

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

MARGARITA CASTILLO

Applicant

And

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

Respondents

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

COMPENDIUM OF THE RECEIVER
(September 30, 2020 Case Conference)

September 30, 2020

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TO: **THE SERVICE LIST**

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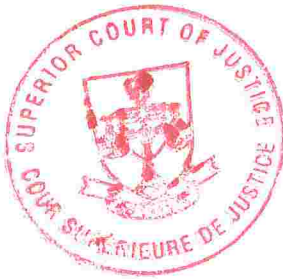
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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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.

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

SERVICE

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

APPOINTMENT

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

RECEIVER'S POWERS

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

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
 - (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$250,000, provided that the aggregate consideration for all such transactions does not exceed \$1,000,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;
- and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;
- (l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
 - (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
 - (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
 - (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and

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

- (p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (q) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

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

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

- a) selling or publicly marketing the shares of Lisa S.A., Gabinvest S.A., or any shares owned by these entities;
- b) publicly disclosing any information about the above-mentioned litigation and/or the Receiver’s conclusions or intentions, provided that the Receiver may disclose such information to Juan and Margarita Castillo (“Margarita”) and their counsel upon Juan and Margarita each executing a non-disclosure agreement in a form reasonably acceptable to the Receiver, and if the Receiver does disclose such information, conclusions or intentions, the Receiver shall disclose equally to Juan and Margarita;

- c) replacing counsel in the above mentioned litigations; and
- d) engaging in settlement negotiations or contacting opposing parties in the above-mentioned litigation.

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

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

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

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

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

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

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

NO PROCEEDINGS AGAINST THE RECEIVER

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

NO EXERCISE OF RIGHTS OR REMEDIES

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

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

NO INTERFERENCE WITH THE RECEIVER

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

CONTINUATION OF SERVICES

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

RECEIVER TO HOLD FUNDS

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

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

EMPLOYEES

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

PIPEDA

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

LIMITATION ON ENVIRONMENTAL LIABILITIES

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

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

LIMITATION ON THE RECEIVER'S LIABILITY

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

RECEIVER'S ACCOUNTS

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

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

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

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

FUNDING OF THE RECEIVERSHIP

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

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

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

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

TERMINATION OF RECEIVERSHIP

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

SERVICE AND NOTICE

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

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

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

GENERAL

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

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

30. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

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

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

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



A handwritten signature in black ink, appearing to be 'M. J. T.', written above a horizontal line.

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

JUL 05 2019

PER / PAR:



A handwritten signature in blue ink, appearing to be 'A', written next to the text 'PER / PAR:'.

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

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

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

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

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

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

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

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

DATED the ____ day of _____, 20__.

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

Per: _____

Name:

Title:

MARGARITA CASTILLO
Moving Party

-and-

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

ORDER

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Lawyers for the moving party, Margarita Castillo

TAB 2

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE

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FRIDAY, THE 28TH

JUSTICE MCEWEN

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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.

MCE T.

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

TAB 3

From: [Derek Knoke](#)
To: "cmacleod@cambridgellp.com"; "jkasoz@cambridgellp.com"
Cc: [Monique Jilesen](#); [Peter Griffin](#)
Bcc: "[KSVAD_52463 Xela Enterprises Ltd Emails](#)"
Subject: Further information [IWOV-LSRSGDOCS.FID635496]
Date: Friday, September 4, 2020 4:39:33 PM
Attachments: [image001.png](#)

Chris and Joan,

Juan Guillermo testified, in August 2018, that he bought an iPad in April 2017, (Examination in Aid of Execution, Aug. 2018, Q. 1089-1090, in the MR to Appoint Receiver). He says that the purchase "must have been a replacement for my iPad, the one I use for work. I don't have a laptop, I use an iPad. And it was accidentally damaged and I needed a replacement; I can't operate without communications device, right?" (Q. 1094). Since he has no other work and no other income, this is used for Xela business and will have Xela information on it.

Could you also please provide the email address and phone number for Juan Andres (Juan Guillermo's son and former Xela employee)?

Derek



[Derek Knoke](#)*

T 416-865-3018
F 416-865-2876
dknoke@litigate.com

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Suite 2600
Toronto, ON
Canada M5H 3P5
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TAB 4

From: [Derek Knoke](#)
To: ["Joan Kasozi"; "Chris Macleod"](#)
Cc: [Monique Jilesen; Peter Griffin](#)
Bcc: ["KSVAD - 52463 Xela Enterprises Ltd - Emails"](#)
Subject: RE: Further information [IWOV-LSRSGDOCS.FID635496]
Date: Thursday, September 10, 2020 11:01:28 AM
Attachments: [image004.png](#)
[image006.png](#)
[image007.png](#)
[image010.png](#)
[image011.png](#)

Hi Joan,

I'm following up on the outstanding requests. Could you please advise when you expect to send us the following:

- Xela's materials in your possession, being:
 - Any documentation and correspondence related to your representation of Xela, its subsidiaries, or affiliates, which includes:
 - Cambridge's representation of Xela in these proceedings;
 - Correspondence with Xela's subsidiaries, its affiliates (which includes its former subsidiaries), and any third parties; and
 - Any and all correspondence respecting the February 2020 transaction with LISA;
- An itemized list of the materials that you claim privilege; and
- A time when we can obtain (or meet and obtain a forensic copy of) Juan Guillermo's iPad and cellphone.

Thank you.

Derek

From: Derek Knoke
Sent: Friday, September 4, 2020 7:19 PM
To: 'Joan Kasozi' <jkasozi@cambridgellp.com>; Chris Macleod <cmacleod@cambridgellp.com>
Cc: Monique Jilesen <mjilesen@litigate.com>; Peter Griffin <pgriffin@litigate.com>
Subject: RE: Further information [IWOV-LSRSGDOCS.FID635496]

Hi Joan,

Further to my request for Juan's iPad and given that he has no other work besides Xela, we also request his cell phone, which will have Xela documents on it.

We are aware of, at least the following devices: Juan had two devices through Rogers and another device with Bell in Quebec in early 2016. By September 2017, Juan has one bill at Rogers (Rogers *487422354). Given the significant increase, there could be two devices at Rogers as at September 2017. These are set out in the UT Documents, March 20, 2018.

In any event, the iPad and the cell phone (whichever one he now uses) fall within the scope of the

order. We can make an arrangement to have a forensic examiner meet at Cambridge LLP's offices to take an image.

Derek

From: Joan Kasozi <jkasozi@cambridgellp.com>
Sent: Friday, September 4, 2020 4:50 PM
To: Derek Knoke <dknoke@litigate.com>; Chris Macleod <cmacleod@cambridgellp.com>
Cc: Monique Jilesen <mjilesen@litigate.com>; Peter Griffin <pgriffin@litigate.com>
Subject: RE: Further information [IWOV-LSRSGDOCS.FID635496]

Hi Derek,

Email received with thanks. We will consult with our client and get back to you as soon as possible.

Best regards,

Joan Kasozi
Litigation Associate

CAMBRIDGE LLP

333 Adelaide Street West, 4th Floor
Toronto, ON, M5V 1R5
Phone: (416) 477 7007 ext. 331
Direct: (416) 240 1765
Email: jkasozi@cambridgellp.com
Website: www.cambridgellp.com



From: Derek Knoke <dknoke@litigate.com>
Sent: September 4, 2020 4:40 PM
To: Chris Macleod <cmacleod@cambridgellp.com>; Joan Kasozi <jkasozi@cambridgellp.com>
Cc: Monique Jilesen <mjilesen@litigate.com>; Peter Griffin <pgriffin@litigate.com>
Subject: Further information [IWOV-LSRSGDOCS.FID635496]

Chris and Joan,

Juan Guillermo testified, in August 2018, that he bought an iPad in April 2017, (Examination in Aid of Execution, Aug. 2018, Q. 1089-1090, in the MR to Appoint Receiver). He says that the purchase “must have been a replacement for my iPad, the one I use for work. I don’t have a laptop, I use an iPad. And it was accidentally damaged and I needed a replacement; I can’t operate without communications device, right?” (Q. 1094). Since he has no other work and no other income, this is used for Xela business and will have Xela information on it.

Could you also please provide the email address and phone number for Juan Andres (Juan Guillermo's son and former Xela employee)?

Derek



[Derek Knoke*](#)

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TAB 5

From: [Joan Kasozi](#)
To: [Derek Knoke](#); [Chris Macleod](#)
Cc: [Peter Griffin](#); [Monique Jilesen](#)
Subject: RE: Cellphone and iPad [IWOV-LSRSGDOCS.FID635496]
Date: Tuesday, September 15, 2020 11:39:57 AM
Attachments: [image002.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[image007.png](#)

Hi Derek,

The brief we provided you contained documents in Cambridge LLP's possession. We are still awaiting information from our client with respect to your other requests. You never explicitly requested the iPad and cell phone before last Friday. This iPad was referenced in an examination that took place in 2018. In addition, you are making a request for his personal phone that contains personal information. We are obtaining instructions, and should be able to provide details of our position. It is not unreasonable for us to request additional time to obtain instruction and determine whether the iPad contained personal information. I will get back to you once I have instructions, which I expect to receive shortly.

Best,

Joan Kasozi
Litigation Associate

CAMBRIDGE LLP

333 Adelaide Street West, 4th Floor
Toronto, ON, M5V 1R5
Phone: (416) 477 7007 ext. 331
Direct: (416) 240 1765
Email: jkasozi@cambridgellp.com
Website: www.cambridgellp.com



From: Derek Knoke <dknoke@litigate.com>
Sent: September 14, 2020 7:03 PM
To: Joan Kasozi <jkasozi@cambridgellp.com>; Chris Macleod <cmacleod@cambridgellp.com>
Cc: Peter Griffin <pgriffin@litigate.com>; Monique Jilesen <mjilesen@litigate.com>
Subject: Cellphone and iPad [IWOV-LSRSGDOCS.FID635496]

Hi Joan,

We've reviewed your brief, and there was no mention in it or your correspondence about imaging (or obtaining) the cell phone and iPad that Juan Guillermo uses for Xela's business.

Could you please respond before tomorrow at noon and provide us with a time frame for us to obtain it (or image it)? Failing which, we will request a 9:30 appointment with Justice McEwen to be held early next week.

Thank you.

Derek



Derek Knoke*

T 416-865-3018

F 416-865-2876

dknoke@litigate.com

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Canada M5H 3P5

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TAB 6

SENT VIA EMAIL TO DKNOKE@LITIGATE.COM, MJILESEN@LITIGATE.COM AND PGRIFFIN@LITIGATE.COM

September 29, 2020

Chris MacLeod
cmacleod@cambridgellp.com

Derek Knoke
Monique Jilesen
Peter Griffin
Lenczner Slaght
2600-130 Adelaide Street West
Toronto, ON M5H 3P5

Dear Counsel:

Re: Margarita Castillo v Xela Enterprises Ltd. et al.
Court File No.: CV-11-9062-00CL

I write further to the Order of Justice McEwen and the Receiver's letter addressed to Cambridge LLP dated September 26, 2020.

The following are the answers to the Receiver's requests for information:

1. The email address for Juan Andres is: andres@bdtinvestments.com;
2. With respect to the Receiver's request for access to the Xela server, we understand that ATS informed the Receiver on September 25, 2020 that the Xela server could not be accessed without exposing all information maintained by ATS, including ATS's own documents and those of its clients. However, as its letter indicates, ATS is willing to work with the Receiver's IT expert to access Cogent together, and segregate and extract all Xela data from the server in a way that does not expose data to which the Receiver is not entitled.
3. Juan Gutierrez no longer has direct access to his Xela.com email address. Xela.com has a registered and active domain name. Juan is uncertain of who hosts xela.com, however, if the Receiver has information in that regard, Mr. Gutierrez is willing to provide the Receiver with the authority to speak to the company and/or individual who hosts the xela.com website;
4. The damaged ipad referenced in Mr. Gutierrez' 2018 examination will be provided to the Receiver. Mr. Gutierrez' current ipad was not purchased by Xela and has never been used to conduct business related to Xela;
5. Juan Gutierrez does not have a phone number or email address for Cogent Communications Toronto located at 245 Consumers Rd, Suite 300, North York, ON M2J 1R3

6. Juan Gutierrez's current cellular phone was purchased by Mr. Gutierrez and is used for personal purposes. The Receiver is not entitled to access this cellular phone.

With respect to the Receiver's letter dated September 26, 2020 addressed to Cambridge LLP, regarding the shareholders meeting, please be advised that Juan Gutierrez immediately forwarded the Receiver's letter to Harald Johannessen. I attach a copy of Mr. Gutierrez' email to Mr. Johannessen.

Mr. Gutierrez received a response from Mr. Johannessen on September 27, 2020. I have also attached Mr. Johannessen's response. Since Mr. Johannessen's response was in Spanish, Mr. Gutierrez prepared a rough English translation of Mr. Johannessen's response, which I have also attached to this letter. In summary, Mr. Johannessen's response indicates that issues related to attendance at shareholders meeting are to be resolved under Panamanian Law.

If you have any further questions, please do not hesitate to contact me.

Yours very truly,

CAMBRIDGE LLP

Per:



CHRIS MACLEOD

CRM/jk

Signed electronically on behalf of Chris MacLeod

Enclosure: Email from Juan Gutierrez to Harald Johannessen dated September 26, 2020 with
 attachment Email from Harald Johannessen to Juan Gutierrez dated September 27, 2020
 English Translation of Harald Johannessen email response.

TAB 7

April 2, 2020

BY COURIER

Arturo's Technical Services Ltd.
90 Stadium Road
Toronto, ON M5V 3W5

Dear Sirs,

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

We are lawyers for KSV Kofman Inc. (“**KSV**”), in its capacity as the court-appointed receiver and manager (in such capacity, the “**Receiver**”) of Xela Enterprises Ltd. (“**Xela**”). KSV was appointed Receiver pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the “**Ontario Court**”) made on July 5, 2019 (the “**Appointment Order**”). A copy of the Appointment Order is enclosed with this letter. All court materials filed in the receivership proceedings can be found on the Receiver’s website: <https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd>.

The Receiver has learned that you provide information technology and other services to Xela and have related property of Xela in your possession. Pursuant to paragraph 3 of the Appointment Order, the Receiver is authorized and empowered to take possession and control of any and all assets or property of Xela. Pursuant paragraphs 5 and 6 of the Appointment Order, you are required to immediately advise the Receiver of any Xela property, assets or records in your possession or control and to deliver the same to the Receiver upon the Receiver’s request. Paragraph 7 of the Appointment Order specifically requires you, as a service provider, to grant the Receiver immediate and unfettered access to any Xela records stored in or otherwise contained on a computer or other electronic information storage system in your possession and control.

On behalf of the Receiver, we hereby request that Arturo’s Technical Services Ltd. immediately:

- (a) advise the Receiver of any assets or property of Xela in its possession or control, including any books or records, whether in electronic form or otherwise;
- (b) deliver all such property of Xela to the Receiver; and

- (c) allow the Receiver continued and unfettered access to such assets, property and records including, without limitation, for the purpose of copying electronic records of Xela.

Without limiting the forgoing, please advise the Receiver of the existence of any computer hard drives, servers or other storage devices or equipment in your possession containing books and records of Xela.

The Receiver's representative, Noah Goldstein, will communicate directly with you in order to make arrangements.

We look forward to your cooperation and appreciate your immediate attention to this matter. Should you have any questions, please contact the undersigned or Mr. Goldstein at telephone number (416) 844-4842 or email ngoldstein@ksvadvisory.com.

Yours truly,

AIRD & BERLIS LLP

Kyle Plunkett

Kyle B. Plunkett

*cc by Email: Bobby Kofman and Noah Goldstein, KSV Kofman Inc.
Steven Graff and Sam Babe, Aird & Berlis LLP*

encl.

39450548.2

TAB 8

April 15, 2020

Mr. Kyle B. Plunkett
Aird & Berlis LLP
Toronto, Ontario
Canada

By Email: kplunkett@airdberlis.com

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

Dear Mr. Plunkett:

ATS acknowledges receipt of your letter dated April 2, 2020, wherein you ask our company to identify and deliver to the Receiver any assets or property of Xela Enterprises Ltd. ("Xela") in our possession or control, including books or records in paper or digital formats. We are pleased to cooperate, and we have the following responsive comments.

ATS has possession of approximately 8 wall-sized file cabinets of hard-copy documents belonging to Xela. Those are located at ATS's offices in Toronto, and can be made available to the Receiver at an agreed time.

Separately, ATS controls four decommissioned servers belonging to Xela, which are in possession of a third-party vendor located at the Cogent datacenter in North York, Ontario. Those servers have been offline and unused for at least two years, during which time no software upgrades or other forms of maintenance have been performed. As a result, there is some cost associated with properly starting and accessing the servers. We can provide a quote to bring the servers back online.

Aside from those items, we do not believe we control or possess any assets or property of Xela.

We will be in touch as soon as we have more information.

Sincerely,



Thomas Gutierrez

TAB 9

September 21, 2020

Monique Jilesen
Direct line: 416-865-2926
Direct fax: 416-865-2851
Email: mjilesen@litigate.com

Via Email

Juan Andres Gutierrez and Thomas Gutierrez
Arturo's Technical Services
3-100 Leek Crescent
Richmond Hill, ON L4B 3E6
Email: TGutierrez@arturos.com
Email: Andres@greenpack.bio

Dear Sirs:

**RE: Receivership of Xela Enterprises Ltd. – Servers
Court File No. CV-11-9177-00CL**

Please find enclosed the order of McEwen J., dated July 5, 2019 (the “July 5, 2019 Order”) and the order of McEwen J dated August 28, 2020 (the “August 28, 2020 Order”) both of which are served upon you pursuant to the July 5, 2019 Order and the Commercial List e-service protocol.

Further to the July 5, 2019 Order, KSV Kofman Inc. (the “Receiver”) is entitled to the Records and Property of Xela Enterprises Ltd. (“Xela”). All persons or entities “having notice” of this order shall grant the Receiver “immediate and continued access to the Property” and “provide to the Receiver or permit the Receiver to make, retain and take away copies” of Xela’s Records (para. 5-7). The July 5, 2019 Order requires all persons with notice of this order to give the Receiver “unfettered access” to Xela’s Property and Records – wherever or however they are stored.

On April 15, 2020, Thomas Gutierrez, on behalf of Arturo’s Technical Services (“ATS”), wrote to the Receiver to advise that it was in possession of four servers “belonging to Xela, which are in the possession of ... the Cogent datacenter in North York, Ontario.”

Pursuant to paras. 2-3 of the August 28, 2020 Order (which was sent to ATS on the same date), the Receiver is authorized to attend at any Premises where Xela’s documents or devices were previously or currently stored to preserve, reproduce, and take custody of Xela’s documents and devices. Pursuant to para. 5, all persons are required to provide the Receiver with access to Xela’s documents and devices. Xela’s documents and devices include its servers as well as Xela’s property and records on any other person’s servers.

On September 18, 2020, Cogent Co. advised that Xela ceased to be a customer since June 2017. It confirmed that ATS has a secured cabinet where more than four servers are stored. Cogent Co. indicated that it would require ATS’s consent to access the secured cabinet.

In accordance with the August 28, 2020 Order please immediately:

- i. identify to Cogent Co. and the Receiver all servers, hard drives or other devices at the Cogent Co. location which has Xela data (the “Devices”);
- ii. provide ATS’ consent in writing to Cogent Co. to permit the Receiver to attend to remove the Devices;
- iii. provide all passwords or other information necessary in order to retrieve data from the Devices; and
- iv. advise the Receiver of any and all other locations of Xela data or documents known to you or ATS.

As you know, there is a case conference scheduled with McEwen J. on September 30, 2020 at 11:00 am.

May we please hear from you by September 25, 2020, failing which, we will raise the issue of access to Xela’s servers at the case conference on September 30, 2020.

Yours truly,



Monique Jilesen

Enclosures

- c. Bobby Kofman
Noah Goldstein
Peter H. Griffin
Derek Knoke

TAB 10

September 25, 2020

Ms. Monique Jilesen
Lenczner Slaght
130 Adelaide St W
Suite 2600
Toronto, ON
Canada M5H 3P5

By Email

Re: Receivership of Xela Enterprises Ltd.;
ATS Custody of Xela Documents

Dear Ms. Jilesen:

We acknowledge your letter dated September 21, 2020, regarding access by your client (the "Receiver") to Xela digital documents maintained on ATS servers. ATS intends to cooperate with the Receiver and provide full access to Xela's documents, without reservation or exception. There are, however, some technical issues that require proper treatment in order to protect the rights of ATS and its clients.

As a matter of background, in January 2017, ATS purchased certain fixed assets from Xela, including various servers and software packages, for use by ATS in its business. The Xela documents you are seeking are maintained on the servers acquired from Xela that, although presently decommissioned, is integrated with the ATS network at large. Consequently, if the server containing Xela's documents is activated and accessed, all of ATS's own documents and those of its clients would be as readily available to the Receiver as Xela's documents. In accordance with Paragraph 17 of the August 28 order you provided, ATS asserts the right to confidentiality and privilege over its documents and those of its clients.

Notwithstanding these objections, ATS is able to satisfy the Receiver's request by activating the server in question and segregating all Xela documents for download and delivery to the Receiver. We understand that the Receiver may have engaged an independent forensic computer expert, and ATS would be willing to consult with that person to develop a protocol

that would ensure that a complete and unaltered set of Xela documents is provided to the Receiver, while preserving and protecting the legitimate rights of ATS and its clients. We trust that this approach is acceptable to the Receiver.

As you know, ATS does not have legal counsel in these proceedings. Therefore, if the Receiver is not satisfied with this proposal and considers it necessary to raise the matter further with the court, we request that you notify us in advance and provide a copy of this letter to Judge McEwen.

Sincerely,



Andres Gutierrez

cc:

Thomas Gutierrez

Juan Guillermo Gutierrez

Brian Greenspan

Chris Macleod

TAB 11

September 29, 2020

Monique Jilesen
Direct line: 416-865-2926
Direct fax: 416-865-2851
Email: mjilesen@litigate.com

Via Email

Juan Andres Gutierrez and
Thomas Gutierrez
Arturo's Technical Services
3-100 Leek Crescent
Richmond Hill, ON L4B 3E6
Email: andres@bdtinvestments.com
TGutierrez@arturos.com

Dear Sirs:

RE: Servers
Our File No.: 52463
Court File No.: CV-11-9062-00CL

I write with respect to your September 25, 2020 letter.

The Receiver is prepared to work with Arturo's Technical Services its officers, directors, servants, agents, employees, and anyone else acting on its behalf ("ATS") to access Xela's property, records, and documents on the servers at Cogent Co. For that reason, the Receiver will not raise the issue with McEwen J. at the case conference scheduled for 11:00 am tomorrow, subject to your confirmation in advance of the terms set out below:

1. Pursuant to paragraph 9 of the order of McEwen J., dated August 28, 2020 ("**Order**"), ATS and anyone with notice of this Order may not remove, alter, conceal, touch, activate, or operate the servers. As such, it is a breach of the Order to take steps to segregate any data on the servers;
2. Pursuant to paragraphs 3, 6, and 7 of the Order, the Receiver (which is already an independent, court-appointed officer) is entitled to select a forensic specialist and, together with any other Authorized Persons, conduct its own search for Xela's property, records, and documents; and
3. Pursuant to paragraphs 16-17, the Receiver and any Authorized Persons are permitted to determine what third-party documents may be subject to privilege, and the Receiver and any Authorized Persons have the obligation to segregate such documents. While ATS may assert privilege, it is not entitled to do so prior to the Receiver forensically imaging the servers.

Please confirm, prior to 10:00 am on September 30, 2020, that: (i) ATS and Company Agents (as defined in the Order) have not and will not take any steps to segregate any Xela's property, records, or documents; (ii) ATS and Company Agents will permit the Receiver and its Authorized Persons access to Cogent Co. to forensically image the servers

upon which are located Xela's property, records, and documents; and (iii) ATS will assert privilege over any documents after the servers have been forensically imaged and not before.

If ATS does not provide confirmation of all the above, the Receiver will raise the issue of the servers with McEwen J. tomorrow at the case conference.

Yours truly,

A handwritten signature in black ink, appearing to read 'Monique Jilesen', with a long, sweeping underline.

Monique Jilesen

MJ/

- c. Bobby Kofman
- Noah Goldstein
- Peter H. Griffin
- Derek Knoke
- Chris MacLeod and Joan Kasozi

TAB 12

September 29, 2020

Ms. Monique Jilesen
Lenczner Slaght
130 Adelaide St W
Suite 2600
Toronto, ON
Canada M5H 3P5

By Email

Re: Receivership of Xela Enterprises Ltd.;
ATS Custody of Xela Documents

Dear Ms. Jilesen:

We acknowledge receipt of your letter, which was sent after 4pm today and demands a response by 10am tomorrow. We object to that timing. You have had our correspondence outlining our concerns over ATS's privacy and that of its clients since last Friday, yet your letter gives us less than 24 hrs to consider your demands. Still, while we reserve our rights, we will do our best to respond on short notice.

First, we acknowledge Judge McEwen's August 28 Order (the "Order"), and are happy to confirm that we will comply with it in every respect. Specifically, we have no intention of accessing the Xela server unilaterally or otherwise in any way that would violate the Order.

The procedure you suggest in your second and third points is more problematic, however, in that it does nothing to protect the rights of ATS and its clients to maintain the confidentiality of their private records. As we indicated, it is impossible to access the Xela server without simultaneously exposing all documents maintained by ATS for itself and its clients, none of which are owned by Xela. Although there are undoubtedly privileged documents amongst those belonging to ATS and/or its clients, the issue is broader than mere privilege. Indeed, nothing in the Order entitles the Receiver to duplicate or view any non-Xela documents.

For this reason -- and particularly taking into consideration that other, less-intrusive methods to accomplish the Receiver's goal are available -- we object to the procedure you propose. As indicated, we are willing to allow the Receiver's expert to work directly with ATS to extract and duplicate all Xela documents, but we cannot allow the Receiver to duplicate and take possession of documents belonging to ATS and its clients.

We appreciate that you may decide to take this issue to Judge McEwen, although we believe that the experts could resolve it without the Court's involvement, given our willingness to cooperate. As you know, ATS does not have counsel to argue these issues in court, but we are confident that the judge will take appropriate steps to prevent the Receiver from

overstepping, and for this reason we request that you provide a copy of this letter, along with our letter of last Friday, to the Court should you decide to raise the issue tomorrow morning.

We remain willing to discuss a protocol that gives the Receiver a full, unadulterated set of all Xela documents on the server while simultaneously protecting the confidentiality of the business records of ATS and its clients. We hope you will consider this more balanced approach.

Sincerely,

Andres Gutierrez

cc: 
Thomas Gutierrez
Juan Guillermo Gutierrez
Brian Greenspan
Chris Macleod

TAB 13

1 we've had in reality.

2 949. Q. So you weren't travelling for personal
3 reasons at all?

4 A. I don't remember. I may have one or
5 two trips on that, but I didn't take vacations or
6 anything. I wouldn't go to Disneyworld or the World
7 Cup Soccer, or any of that stuff. I did attend by
8 invitation to Super Bowl because I was invited by
9 PepsiCo to go, and I attended to that. But other than
10 that, I don't remember taking any vacations at all.
11 The travelling was all related to business. Even that
12 thing, because I was -- to build relationships.

13 950. Q. Have you been using your credit card
14 since, let's say, starting in January 2017?

15 A. That's the only -- without a credit
16 card you can't buy anything, basically. I don't have
17 a bank account or anything, so yes, I buy my food with
18 a credit card; my wife pays the credit card.

19 951. Q. And we talked about this earlier and
20 you were very firm that your only source of money was
21 the TD bank account.

22 A. That's not a source of money; the bank
23 doesn't give me money. The source of money is where
24 you get money from, and my only source of money was
25 Xela, until stopped paying me. I don't have another

JUAN GUILLERMO GUTIERREZ - 233

1 one. And the bank account is where you move your
2 money through. And I only have one bank account; I
3 already answered that.

4 952. Q. And so, you've made a distinction here
5 between Xela money and your personal bank account.
6 When you had credit card bills would you always pay
7 for them out of your TD joint account, or would you
8 ever pay for them out of Xela money, if they were
9 really business expenses?

10 A. I never, I never, and listen to this
11 very carefully. I never used Xela credit card for
12 personal purpose. I never used Xela money to pay my
13 personal credit card. Opposite to my brother-in-law
14 who charged more than \$100,000 for personal expenses
15 on the corporate Amex, which is what triggered all
16 these discussions.

17 When my father found out about that, he
18 fired him, which is what he would do to any employee
19 that would spend money for personal purposes without
20 any authorization on the corporate card. I never did
21 that. I never paid any of my credit card or personal
22 expenses with Xela money.

23 953. Q. So there's two different things that
24 I'll ask about. First I'll talk about the Xela -- you
25 have a Xela corporate card -- you had a Xela corporate

JUAN GUILLERMO GUTIERREZ - 283

1 there before -- took my wife with me, and the person
2 that we were meeting with there invited us to go and
3 visit the Latheau, which is Tibet, which for Chinese
4 people is a very important place.

5 So, I never had plans to go there, he wanted
6 to go there so off we went. So is spending \$315 is a
7 sin? Is there something wrong in April 2016?

8 1067. Q. Well, I'm allowed to ask about your
9 spending, so that's what I'm doing. So, you're saying
10 it was a business trip to China?

11 A. I did a business trip to China at the
12 time.

13 1068. Q. What was the business opportunity in
14 China?

15 A. I was thinking of getting into the
16 plastic business, so we went to talk to people there.
17 Actually what I did is I attended a conference there,
18 a trade fair.

19 1069. Q. That ties into another question I was
20 going to ask you. Given what you described as the
21 state of Xela, have you looked at any other employment
22 or income opportunities?

23 A. I never searched for any other
24 opportunity. I worked in Xela since we founded my dad
25 and I in 1984, in June. The company started; I

1 started working there from the beginning and I worked
2 all the way there. And that was my only commitment.
3 All I did was work for that company.

4 1070. Q. So, looking forward what would you
5 anticipate as potential sources of income?

6 A. Going forward?

7 1071. Q. Yes?

8 A. I don't know. I don't know. I just
9 expect to be able to resolve our problems down south.
10 At this particular time I'm 62 years' old, so I don't
11 know what I'm going to do at this point. Right now I
12 can't get -- you have to understand the damage you
13 guys did to me with those allegations that my sister
14 has done publicly is unbelievable.

15 My reputation is completely ruined. So,
16 what do you expect me to do; flip burgers at
17 McDonald's or something like that? I may have to do
18 that at one point, but I'm not there yet.

19 1072. Q. And that's what I'm just trying to get
20 to the bottom of that. You mentioned the downside of
21 you're talking about the litigation with the cousins?

22 A. Yeah.

23 1073. Q. I think you described what that was in
24 the last examination, so I think we both know what I'm
25 referring to by that, but relating to shares of

JUAN GUILLERMO GUTIERREZ - 295

1 clothing -- that's what I meant. So you can try to
2 twist it and spin it anyway you want; we're not people
3 that throw money around like crazy and spend money
4 that's not ours. And by the way, I worked really hard
5 all my life. I worked -- never had less than 10, 12
6 hours a day work, maybe 14 hours a day. On Saturdays
7 and Sundays I have the phone on and the computer on; I
8 was connected to our business all the time.

9 I was the only one in the family doing that
10 and I'm the one that's getting nothing now. I've lost
11 everything I had, and that's a fact that you need to
12 know. You're trying to find out what else can you
13 take away from me to give my sister for this judgment.
14 Well, I told you already you can take my eyes, my
15 ears, my lungs, any of my organs if they can be sold
16 for somebody who needs a transplant, because that's
17 the only thing I have left personally.

18 Everything else is either you took it or I
19 never had it. Okay, so what else you want me to tell
20 you?

21 1094. Q. Just answer my questions and we'll be
22 fine. Do you recall what you bought at the Apple
23 Store?

24 A. I just told you, because of the pricing
25 must have been a replacement for my iPad, the one I

1 use for work. I don't have a laptop, I use an iPad.
2 And it was accidentally damaged and I needed a
3 replacement; I can't operate without communications
4 device, right?

5 1095. Q. If you flip over the page, page 7 of 8
6 for the year end summary of 2017?

7 A. Which one? What are you talking about?

8 1096. Q. The one that you were just looking at,
9 you're on page 6 of 8?

10 A. This?

11 1097. Q. Flip it over, please? And I'm going to
12 ask about in the middle of the page, on October 13,
13 2017 there's a series of charges relating to Porsches
14 and Minis and Audis that total \$3,361. Can you
15 describe to me what those were for?

16 A. Because of the date, the first one must
17 have been probably the purchasing of winter tires, I
18 presume, because cars need those. The Mini is my
19 son's car and he might probably need money to pay for
20 service or something, I don't know what exactly that
21 was.

22 1098. Q. So you would've still been paying money
23 at least sometimes to help your kids as late as
24 November 2017?

25 A. No, I don't know exactly what these

TAB 14

1 A. I suppose so. We're dating back now a
2 long ways, but we reviewed financial things at the
3 meetings and we're always on the dockets.

4 370. Q. And was Xela at least at the time
5 exercising some oversight over the subsidiary
6 companies?

7 A. Yes.

8 371. Q. And so, is it your understanding that
9 that oversight has stopped?

10 A. Yes -- well, I assume so. Juan is
11 still involved; Juan Gutierrez is still involved with
12 them. So, what is taking place I can't answer that.
13 But Xela basically is defunct. The companies I think
14 are mostly running pretty much on their own.

15 372. Q. And so, if anyone knew whether Xela was
16 exercising any oversight over the subsidiaries it
17 would be Juan Gutierrez?

18 A. Yes, I think so yeah.

19 373. Q. Can I ask you to follow up and ask Juan
20 whether he's exercising, as president of Xela, whether
21 he's exercising any oversight over any of the direct
22 or indirect subsidiaries?

23 MR. RODRIGUEZ: Why can't you ask him
24 yourself, since he's in Toronto?

25 MR. BORTOLIN: I would like to. I examined

CALVIN SHIELDS - 88

1 him in a personal capacity and he steadfastly refused
2 to talk about Xela. And I invited him to be examined
3 on Xela's behalf today rather than Mr. Shields, and
4 that proposal was declined.

5 THE DEPONENT: Well if he won't respond, why
6 should I, or why should I even ask him?

7 MR. BORTOLIN: You're here testifying as a
8 representative of Xela; the representative that Xela
9 wanted me to examine. And so, to the extent you're a
10 director of the company you can obtain information in
11 that capacity from other people on behalf of the
12 company. I will make those requests for you to do
13 that. In my view those are proper requests, but you
14 can refuse them.

15 THE DEPONENT: Look, I'm 87 years' old. I'm
16 retired basically. Why should I get back involved?
17 You're asking me to do that. I see no benefit to me.

18 BY MR. BORTOLIN:

19 374. Q. And we covered at the beginning that
20 you understood you were testifying on behalf of Xela
21 and that you are still a Xela director.

22 A. But I don't have to ask questions that
23 you can ask. You pursue it. I see no reason why I
24 should be getting involved at this stage. The company
25 is basically defunct. There's nothing for me to be

CALVIN SHIELDS - 90

1 you instead by Xela's counsel.

2 And so, on that basis I can't ask anyone
3 else these questions. If when I asked them of Juan he
4 refused to answer them, even when I touched generally
5 on Xela. So you're the only person I can ask these
6 questions of.

7 And if you'll refuse the question that's
8 your prerogative. In my view they're proper questions
9 and I'll at least put them on the record.

10 MR. RODRIGUEZ: But for the record and I
11 don't mean to be argumentative, but you know Mr.
12 Shields lives in Florida. Juan Guillermo Gutierrez
13 lives in Toronto. Xela is a Toronto company, and this
14 is a Toronto case. The Toronto Court should have
15 jurisdiction over Juan Guillermo.

16 If he is not answering your questions, I
17 assume that you have the ability to compel him to
18 answer questions and obtain a contempt. Why you would
19 expect that a Florida resident living in the United
20 States has to somehow, I don't know, undertake to ask
21 questions of a witness who's in your jurisdiction,
22 just doesn't make any sense to me.

23 MR. BORTOLIN: Well, and this is getting
24 into argument but I don't know that it's useful for
25 our purposes. But, if it helps eliminate roadblocks

1 390. Q. The document also listed you as the
2 president of Lisa, S.A. Is that correct?

3 A. Yes.

4 391. Q. And is Lisa, S.A. a company that has
5 met within the past two years?

6 A. Well, not really, not that was done
7 lately.

8 THE DEPONENT: Are you aware of anything?

9 MR. RODRIGUEZ: No.

10 THE DEPONENT: I don't think so.

11 BY MR. BORTOLIN:

12 392. Q. And that document also listed David
13 Harry as another director and officer. Are you
14 familiar with him?

15 A. Yes.

16 393. Q. And are you -- if Lisa were to hold a
17 meeting would you coordinate that with him and what
18 would you do to have a meeting?

19 A. Well, I'm not here for Lisa; are we?

20 394. Q. What we're here for is Xela, and I
21 don't know if you're familiar with the background on
22 this.

23 A. Xela -- I mean, Lisa under Gavinvest?

24 395. Q. Yes.

25 THE DEPONENT: Are we supposed to be

1 answering questions on Lisa?

2 MR. RODRIGUEZ: No.

3 THE DEPONENT: I mean, it seems to me we're
4 getting off subject.

5 BY MR. BORTOLIN:

6 396. Q. No, this is very much on the subject.
7 And you may not be familiar with this background, but
8 there were questions, several questions directed to
9 you on the last exam that concerned subsidiaries and
10 indirect subsidiaries of Xela.

11 And I believe Mr. Rodriguez may have taken
12 those under advisement. Xela's law firm here in
13 Toronto then refused to answer a lot of those
14 questions. Those questions then went before a motion
15 with respect to whether those refusals were proper,
16 and a Master directed that questions concerning the
17 indirect subsidiaries were proper and were required to
18 be answered.

19 And if that's something you're not familiar
20 with, we can go off the record for a few minutes and I
21 can send the Master's reasons to Mr. Rodriguez, if it
22 helps inform whether those are proper questions?

23 MR. RODRIGUEZ: Go ahead and send me that.
24 I'm not sure that -- I don't want to stop the
25 examination, so just send me the email while you

1 continue your questioning and I'll look at that.

2 MR. BORTOLIN: I just sent that over. I
3 will think about whether I can move on to something
4 else, although many of my questions that I have left
5 will be concerned with indirect subsidiaries.

6 MR. RODRIGUEZ: I think the question that
7 you posed to him was whether or not he was aware of
8 the officers of Lisa?

9 MR. BORTOLIN: Yes.

10 MR. RODRIGUEZ: You also asked him whether
11 or not there had been any meetings of the Board of
12 Directors of Lisa?

13 MR. BORTOLIN: Yes.

14 MR. RODRIGUEZ: Okay.

15 MR. BORTOLIN: And are those questions
16 you're refusing to answer?

17 MR. RODRIGUEZ: You can answer those
18 questions -- I think he did answer those questions
19 that there have been no meetings of Lisa, but he can
20 confirm or not.

21 THE DEPONENT: Well, there have been no
22 meetings.

23 BY MR. BORTOLIN:

24 397. Q. Okay. And I believe you discussed this
25 at the last examination, but it's correct that Lisa

1 holds a share certificate or share certificates in
2 Avicola?

3 MR. RODRIGUEZ: Well, I'm going to object to
4 the form of the question, because there is no company
5 called Avicola. There's a group of companies in
6 Guatemala that is called The Avicola Group and that's
7 comprised of last we heard somewhere around 22
8 companies.

9 --- REFUSAL

10 BY MR. BORTOLIN:

11 398. Q. And what is the name of the entity in
12 which Lisa has a share certificate?

13 MR. RODRIGUEZ: Anyway, I'm going to object
14 to the form of the question. I just told you that
15 it's not one company, it's 22 different companies.

16 --- REFUSAL

17 MR. BORTOLIN: And I understand what you're
18 saying and I appreciate the clarification. Let me ask
19 the question more generally then.

20 BY MR. BORTOLIN:

21 399. Q. Am I correct in my understanding that
22 Lisa holds a share certificate in at least one of
23 those 22 companies?

24 A. Yes.

25 400. Q. You said yes, sorry?

CALVIN SHIELDS - 100

1 A. Yes.

2 401. Q. Can you tell me which one or ones of
3 the Avicola entities that is?

4 A. No. I have no idea.

5 402. Q. And are there paper copies of the share
6 certificates?

7 A. I don't know. I suppose, though I
8 don't know.

9 403. Q. And if you as a president and director
10 of Lisa don't know the answer to that question; who
11 would?

12 A. Probably Mark, either Mark or Juan --
13 probably Juan.

14 404. Q. And so, do I understand from that
15 answer that even though, and by Mark you mean Mark
16 Korol?

17 A. Yes.

18 405. Q. And by Juan you mean Juan Gutierrez?

19 A. Yes.

20 406. Q. And so, if I understand what you're
21 saying is that even though they're not officers or
22 directors of Lisa, they have some understanding of
23 what's going on inside that company?

24 A. Yes.

25 MR. BORTOLIN: And could I ask you to

CALVIN SHIELDS - 114

1 But more than that, that's about the extent
2 of what I know.

3 450. Q. And do you have any current information
4 on the status of that litigation, and whether it has
5 any prospect of being resolved?

6 A. Actually no. It's been on the verge of
7 being resolved for many years, but it never has been.

8 451. Q. And would the person who does have
9 knowledge of the status of that litigation again be
10 Juan Gutierrez?

11 A. Yes.

12 MR. BORTOLIN: Okay, subject to the refusals
13 and undertakings, although I don't think you gave me
14 any, but subject to refusals and undertakings those
15 are my questions. Thank you for your time.

16 THE DEPONENT: Thank you.

17 MR. RODRIGUEZ: Have a good day.

18 MR. BORTOLIN: You too.

19

20 --- WHEREUPON THE EXAMINATION WAS ADJOURNED AT 12:19 P.M.

21

22

23

24

25

TAB 15

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

I, Juan Guillermo Gutierrez, of the City of Toronto, in the Province of Ontario,
MAKE OATH AND SAY:

1. I Juan Guillermo Gutierrez am the President of Xela Enterprises Ltd. (“**Xela**”) and as such, have knowledge of the matters contained in this affidavit. Where the statements made herein are based on information and/or belief, I state the source of the information and/or belief, and verily believe it to be true.

I. BACKGROUND

2. The Motion that has been brought by the Receiver, which is returnable August 28, 2020 is a surprise to Xela. When the parties were last before the Court, the Receiver had asked that sanctions be ordered against me, Xela’s sole shareholder, asserting, among other things, non-cooperation with the Receiver’s

attempt to take control of the board of directors of LISA, S.A. (“**LISA**”), an indirect subsidiary of Xela in Panama, as described in the Receiver’s Second Report and related supplements (collectively the “**Second Report**”).

3. The Second Report, however, was incomplete and/or inaccurate in various material respects and was based almost entirely on hearsay. In response, I submitted a sworn affidavit to correct the record, and my counsel insisted upon cross-examining the Receiver before the Court rendered any decision.
4. Rather than continuing on that course, however, the Receiver agreed to adjourn the Motion for Sanctions *sine die*, and the parties expressed a desire to cooperate going forward on all issues, including those of concern to Xela’s management and ownership. To address the Receiver’s stated concerns, the Court issued its Endorsement dated March 24, 2020 (the “March 24 Endorsement”), requiring me to provide any documents I had not previously supplied to the Receiver: (a) regarding LISA’s efforts in December 2019 to borrow sums sufficient to terminate the receivership; (b) that were described in the Court’s October 29, 2019 Disclosure Order, including documents relating to BDT’s loan advances to LISA and/or Xela; and (c) regarding the transfer in February 2020 of LISA’s interest in the Avicola Group to BDT in satisfaction of the more than US\$50 million in litigation funding given to LISA by BDT since 2005 (the “BDT Assignment”). The March 24, 2020 Endorsement also included an Annex A containing a list of specific questions for me to answer concerning my knowledge of the BDT Assignment.
5. I responded in a timely and truthful manner to the questions in Annex A, although I had scant information myself, and I had no additional documents responsive to

the March 24 Endorsement.¹ However, it is in my own interest to work with the Receiver with the ultimate goal of discharging the receivership, and my expressed desire to cooperate was genuine. Accordingly, I requested assistance from LISA in correspondence dated April 15, 2020, as follows:

Nevertheless, As the owner of Xela, which indirectly owns LISA, I urge LISA and its management to cooperate with the Receiver in every respect and to the fullest extent possible. This instruction applies, without limitation, to the Receiver's request that LISA add certain additional Directors, that LISA supply answers to certain written questions referenced in the Toronto Court's Endorsement dated 24 March 2020, and that LISA supply any documents and information in its possession or control requested by the Receiver.

Attached hereto and marked as **Exhibit "A"** is a true copy of my letter dated April 15, 2020.

6. I sent a second, similar letter to LISA on April 22, 2020, urging its cooperation:

I refer to my letter dated April 15th, 2020. Having not received a response, and anticipating the possibility that you may not have received a copy of the Court's endorsement dated March 24, 2020, I am attaching a copy. As you can see, Paragraph 3 of the Court's Endorsement asks LISA to respond to certain questions, and I would urge compliance.

7. Attached hereto and marked as **Exhibit "B"** is a true copy of my letter dated April 22, 2020.

¹ At my request, LISA and BDT are prepared – subject to an agreement to preserve the confidentiality of their respective private financial information – to give the Receiver a copy of a set of documents evidencing more than US\$50 million in advances made by BDT to LISA dating to 2005. Those documents were produced in the Miami garnishment case in response to Villamorey's false allegation that BDT's Panama judgment was unsupported by actual funding from BDT.

8. Despite Xela's requests, LISA resisted and asked the Receiver to consider the various issues LISA had previously raised, including the yet-unresolved question of whether more than USD 4 million of LISA's Villamorey dividends had already been paid to Margarita Castillo by the majority shareholders in the form of a sham loan granted to Margarita Castillo by a Panamanian entity, Villamorey, through the G&T Bank in Guatemala.
9. On May 4, 2020, Cambridge LLP wrote to Aird & Berlis LLP (the "**May 4 Letter**") and provided a copy of LISA's response. Attached hereto and marked as **Exhibit "C"** is a true copy of the May 4, 2020 letter.
10. Recognizing that it might not satisfy the Receiver, Cambridge LLP suggested that the parties discuss the issue:

In any event, we emphasize that Xela and Mr. Gutierrez intend to continue cooperating with the Receiver. In that regard, Mr. Gutierrez wrote to LISA on April 15, 2020, and again on April 22, 2020, formally requesting LISA's assistance with the Receiver's requests. LISA's response is attached as Annex B. Unfortunately, it may not fully address the Receiver's requests, and we are prepared to discuss next steps. (Emphasis added.)

11. The May 4 Letter also set out the position regarding what Xela understood the remaining outstanding issues to be. In addition, the May 4 Letter asks the Receiver to report any contact with my cousins or their lawyers – who are monitoring these proceedings in hopes of benefiting from the receivership – and to provide a spreadsheet of payments received by the Receiver and/or its counsel to fund these proceedings. Without exception, the May 4 Letter was

cooperative and constructive in response to the Receiver's request and shows good faith on Xela's part (and my own) in trying to resolve all remaining issues.

12. What followed, however, was a period of almost three months of complete silence from the Receiver and its counsel. The Receiver made no effort to contact Cambridge LLP to discuss the remaining Xela documents requested by the Receiver as discussed in the May 4 Letter (many of which are duplicative of the thousands of pages of documents I already supplied to the Receiver), or any of the other issues in the May 4 Letter. Most surprisingly, after three months of silence, the Receiver made no effort to discuss delivery of the Xela documents demanded from Arturos Technical Services, Ltd. ("**ATS**"), electing instead to file the Motion and involve the Court in matters that counsel might resolve amicably in the exercise of good faith.
13. Further, the current motion – coming, as it does, on the heels of a request for sanctions against me – might be taken to imply non-cooperation on my part. Nothing could be further from the truth. The Receiver's requests for information have often been duplicative, and I have admittedly been confused by the Receiver's continuing focus on activities that seem ill-suited to collecting Xela's receivables, but I have done everything in my power to respond to his requests.
14. Conversely, the Receiver has ignored Xela's request for information concerning his contacts (if any) with my cousins and/or their lawyers, nor has he provided information about his source(s) of income for these proceedings.

Collection of Xela Assets

15. Regarding the Receiver's primary focus – the collection of assets held by Xela – the May 4 Letter provided the following update and invited the Receiver to participate:

[W]e understand that a new action for damages has been commenced in Panama's Court No. 6 against Villamorey, relating to the non-payment of LISA dividends. A copy of the Complaint is attached as Annex A. We hope that the Receiver is amenable to helping develop these claims and assisting in the enforcement of the anticipated LISA Judgement payment order referenced above.

16. Again, the Receiver has not responded to this invitation, but has elected to file this Motion instead, after three months of silence.

A. Transfer of LISA's Avicola Group Interest to BDT

17. Regarding the Receiver's concerns over the transfer of LISA's Avicola Group interest to BDT in satisfaction of LISA's longstanding debt, Xela suggested a cost-saving approach:

This, of course, brings up the subject of BDT. As you know, BDT held a Panamanian judgment for US\$19,184,680 against LISA, stemming from an unpaid promissory note from LISA to BDT for litigation financing disbursements during the 2005-2008 timeframe. BDT also held a related judgment lien against all of LISA's assets. In its capacity as creditor, BDT had been willing to subordinate its claim to "the reasonable requirements of the receivership," which we understand signified BDT's willingness to allow the Castillo Judgment and

reasonable receivership expenses to be paid out of sums received from enforcement of the LISA Judgment.

While Xela cannot speak for BDT, we understand that BDT has its own interest in satisfying the Castillo Judgment. We might suggest, therefore, as a first course of action, that the Receiver request BDT's future cooperation in connection with the LISA Judgment, as a more efficient, reliable and less costly alternative to challenging the validity of the transfer through some form of adversarial process.

B. Arturo's Technical Services/Gabinvest Share Register and Share Certificates

18. Regarding the primary subject of the Motion – the Receiver's request for property/documents maintained by ATS and for the Gabinvest share register and share certificates – the May 4 Letter states as follows:

Separately, we refer to your letter dated April 3, 2020, directed to Arturo's Technical Services Ltd. ("ATS"), requesting production of any property or documents of Xela in ATS' possession. We also refer to your letter dated April 21, 2020, to Mr. Greenspan, asking for the whereabouts of the Gabinvest share register and share certificates. As these requests may be related, we address them together.

In Canada, Xela has one full storage unit of documents at a rental facility in Barrie. Separately, there are documents housed at ATS's offices in Toronto, and ATS also controls four decommissioned servers belonging to Xela at a datacenter in North York. The documents in all three of those locations are

peppered with attorney/client communications and other confidential and protectable information, which must be reviewed under some satisfactory protocol before they can be delivered to the Receiver. Mr. Gutierrez does not presently know the location of the Gabinvest shares and certificates, but he believes that they are likely amongst the records in Barrie. (Emphasis added.)

II. THE MOTION SHOULD NOT BE GRANTED WITHOUT A DOCUMENT REVIEW PROTOCOL THAT RELIABLY PROTECTS AGAINST THE POTENTIAL IMPROPER DISCLOSURE OF PRIVILEGED MATERIAL

19. Accompanying this Opposition is my Affidavit dated March 22, 2020 (the “**Gutierrez Affidavit**”). As stated above, Xela has documents in three separate places:

- (a) in a storage unit at a rental facility in Barrie;
- (b) at ATS's offices in Toronto; and
- (c) on four decommissioned servers at a datacenter in North York.

I stated that I do not believe that any documents relevant to LISA's (now BDT's) collection efforts, or to any of the concerns raised by the Receiver, are located at any of the three locations, and that the cost associated with reactivating the servers and reviewing the documents and data would outweigh the potential benefit to the stakeholders.

20. However, if it is appropriate for the Receiver to proceed in this fashion, Xela is prepared to work with the receiver to resolve issues relating to document disclosure. As stated above, Xela has documents in three separate locations in Ontario. First, Xela maintains a storage unit at a third-party facility in Barrie that

contains documents belonging to Xela. To my knowledge, those documents are not subject to privilege or any other concerns that might limit the Receiver's access. Accordingly, Xela's counsel is prepared to provide contact information and any consent necessary to give the Receiver unimpeded access to the storage unit in Barrie, subject only to a potential lien by the storage facility, stemming from Xela's inability to stay current on its rental payments for the unit.

21. Second, ATS holds some documents belonging to Xela at the ATS offices in Toronto. To my knowledge, those documents are not subject to privilege or any other concerns that might limit the Receiver's access, and Xela will consent to providing the Receiver with unimpeded access to those documents.
22. Third, ATS controls four decommissioned servers belonging to Xela, which are in the possession of a third-party vendor located at the Cogent datacenter in North York, Ontario. As ATS told the Receiver's counsel in writing in April 2020, those servers have been offline and unused for at least two years, during which time no software upgrades or other forms of maintenance have been performed. As a result, there is some cost associated with properly starting and accessing the servers. ATS offered to provide the Receiver with a quote, although I do not believe the Receiver responded.
23. I am informed by ATS and I verily believe that the servers have been unused since approximately 2017. The servers used the Windows 2008 operating system, which is no longer supported by Microsoft. Consequently, even if the necessary security patches are available to prevent viruses and other intrusions when the servers are restarted, there is no guarantee against data corruption.

24. Separately, while the servers do contain data owned by Xela, they also contain data owned by various other persons and entities. Once the servers are restarted, I am informed by ATS that ATS' IT personnel will be able to isolate the data owned by Xela. However, within Xela's own data, there are unquestionably some documents containing information subject to privilege(s) held by third parties, although I cannot identify those third parties without accessing and reviewing the data.
25. Xela and I object to the notion that Xela may not assert its own privileges as against the Receiver in these circumstances. Xela has a pending complaint for conspiracy in the Toronto courts against Ms. Castillo and the Avicola Group majority shareholders, which remains unresolved. At the same time, Paragraph 4(b) of the Receiver's Appointment Order might be construed as giving the Receiver the right to share Xela's privileged materials with Ms. Castillo under nothing more than the thin protection of a non-disclosure agreement.
26. Accordingly, while Xela believes the Receiver's desire to retrieve Xela's documents from ATS is counterproductive to the ultimate cause, any Order requiring production should also implement a protocol under which: (a) third parties are given a reasonable opportunity to assert privileges; (b) Xela and/or I retain the right to assert privilege as against the Receiver, subject to this Court's review; and (c) the Receiver is barred from sharing privileged Xela information with Ms. Castillo or any other person or entity.

III. CAMBRIDGE LLP SHOULD NOT BE REQUIRED TO DELIVER UP THEIR FILES

27. The Motion requests for an Order requiring Cambridge LLP to deliver up access to their files in these proceedings for inspection by the Receiver. The request is unduly burdensome and oppressive, and there is no valid rationale for it. Cambridge LLP acts for me. Solicitor-client privilege is one of the most important tenets of the legal system. The receiver has no right to review Cambridge LLP's files, especially in light of some of the claims that may be advanced against the Applicants in this proceeding.

IV. THE RECEIVER SHOULD BE COMPELLED TO DISCLOSE ITS FUNDING SOURCE(S) AND ANY COMMUNICATIONS WITH ANY PERSON PURPORTING TO ACT FOR THE MAJORITY SHAREHOLDERS OF THE AVICOLA GROUP

28. From the outset of these proceedings, the Receiver's attitude toward Xela and me has been hostile and dismissive. The Receiver has depleted resource on matters unlikely to yield any income for Xela's creditors, while showing little interest in Xela's most promising asset, the unpaid dividends wrongfully withheld by the Avicola Group. Counsel for Banco Santander International conceded on the record in the Miami garnishment case that he had received private, confidential LISA documents from the Receivership.² Similarly, the Receiver's reaction to LISA's loan commitment in December 2019 is difficult to understand, as it in effect prevented a discharge. Indeed, the Receiver's strategy to date – unnecessarily perpetuating the receivership, taxing the resources of Xela and its affiliates, while adding to the stable of lawyers addressing issues unrelated to the collection of LISA's unpaid dividends – is precisely aligned with the 20-year litigation strategy of the Avicola Group.

² In fairness, the document in question had already been produced to counsel for Santander in discovery in the garnishment case. However, counsel elected to use as a deposition exhibit a version of the document that had not been produced in discovery, and when questioned about it, he admitted that he had obtained the document from the receivership.

29. It was on the basis of these concerns that Cambridge LLP requested, in the May 4 Letter, the following information from the Receiver:

Lastly, as matter of housekeeping, we would request that the Receiver provide Xela with two categories of information. First, we respectfully request that the Receiver produce to us a complete record of his funding sources for this receivership, showing at least the payor names, dates and amounts of payment. Second, we ask that the Receiver identify any and all communications between KSV (including its partners, associates and other personnel) and any person acting on behalf of Villamorey and/or the Avicola Group and/or any of their affiliates regarding this receivership, and provide copies of any such communications as are in writing.

30. The requested information is both reasonable and appropriate as a check against inappropriate conduct in receivership matters. To date, however, the Receiver has provided none of the requested information, and the Court should require him to comply.

V. THE RECEIVER'S THIRD REPORT IS INACCURATE AND/OR INCOMPLETE

31. The Receiver's Third Report is inaccurate and incomplete in various material respects, as set out in the Gutierrez Affidavit.
32. I swear this Affidavit in response to the Receiver's motion to compel disclosure and for no other or improper purpose.

SWORN BEFORE ME via video conference at the City of Toronto, in the Province of Ontario on August 21, 2020.

Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO# 70332Q)

JUAN GUILLERMO GUTIERREZ

MARGARITA CASTILLO
Plaintiff

-and- XELA ENTERPRISE LTD. et al.
Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**COMPENDIUM OF THE RECEIVER
(September 30, 2020 Case Conference)**

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