don't know it but I have it 14 with me, so I can give it to you.	11 Justice McEwen and that motion was dismissed and 12 Justice McEwen ordered that Margarita receive an
15 35. Q. If I can get a copy of it, please. 16 Mr. Mendelzon, it's fine if we take a copy of 17 that?	13 additional approximately \$15,000; is that -- you 14 are aware of that, sir? 15 A. I don't remember hearing the number 16 but I guess it's right.
18 MR. MENDELZON: Yes. 19 THE DEPONENT: Just don't forget to give 20 it to me before we leave because I have to drive 21 home.	17 43. Q. You have not appealed the decision of 18 Justice McEwen? 19 MR. MENDELZON: As of now there's been no 20 appeal.
22 BY MR. WOYCHESHYN:	21 MR. WOYCHESHYN: Okay. And if that 22 changes, you'll let me know?
23 36. Q. This is an examination in aid of 24 execution arising from a judgment of Justice 25 Newbould dated October 28, 2015. Do you remember	23 U/T MR. MENDELZON: We sure will. 24 BY MR. WOYCHESHYN: 25 44. Q. So the total court orders, and I
1 that?	1 recognize that the orders against you, sir, are
2 A. Yeah, I do remember.	2 joint as against you, your father's estate and
3 37. Q. Okay. You recall that that judgment 4 jointly required you to pay Margarita \$4.25 5 million plus 2 percent interest. Does that sound 6 about right?	3 Xela, total about \$5.2 million. We are now at 4 the end of July 2017 and am I right that you 5 haven't paid Margarita any money towards that 6 judgment or those orders?
7 A. Probably, yeah.	7 A. Can you ask the question again?
8 MR. MENDELZON: And, counsel, just to be 9 clear, it required him to purchase Margarita's 10 shares for 4.25 million.	8 45. Q. Yes. You haven't paid any money -- 9 A. No, we have not paid anything.
11 BY MR. WOYCHESHYN:	10 46. Q. Okay. And what is the reason for 11 non-payment?
12 38. Q. Thank you. And jointly with 13 yourself, your father and Xela Enterprises, 14 right? You understood that?	12 A. Well, part is because we don't have 13 the funds to do that. As a matter of fact, we 14 intend to pay when we can but right now it's 15 impossible. It's impossible because of all the 16 actions of Margarita has taken in the last eight 17 years has made it impossible.
15 A. I understand that for about the same 16 price as we offered her in 2010 and she rejected 17 then.	18 MR. MENDELZON: And, counsel, Juan, when 19 you are saying "we" in your answers --
18 39. Q. And then you recall in about December 19 of 2015, Justice Newbould released his cost 20 endorsement for around \$890,000?	20 THE DEPONENT: When I say "we", I refer 21 myself and my father and the company too, the 22 three of us, we would like to pay. Now, 23 obviously you are going to cross-examine my 24 mother as an executor of my dad's estate and 25 somebody else for Xela, so they will speak for
21 A. I remember hearing about that, yeah.	21
22 40. Q. And then there was an appeal to the 23 Divisional Court of Ontario and the Divisional 24 Court made an additional order of costs of 25 \$76,096.47; do you remember that?	22

Page 18

1 the companies, but I tend to say "we" all the
 2 time as my way of speaking.
 3 BY MR. WOYCHESHYN:
 4 47. Q. And I understand it's a family
 5 company and you, for a long time, have been the
 6 head of the company so I understand why you would
 7 use "we", but in terms of your personal finances,
 8 your evidence is that you personally do not have
 9 the resources or assets to pay any portion of
 10 Margarita's judgment or order?
 11 A. At this particular time, I don't.
 12 48. Q. Is there something on the horizon
 13 that you see a time when you will be able to pay
 14 those amounts?
 15 A. Yes. We have a major lawsuit against
 16 several defendants including Margarita for \$400
 17 million, very well substantiated, has not gone to
 18 hearings yet. So we expect to get a solution on
 19 that and when that happens, we are going to have,
 20 you know, money to pay for this. I say "we"
 21 again, it's myself or any of the other two
 22 parties.
 23 49. Q. And just so I'm clear, that -- the
 24 action -- the lawsuit that you are just referring
 25 to is the lawsuit that you and Xela and others

Page 19

1 commenced against Margarita, Ricardo, Roberto and
 2 I'll call them the boys in Guatemala, but that
 3 action was commenced in 2011 in Ontario; is that
 4 the action you are referring to?
 5 A. That is the action and it's been held
 6 for six years arguing the service of process
 7 which has been affirmed. So go figure, six years
 8 to discuss service, that's where we are but when
 9 that lawsuit is resolved, we'll have more than
 10 plenty resources to pay for this judgment.
 11 Before that, I can't.
 12 50. Q. Okay. So just so I understand,
 13 that's the only potential source of income that
 14 you can get that will satisfy the -- that will
 15 allow you to pay Margarita.
 16 A. Me personally, yes. That's the only
 17 -- the only option I have.
 18 51. Q. And if -- I know you anticipate that
 19 you will be successful in that action but if that
 20 action does not result in a payment to you, am I
 21 right that you will not be able to pay Margarita?
 22 A. As things are today, I can't.
 23 52. Q. And other than the outcome of the
 24 action, you don't have any source of income that
 25 you see on the horizon that would allow you to

Page 20

1 pay Margarita; am I right?
 2 A. At this point in the immediate time,
 3 I can't. I have no source of income coming, and
 4 I may add, it's a direct consequence of many of
 5 the actions taken by Margarita and the other
 6 people that are working with her. So they have
 7 cornered me. So at this point, I don't have
 8 anything else. I gave you my financial statement
 9 there.
 10 53. Q. Right. So you have nothing right now
 11 and you have nothing foreseeable other than the
 12 potential recovery on the action.
 13 MR. MENDELZON: Counsel, I think you've
 14 asked him this about --
 15 BY MR. WOYCHESHYN:
 16 54. Q. No, but he hasn't --
 17 A. I answer again, as far as I know, I'm
 18 not the -- let me put it this way: I don't have
 19 a crystal ball that tell me what's going to
 20 happen in the future. At this particular time, I
 21 don't have any other thing that I can tell you is
 22 going to barely make me survive at this point. I
 23 cannot tell you what's going to happen in a year
 24 or in two years or five years.
 25 55. Q. Okay. I note you have a lawyer

Page 21

1 present with you today.
 2 A. Yes.
 3 56. Q. Who is paying for your lawyer?
 4 A. Well --
 5 R/F MR. MENDELZON: Don't answer that.
 6 THE DEPONENT: Okay.
 7 MR. WOYCHESHYN: On the grounds of?
 8 MR. MENDELZON: It's privileged.
 9 MR. WOYCHESHYN: As to who is paying?
 10 MR. MENDELZON: Correct.
 11 BY MR. WOYCHESHYN:
 12 57. Q. Are you paying your lawyer?
 13 R/F MR. MENDELZON: Don't answer that.
 14 BY MR. WOYCHESHYN:
 15 58. Q. I'm going to be examining you in your
 16 personal capacity and I just -- I'm going to ask
 17 you some questions about Xela but I'm not
 18 expecting you to answer questions on behalf of
 19 Xela; do you understand the difference?
 20 A. Yes.
 21 59. Q. You are the president and CEO of
 22 Xela?
 23 A. Yes.
 24 60. Q. And just for clarity of the record,
 25 when I refer to Xela, I'm referring to Xela

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

1 only bank account was a joint account with your wife
2 at TD Bank. Is that still correct?

3 A. Yes, it is.

4 669. Q. And is that an account to which you
5 still have access to funds?

6 A. No, it's actually drawn on a line when
7 you froze it about a year ago.

8 670. Q. Can you explain what you mean by that?

9 A. That bank account had a line of credit
10 as part of it, like an overdraft facility, and I was
11 drawing on that one when you froze it last year. So,
12 there's no availability of funds at all, besides its
13 frozen.

14 671. Q. And so, there are no other bank
15 accounts of which you have access to funds from?

16 A. I told you already no. I told you that
17 last year; I don't have another bank account; I never
18 had a different bank account. I only had one bank
19 account because I didn't need another one. I just ran
20 my affairs through one bank account. I don't know how
21 many times I have to explain it to you for you to
22 understand it. There's none -- no other ones.

23 672. Q. And that will not be the last question
24 that you hear me ask today that you've been asked
25 before, and the reason I'm asking them is because you

JUAN GUILLERMO GUTIERREZ - 131

1 answered them last year and I'm asking them today and
2 things could change.

3 You had RRSPs, which you provided us with
4 account statements for. My question is have you drawn
5 any money out of the RSPs since last July?

6 A. No. You froze all my bank accounts.
7 I'm not like your side of the equation that I don't
8 play by the rules, I respect the rules. I'm doing
9 what I've been instructed to do, so I'm not touching
10 any of my assets at all. I don't have any assets, by
11 the way because you already took them all away.

12 673. Q. Well the RSP's that's not true; is it?

13 A. No, the RSP is the only thing is there
14 and is untouched.

15 674. Q. So, I have your evidence then that you
16 haven't created any new RSP's in the last year?

17 A. How would I, if you froze all my assets
18 and took all my money away from me? I can't put
19 anything anywhere, so the answer is no. No change
20 from last year on any of the questions you asked me,
21 with the exception of all the assets I had at that
22 time that you took from me.

23 That's the only answer. The only change has
24 been you took my cars away, you forced my house to be
25 sold and you forced me to forfeit or sell my half of

JUAN GUILLERMO GUTIERREZ - 132

1 the cottage; I have no assets left. So there's no
2 changes. You can ask all the questions you want, but
3 I'll tell you already; no changes from last time
4 because I haven't done anything.

5 675. Q. Well I will ask the questions anyway,
6 but I appreciate that as an overview answer and we'll
7 see if it can help speed things up at any point today.
8 You mentioned the house; that is the house that was
9 sold at 2 Gordon Road, and I understand that sale
10 closed on August 20th. Is that right?

11 A. That's correct.

12 676. Q. And I understand though that you're not
13 required to vacate until the end of November. Is that
14 right?

15 A. That's correct.

16 677. Q. So, where will be your primary
17 residence from now until the end of November?

18 A. I don't know.

19 678. Q. Will it be one of either 2 Gordon Road
20 or 174 Amber Bay Road?

21 A. Gordon Road no, because I just sold it;
22 you just told me. I sold the house, you already told
23 me that, so why am I going to live there after I'm
24 supposed to leave the house when the new buyer takes
25 over?

PRELIMINARY SEARCH RESULTS ACROSS ALL COUNTIES IN ONTARIO FOR ANY PROPERTY OWNED BY JUAN GUILLERMO GUTIERREZ

NO HITS IN: ALGOMA, BRANT, BRUCE, COCHRANE, DUFFERIN, DUNDAS, DURHAM, ELGIN, ESSEX, FRONTENAC, GLENGARRY, GRENVILLE, GREY, HALDIMAND, HALIBURTON, HALTON COUNTY, HASTINGS, HURON, KENORA, KENT COUNTY, LAMBTON, LANARK, LEEDS, LENNOX, MANITOULIN, MIDDLESEX COUNTY, MUSKOKA, NIAGARA NORTH/NIAGARA, NIAGARA SOUTH/NIAGARA 30, NIPISSING, NORFOLK, NORTHUMBERLAND, OTTAWA-CARLTON, OXFORD COUNTY, PEEL, PERTH, PETERBOROUGH, PRESCOTT, PRINCE EDWARD, RAINY RIVER, RENFREW, RUSSELL, SIMCOE, STORMONT, SUDBURY, TIMISKAMING, THUNDER BAY, VICTORIA, WATERLOO, WELLINGTON, HAMILTON WENTWORTH, YORK REGION

HITS IN TORONTO - 2 EXACT HITS NO LONGER ACTIVE:

Name: GUTIERREZ, JUAN GUILLERMO

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 1

▼ PIN	STATUS	ADDRESS	DESCRIPTION		
10102-0345 (R)	INACTIVE	2 GORDON ROAD, NORTH YORK	LOT 187, PLAN 3517 TWP OF YORK/NORTH YORK , CITY OF TORONTO	Parcel Register	Map

Address: 2 GORDON ROAD

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 2

▼ PIN	STATUS	ADDRESS	DESCRIPTION		
10102-0345 (R)	INACTIVE	2 GORDON ROAD, NORTH YORK	LOT 187, PLAN 3517 TWP OF YORK/NORTH YORK , CITY OF TORONTO		
10102-0198 (LT)	ACTIVE	2 GORDON ROAD, TORONTO	LT 187 PL 3517 NORTH YORK; TORONTO (N YORK) , CITY OF TORONTO	Parcel Register	Map

Name: GUTIERREZ, JUAN GUILLIERMO

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 1

▼ PIN	STATUS	ADDRESS	DESCRIPTION		
10100-0203 (R)	INACTIVE	109 GORDON ROAD, NORTH YORK	LOT 51, PLAN 3517 TWP OF YORK/NORTH YORK , CITY OF TORONTO	Parcel Register	Map

Address: 109 GORDON ROAD

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 2

▼ PIN	STATUS	ADDRESS	DESCRIPTION		
10100-0203 (R)	INACTIVE	109 GORDON ROAD, WILLOWDALE	LOT 51, PLAN 3517 TWP OF YORK/NORTH YORK , CITY OF TORONTO		
10100-0119 (LT)	ACTIVE	109 GORDON ROAD, TORONTO	LT 51 PL 3517 NORTH YORK; TORONTO (N YORK) , CITY OF TORONTO	Parcel Register	Map

HITS IN PARRY SOUND - 2 EXACT HITS NO LONGER ACTIVE - CONSOLIDATED INTO PIN 52193-0908

Name: GUTIERREZ, JUAN GUILLERMO

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 2

PIN	STATUS	ADDRESS	DESCRIPTION	
52193-0895 (LT)	INACTIVE	, SEGUIN	PT SHORE RDAL IN FRONT LT 29 CON 6 HUMPHREY PTS 1 & 2 42R19805 (CLOSED BY BY-LAW 2014-012 AS IN GB71242); TOWNSHIP OF SEGUIN	Parcel Register Map
52193-0194 (LT)	INACTIVE	174 HAMER BAY RD, SEGUIN	PCL 25187 SEC SS; PT LT 29 CON 6 HUMPHREY PT 2 42R5848; SEGUIN	

52193-0908 ✓ ▾ Parcel Register: 52193-0908 (LT) PDF ▾

Adjacents

Custom

52193-0194 ▶

52193-0845 ▶

DESCRIPTION -

PT LT 29 CON 6 HUMPHREY PT 2 42R5848; PT SHORE RDAL IN FRONT LT 29 CON 6 HUMPHREY PTS 1 & 2 42R19805 (CLOSED BY BY-LAW 2014-012 AS IN GB71242); TOWNSHIP OF SEGUIN

Estate:	FEE SIMPLE	PIN Creation:	2014/07/07
Qualifier:	ABSOLUTE	Recently:	CONSOLIDATION



10102-0198 (LT)

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

PROPERTY DESCRIPTION: LT 187 PL 3517 NORTH YORK; TORONTO (N YORK) , CITY OF TORONTO

PROPERTY REMARKS:

RECENTLY:
RE-ENTRY FROM 10102-0345

PIN CREATION DATE:
2002/04/29

FEE SIMPLE
LT CONVERSION QUALIFIED

OWNERS' NAMES
MULLINS, LARRY

CAPACITY SHARE
ROWN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
** PRINTOUT		INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2002/04/26 **				
**SUBJECT,		ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:				
**		SUBSECTION 44 (1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES *				
**		AND ESCHEATS OR FORFEITURE TO THE CROWN.				
**		THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF				
**		IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY				
**		CONVENTION.				
**		ANY LEASE TO WHICH THE SUBSECTION 70(2) OF THE REGISTRY ACT APPLIES.				
**DATE OF CONVERSION TO LAND TITLES: 2002/04/29 **						
64BA1677	1980/04/28	PLAN BOUNDRIES ACT				C
		REMARKS: RE: NY778220, FL11216				
64BA2487	1990/10/15	PLAN BOUNDRIES ACT				C
		REMARKS: RE: TH719171/PLAN 12027				
TR7793	1997/07/15	TRANSFER		*** DELETED AGAINST THIS PROPERTY *** MULLER, STACEY LYNN MULLER, KIRK CHRISTOPHER	GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	
TR9847	1997/08/18	CHARGE		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE TORONTO-DOMINION BANK	
					NUTLEY.	
TR66199	2000/09/08	CHARGE		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE TORONTO-DOMINION BANK	

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.



10102-0198 (LT)

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
TR85837	2001/11/13	CHARGE		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE TORONTO-DOMINION BANK	
E549412	2002/06/10	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE TORONTO-DOMINION BANK	
E602780	2002/09/19	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
				REMARKS: RE: TR085837		
E602787	2002/09/19	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
				REMARKS: RE: TR066199		
AT1727091	2008/03/05	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE BANK OF NOVA SCOTIA	
AT1738970	2008/03/26	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
				REMARKS: RE: E549412		
AT3289565	2013/05/01	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE BANK OF NOVA SCOTIA		
				REMARKS: AT1727091.		
AT3302149	2013/05/16	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
				REMARKS: TR9847.		
AT3302825	2013/05/17	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE BANK OF NOVA SCOTIA	
AT4413110	2016/11/25	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	2348793 ONTARIO LTD.	
AT4939270	2018/08/20	DISCH OF CHARGE		*** COMPLETELY DELETED *** 2348793 ONTARIO LTD.		
				REMARKS: AT4413110.		

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10102-0198 (LT)

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
AT4939381	2018/08/20	TRANSFER	\$3,174,596	GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	MULLINS, LARRY	C
AT4939382	2018/08/20	CHARGE	\$1,200,000	MULLINS, LARRY	THE TORONTO-DOMINION BANK	C
AT4946745	2018/08/30	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE BANK OF NOVA SCOTIA		
REMARKS: AT3302825.						



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PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

PAGE 1 OF 3
PREPARED FOR GraceT01
ON 2022/11/15 AT 10:50:24

LAND
REGISTRY
OFFICE #66

10100-0119 (LT)

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

PROPERTY DESCRIPTION: LT 51 PL 3517 NORTH YORK; TORONTO (N YORK) , CITY OF TORONTO

PROPERTY REMARKS:

ESTATE/QUALIFIER:

FEE SIMPLE
LT CONVERSION QUALIFIED

RECENTLY:
RE-ENTRY FROM 10100-0203

PIN CREATION DATE:
2002/04/29

OWNERS' NAMES
JIWA, SALZAH

CAPACITY SHARE
ROWN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
** PRINTOUT		INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2002/04/26 **				
**SUBJECT,		ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:				
**		SUBSECTION 44 (1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES *				
**		AND ESCHEATS OR FORFEITURE TO THE CROWN.				
**		THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF				
**		IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY				
**		CONVENTION.				
**		ANY LEASE TO WHICH THE SUBSECTION 70 (2) OF THE REGISTRY ACT APPLIES.				
**DATE OF CONVERSION TO		LAND TITLES: 2002/04/29 **				
64BA1677	1980/04/28	PLAN BOUNDRIES ACT				
		REMARKS: RE: NY778220, FL11216				
TR9902	1997/08/18	TRANSFER		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	KALLMEYER, JEFFREY LYNTON KALLMEYER, DORYN	C
TR9903	1997/08/18	CHARGE		*** DELETED AGAINST THIS PROPERTY *** KALLMEYER, JEFFREY LYNTON KALLMEYER, DORYN	BANK OF MONTREAL	
TR9904	1997/08/18	CHARGE		*** DELETED AGAINST THIS PROPERTY *** KALLMEYER, JEFFREY LYNTON KALLMEYER, DORYN	BANK OF MONTREAL	
TR21462	1998/03/31	TRANSFER OF CHARGE		*** DELETED AGAINST THIS PROPERTY *** BANK OF MONTREAL	ROYAL BANK OF CANADA	
		REMARKS: RE TR9903				

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10100-0119 (LT)

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
TR76257	2001/05/11	CHARGE		*** DELETED AGAINST THIS PROPERTY *** KALLMEYER, JEFFREY LYNTON KALLMEYER, DORYN	CANADIAN IMPERIAL BANK OF COMMERCE	
TR78357	2001/06/27	TRANSFER OF CHARGE		*** DELETED AGAINST THIS PROPERTY *** ROYAL BANK OF CANADA	CIBC MORTGAGES INC.	
AT1365731	2007/01/30	TRANSFER		*** COMPLETELY DELETED *** KALLMEYER, DORYN KALLMEYER, JEFFREY LYNTON	KALLMEYER, JEFFREY LYNTON	
AT1379938	2007/02/16	CHARGE		*** COMPLETELY DELETED *** KALLMEYER, JEFFREY LYNTON	CIBC MORTGAGES INC.	
AT1390842	2007/03/05	DISCH OF CHARGE		*** COMPLETELY DELETED *** CIBC MORTGAGES INC.	CIBC MORTGAGES INC.	
AT1401637	2007/03/20	CHARGE		*** COMPLETELY DELETED *** KALLMEYER, JEFFREY LYNTON	CANADIAN IMPERIAL BANK OF COMMERCE	
AT1465511	2007/06/05	DISCH OF CHARGE		*** COMPLETELY DELETED *** CANADIAN IMPERIAL BANK OF COMMERCE	CANADIAN IMPERIAL BANK OF COMMERCE	
AT1733839	2008/03/17	DISCH OF CHARGE		*** COMPLETELY DELETED *** BANK OF MONTREAL		
AT1738818	2008/03/25	TRANSFER		*** COMPLETELY DELETED *** KALLMEYER, JEFFREY LYNTON	COX, FIRIND	
AT1738819	2008/03/25	CHARGE	\$800,000	COX, FIRIND	BANK OF MONTREAL	C
AT1751563	2008/04/09	DISCH OF CHARGE		*** COMPLETELY DELETED *** CIBC MORTGAGES INC.		
AT1794012	2008/05/30	DISCH OF CHARGE		*** COMPLETELY DELETED *** CANADIAN IMPERIAL BANK OF COMMERCE		

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
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10100-0119 (LT)

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
AT2995559	2012/04/20	TRANSFER		COX, FIRIND	JIWA, SALZAH	C
AT3230956	2013/02/04	CHARGE	\$500,000	JIWA, SALZAH	BANK OF MONTREAL	C

REMARKS: RE: AT1401637



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PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

LAND
REGISTRY
OFFICE #42

52193-0908 (LT)

PAGE 1 OF 2
PREPARED FOR GraceT01
ON 2022/11/15 AT 11:18:46

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

PROPERTY DESCRIPTION: PT LT 29 CON 6 HUMPHREY PT 2 42R5848; PT SHORE RDAL IN FRONT LT 29 CON 6 HUMPHREY PTS 1 & 2 42R19805 (CLOSED BY BY-LAW 2014-012 AS IN GB71242); TOWNSHIP OF SEGUIN

PROPERTY REMARKS: CROWN GRANT SEE LPI258.

ESTATE/QUALIFIER: RECENTLY:
FEE SIMPLE CONSOLIDATION FROM 52193-0194, 52193-0895
ABSOLUTE

OWNERS' NAMES
WEVER, ELISA MARIA
CAPACITY SHARE
ROWN

PIN CREATION DATE:
2014/07/07

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
** PRINTOUT	INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2014/07/07 **					
42R5848	1978/11/14	PLAN REFERENCE				C
LT194742	1992/09/30	TRANSFER		*** DELETED AGAINST THIS PROPERTY ***	GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	
LT263182	2004/11/15	CHARGE		*** DELETED AGAINST THIS PROPERTY ***	THE BANK OF NOVA SCOTIA	
42R19805	2012/12/11	PLAN-REFERENCE				C
GB69256	2013/11/27	APL (GENERAL)		THE CORPORATION OF THE TOWNSHIP OF SEGUIN	THE CORPORATION OF THE TOWNSHIP OF SEGUIN	C
GB71242	2014/03/06	BYLAW		THE CORPORATION OF THE TOWNSHIP OF SEGUIN		C
GB72199	2014/04/23	TRANSFER		THE CORPORATION OF THE TOWNSHIP OF SEGUIN 1 & 2 42R19805.	GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	
GB72200	2014/04/23	APL ANNEX REST COV		GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE		C
GB74096	2014/07/04	APL CH NAME OWNER		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO	GUTIERREZ, JUAN GUILLERMO	
GB74097	2014/07/04	APL CONSOLIDATE		GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE		C
GB114228	2018/08/14	APL (GENERAL)		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	GUTIERREZ, WENCKE	

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
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52193-0908 (LT)

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
		REMARKS: DEED POOL				
GB114229	2018/08/14	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	NORTHERN FUNDING GROUP INC.	
GB114230	2018/08/14	NO ASSGN RENT GEN		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	NORTHERN FUNDING GROUP INC.	
		REMARKS: GB114229 - RENTS				
GB137705	2020/12/24	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	SACKS, ANNETTE 2632344 ONTARIO INC.	
GB141544	2021/05/10	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	LETHRIDGE, FREDERICK EDWARD REYNOLDS, ROBERT GEORGE MAXELL ETHERINGTON, JAMES DAVID HANS	
GB145827	2021/09/01	DISCH OF CHARGE		*** COMPLETELY DELETED *** LETHRIDGE, FREDERICK EDWARD REYNOLDS, ROBERT GEORGE MAXELL ETHERINGTON, JAMES DAVID HANS		
		REMARKS: GB141544.				
GB145842	2021/09/01	DISCH OF CHARGE		*** COMPLETELY DELETED *** SACKS, ANNETTE 2632344 ONTARIO INC.		
		REMARKS: GB137705.				
GB145845	2021/09/01	DISCH OF CHARGE		*** COMPLETELY DELETED *** NORTHERN FUNDING GROUP INC.		
		REMARKS: GB114229.				
GB145853	2021/09/01	TRANSFER	\$4,000,000	GUTIERREZ, WENCKE	WEVER, ELISA MARIA	C
		REMARKS: PLANNING ACT STATEMENTS.				
GB145854	2021/09/01	CHARGE	\$2,400,000	WEVER, ELISA MARIA	BANK OF MONTREAL	C
GB148548	2021/11/18	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE BANK OF NOVA SCOTIA		
		REMARKS: LT263182.				

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MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

Divisional Court File No.: 703/22
Superior Court File No. CV-11-9062-00CL

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

PROCEEDING COMMENCED AT TORONTO

**COMPENDIUM OF THE
RESPONDENT, THE RECEIVER**

LENCZNER SLAGHT LLP

Barristers
130 Adelaide Street West, Suite 2600
Toronto ON M5H 3P5
Monique J. Jilesen (43092W)
mjilesen@litigate.com
Tel: (416) 865-2926
Derek Knoke (75555E)
dknoke@litigate.com
Tel: (416) 865-3018

AIRD & BERLIS LLP

Brookfield Place
181 Bay Street, Suite 1800 Toronto, ON M5J 2T9
Kyle Plunkett
Email: kplunkett@airdberlis.com
Sam Babe
Email: sbabe@airdberlis.com
Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Respondent, the Receiver