

**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.

**MOVING PARTY'S FACTUM**  
**(Receiver's Access to ATS Documents, returnable August 28, 2020)**

August 25, 2020

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**SUPERIOR COURT OF JUSTICE  
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**TABLE OF CONTENTS**

	<b>Page No.</b>
<b>PART I - INTRODUCTION.....</b>	<b>1</b>
<b>PART II - SUMMARY OF FACTS .....</b>	<b>3</b>
<b>A. RELEVANT PLAYERS.....</b>	<b>3</b>
<b>B. REVIEWABLE TRANSACTIONS .....</b>	<b>5</b>
<b>C. THE APPOINTMENT ORDER.....</b>	<b>6</b>
<b>D. ATTEMPTS TO OBTAIN THE COMPANY’S RECORDS .....</b>	<b>7</b>
<b>E. JUAN GUILLERMO CONTROLLED THE COMPANY.....</b>	<b>10</b>
<b>F. A REVIEW OF THE TRANSACTIONS IS NECESSARY TO FULFILL THE RECEIVER’S PURPOSE .....</b>	<b>12</b>
<b>G. JUAN GUILLERMO’S LATEST AFFIDAVIT .....</b>	<b>13</b>

**PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES ..... 14**

**A. THE RESPONDENT’S POSITION..... 15**

**B. CONTROL OF THE COMPANY’S DOCUMENTS AND SERVERS..... 15**

**C. THIRD PARTIES: COMMUNICATION OF PRIVILEGED INFORMATION IS A WAIVER OF PRIVILEGE..... 20**

**D. THE INFORMATION SOUGHT IS NECESSARY FOR THE RECEIVER TO CARRY OUT ITS DUTIES ..... 21**

**PART IV - ORDER REQUESTED..... 22**

**LIST OF AUTHORITIES..... A-1**

**TEXT OF STATUTES, REGULATIONS & BY - LAWS0) ..... 2**

**DRAFT ORDER ..... 3**

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ENTERPRISES LTD.

**MOVING PARTY'S FACTUM**

**PART I - INTRODUCTION**

1. KSV Kofman Inc. (the “**Receiver**”), was appointed Receiver of Xela Enterprises Ltd. (the “**Company**” or “**Xela**”) a year and half ago in order to recover funds for the benefit of Xela’s creditors. The Receivership Order was obtained by Margarita Castillo, a judgment creditor of Xela.
2. The Receiver’s efforts to obtain the information and documentation necessary to recover funds for the benefit of Xela’s creditors have been impeded repeatedly. The Receiver seeks orders in this motion for production of documents and devices to assist the Receiver in its investigations.
3. In 2015, Justice Newbould found that the President and Director of Xela, Juan Guillermo Gutierrez (“**Juan Guillermo**”), was the controlling mind of the corporation and its subsidiaries.

Nothing has changed. Nevertheless, Juan Guillermo has failed and refused to cooperate in providing the Receiver the information necessary to undertake its mandate.

4. In the midst of attempts to obtain documentation which is commonplace for a receiver, the Receiver learned the Company's most valuable asset was conveyed to a corporation, of which Juan Guillermo's son is a director. This corporation is owned by a Barbados trust – the beneficiaries of which are Juan Guillermo's children.

5. Juan Guillermo claims privilege over the Company's records and property, but his claims of privilege are non-specific. In any event, any claim of Company privilege falls away in the face of the Receiver's appointment.

6. Juan Guillermo's affidavit filed in response to this motion demonstrates that control has resided and has always resided with him. He says that the motion is a "surprise to Xela". Juan Guillermo is not Xela. He refuses to recognize the role of the Receiver appointed by order of this Court.

7. The Receiver seeks an order permitting it to obtain and review the Company's records and property in Ontario, which are in the possession of related parties. In particular, the Receiver seeks an order, among other things:

- (a) Requiring Juan Guillermo and Arturos Technical Services ("ATS") to disclose the location of the Company's storage units and all the Company's past and current servers, including the server presently hosting any current Xela m email accounts;
- (b) Prohibiting Juan Guillermo, ATS, or anyone from accessing, modifying, removing, or deleting any of the Company's property and records;

- (c) Authorizing the Receiver to enter certain premises to inspect, preserve, reproduce and remove the Company's records and property, including its servers;
  - (d) Prohibiting Juan Guillermo, or any person purportedly acting on behalf of the Company or (previously or currently) related to the Company, from asserting privilege against the Receiver in respect of the Company's property or records; and
  - (e) Requiring Cambridge LLP, counsel retained during the receivership by Juan Guillermo to represent the Company, to deliver up its files to the Receiver.
8. Without the information sought in this motion, the Receiver cannot fulfill its purpose.

## **PART II - SUMMARY OF FACTS**

### **A. RELEVANT PLAYERS**

9. Juan Arturo Gutierrez ("**Juan Arturo**", now deceased) is the father of Juan Guillermo and Margarita Castillo ("**Margarita**" or the "**Applicant**"). Juan Arturo started the Company in 1984 and grew it into an extremely valuable company with direct and indirect subsidiaries in North and South America.

10. Juan Guillermo has been intimately involved in the family-owned Company and its subsidiaries for decades. Newbould J. found (and the Company's only other director confirmed) that Juan Guillermo manages and controls the Company and its subsidiaries.

11. Margarita and her husband were involved in the family-owned Company until April 2010. Conflict led to litigation. Litigation led to judgment. On October 28, 2015, Newbould J. ordered the Company, Juan Arturo, and Juan Guillermo (among others), jointly and severally, to pay her approximately \$5 million (the "**Judgment Debt**").

12. After unsuccessful enforcement efforts, Margarita applied for a court-appointed receiver, which was appointed on July 5, 2019 (the "**Appointment Order**").

13. The Company's business is to manage and control its direct and indirect subsidiaries around the world. Two main branches of its wholly-owned subsidiaries have been the Receiver's focus. They are likely the primary sources of funds to satisfy the Judgment Debt. These are the EAI group of companies (EAI stands for "Empresas Arturo International") and LISA S.A. ("**LISA**"). EAI is a holding company that owns several revenue-generating businesses. LISA is a holding company to receive dividends arising from the Company's 33.3% interest in the Avicola Group.

14. The Avicola Group is a poultry business in Central America that is controlled by the cousins of Juan Guillermo and Margarita (who own the remaining 66.7% of the Avicola Group – the "**Cousins**"). The Company's 33.3% interest is estimated to be worth hundreds of millions of dollars, if not more.<sup>1</sup> In 1998, LISA brought lawsuits against the Avicola Group, the Cousins, and related parties for unpaid dividends (the "**Avicola Litigation**").<sup>2</sup>

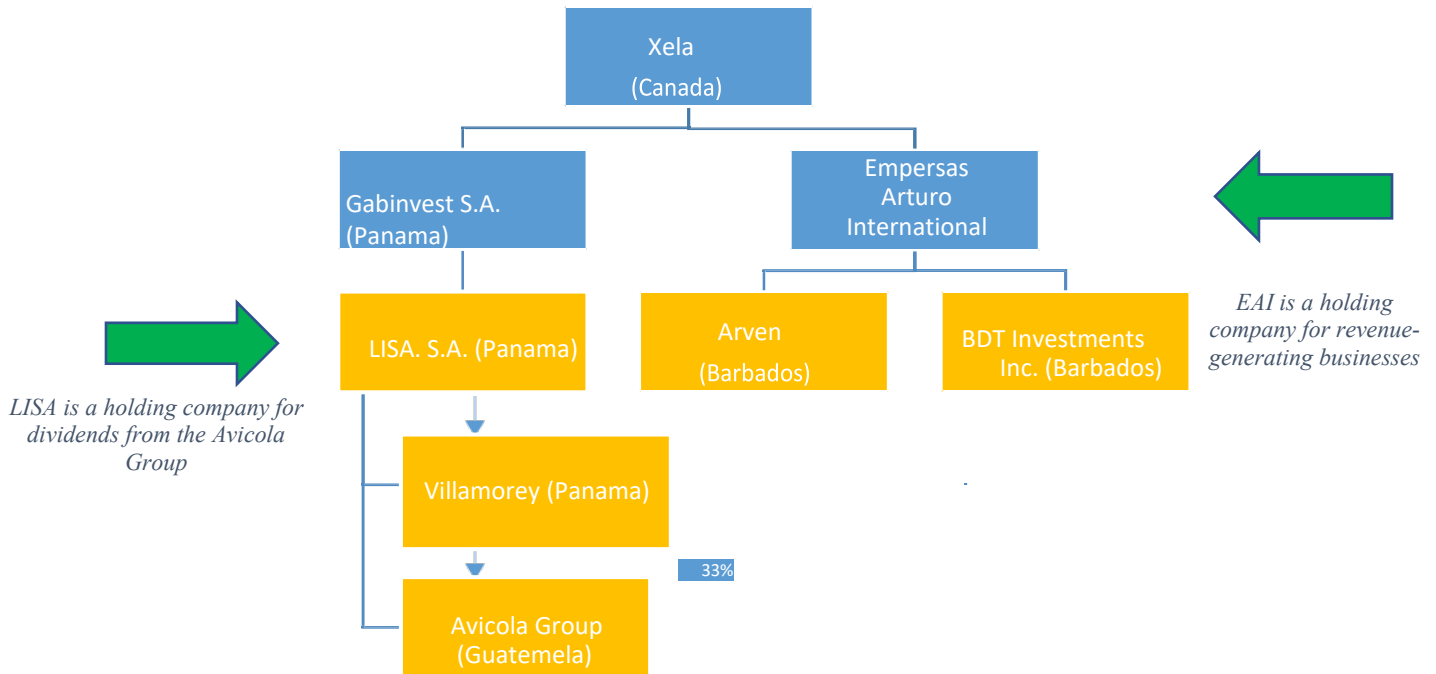
15. The following simplified corporate chart of the Company and the subsidiaries of primary interest to the Receiver, as it stood prior to the Transactions discussed below:

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<sup>1</sup> Affidavit of Margarita Castillo, sworn January 14, 2019 ("**Margarita's Jan. 14, 2019 Affidavit**"), at para. 13, in Motion Record for the Appointment of an Equitable Receiver ("**MR to Appoint**"), at p. 27

<sup>2</sup> Appendix "B" to the Third Report of the Receiver, July 24, 2020 ("**Receiver's First Report**"), at s. 3.0(4), Motion Record of the Receiver (Receiver's Access to ATS Documents), dated July 24, 2020 ("**MR**"), at p. 59, Compendium of the Receiver, dated August 25, 2020 (the "**Compendium**"), Tab 3



Figure #1<sup>3</sup>

## B. REVIEWABLE TRANSACTIONS

16. After the Judgment Debt and *during the receivership* (which covers the time period from October 28, 2015 through 2020), the revenue and/or value of the Company’s interest in the Avicola Group (see Figure #1) was purportedly transferred to the ARTCARM Trust in Barbados (the “**Trust**”). The beneficiaries of the Trust are Juan Guillermo’s children.<sup>4</sup>

17. Beginning in 2016, after the Judgment Debt, someone (presumably Juan Guillermo) caused EAI subsidiaries to realize on their recently-accruing, rapidly-increasing debt (purportedly owed by LISA), effecting major transfers:

<sup>3</sup> This is a condensed Company organizational chart, prior to April 2016. Entities shaded in yellow were transferred to the Trust in April 2016: Third Report of the Receiver, dated July 24, 2020 (“**Receiver’s Third Report**”), at s. 2.0(3), MR, at p. 23, Compendium, Tab 7. The full Organizational Chart prior to April 2016 is Appendix “C” to the Receiver’s Third Report, Compendium, Tab 7(c)

<sup>4</sup> Receiver’s Third Report, at s. 2.0(2), MR, at p. 23, Compendium, Tab 7

- (a) A transfer in April 2016 of certain EAI subsidiaries (being the ones in yellow in Figure #1 above) to Juan Arturo (the father, who died two months later in June 2016) and then to the Trust (the “**EAI Transaction**”);<sup>5</sup> and
- (b) Two purported transactions (one in January 2018<sup>6</sup> and another in February 2020 *during the receivership*<sup>7</sup>) that, if consummated, would have resulted in the complete transfer of the Company’s most valuable asset – its 33.3% interest in the Avicola Group (including proceeds from the Avicola Litigation respecting unpaid dividends) – from LISA to the Trust (the “**LISA Transactions**”; collectively, the LISA Transactions and the EAI Transaction, the “**Transactions**”).

18. The Receiver has made numerous attempts to obtain information about the Transactions in support of its mandate. These efforts have been unsuccessful, thwarted, or refused, despite three court orders. Juan Guillermo denies that he has the knowledge to provide information about the transactions, despite findings and evidence to the contrary.

### C. THE APPOINTMENT ORDER

19. The Appointment Order grants the Receiver broad powers “to take possession of and exercise control over” the Company’s Property and “to receive, preserve, and protect” the Company’s Property.<sup>8</sup> The Property includes “all proceeds” from the sale of the Company’s businesses.<sup>9</sup>

20. The Appointment Order grants the Receiver “unfettered access” to the Company’s Records (emphasis added).<sup>10</sup> The Records include all the information sought on this motion, even if they

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<sup>5</sup> Receiver’s Third Report, at s. 2.2, MR, at p. 24-25, Compendium, Tab 7

<sup>6</sup> Receiver’s Third Report, at ss. 2.0(5) and 2.3, MR, at pp. 23 and 25-26, Compendium, Tab 7

<sup>7</sup> Receiver’s Third Report, at s. 2.5, MR, at pp. 27-28, Compendium, Tab 7

<sup>8</sup> Appendix “A” to the Receiver’s Third Report (the “**Appointment Order**”), at paras. 3(a)-(b), MR, at p. 36, Compendium, Tab 1

<sup>9</sup> Appointment Order, at para. 2, MR, at p. 36, Compendium, Tab 1

<sup>10</sup> Appointment Order, at para. 6, MR at p. 39, Compendium, Tab 1

are in the possession or control of a third party, including the Company’s “legal counsel”.<sup>11</sup> The Appointment Order also grants the Receiver the power to collect monies, carry on legal proceedings, exercise the Company’s shareholder rights. The Receiver’s powers are granted “exclusively” to the Receiver and “to the exclusion of all other Persons ..., including the [Company], and without interference from any other Person.”<sup>12</sup>

#### **D. ATTEMPTS TO OBTAIN THE COMPANY’S RECORDS**

21. The Receiver has made numerous requests for evidence to support the fairness of the Transactions. These requests were made to Juan Guillermo, representatives of EAI’s Subsidiaries as well as LISA’s Board of Directors.<sup>13</sup> However, the information has not been provided.<sup>14</sup> Even when responses have been provided, they have been contradictory.<sup>15</sup>

##### ***(i) The Receiver obtained the Disclosure Order***

22. Given the inability to obtain information about the EAI Transaction and the first LISA Transaction (the second LISA Transaction had not yet occurred), the Receiver sought and obtained a Disclosure Order. On October 29, 2019, this Court ordered disclosure by EAI, EAI subsidiaries, the Trust, and LISA – as well as all people acting on their behalf. The scope of the disclosure included all information regarding the EAI Transaction and the first LISA Transaction.<sup>16</sup> Despite

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<sup>11</sup> Appointment Order, at paras. 5-7, MR at pp. 39-40, Compendium, Tab 1

<sup>12</sup> The Appointment Order, at para. 4, Compendium, Tab 1

<sup>13</sup> Receiver’s Third Report, s. 2.2(6) and 2.3(9), MR, at pp. 25 and 26, Compendium, Tab 7

<sup>14</sup> Receiver’s Third Report, s. 2.3(9), MR, at p. 26, Compendium, Tab 7

<sup>15</sup> For example, when the Receiver asked for the names of the individuals who negotiated and signed the first LISA Transaction, it was told, on August 22, 2019, that Calvin Shields “was the person involved in concluding the agreement” on behalf of the Company: see Xela Enterprises Ltd.’s Answers to Questions from KSV Received August 22 2019, Part III, Q. 1 (p. 8), Compendium, Tab 13. This answer is untenable considering Mr. Shields’ lack of knowledge of the Company’s business and dealings when he testified under oath on behalf of the Company on November 27, 2018 (11 months after the first LISA Transaction), as part of an examination in aid of execution (conducted by Margarita in an attempt to enforce the Judgment Debt). Mr. Shields’ testimony is described in greater detail below.

<sup>16</sup> Appendix “F” to the Receiver’s Third Report, MR, at pp. 88-89, Compendium, Tab 7(f)

the Disclosure Order, Juan Guillermo, EAI, EAI subsidiaries, the Trust, and LISA have failed and/or refused to provide the information that this court ordered be produced.<sup>17</sup>

*(ii) Attempts to exercise the Company's shareholder rights have been thwarted*

23. The Receiver attempted to obtain the information that it required by exercising the Company's shareholder rights. As set out in Figure #1, the Company is the sole shareholder of its direct subsidiary, Gabinvest S.A. (a Panamanian corporation, "**Gabinvest**"). Gabinvest is the sole shareholder of its direct subsidiary, LISA (also a Panamanian corporation).<sup>18</sup> The Appointment Order empowers and authorizes the Receiver to exercise the Company's shareholder rights.<sup>19</sup>

24. On January 16, 2020, the Receiver passed a resolution, replacing Gabinvest's directors. Subsequently, the Receiver directed the new Gabinvest directors to appoint three representatives as new directors of LISA, while leaving the existing three LISA-directors in place.<sup>20</sup>

25. The Receiver directed the three representatives to work cooperatively with LISA's existing Board members.<sup>21</sup> The purpose of the resolutions was to provide the Receiver with access to the books and records of LISA to review the Transactions.<sup>22</sup>

26. This Court subsequently declared, as at March 24, 2020, that the replacement of the Gabinvest Board was a proper exercise of the Receiver's exclusive power and authority. Despite this, LISA's three pre-existing directors have refused to provide any corporate records. They have

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<sup>17</sup> Receiver's Third Report, s. 2.6(4) and (5), MR, at p. 28, Compendium, Tab 7

<sup>18</sup> Receiver's Third Report, at s. 2.4(1), MR, at p. 26, Compendium, Tab 7

<sup>19</sup> Receiver's Third Report, at s. 2.4(2), MR, at p. 26, Compendium, Tab 7

<sup>20</sup> Receiver's Third Report, at s. 2.4(4), MR, at p. 26, Compendium, Tab 7

<sup>21</sup> Receiver's Third Report, at s. 2.4(5), MR, at p. 26, Compendium, Tab 7

<sup>22</sup> Receiver's Third Report, at s. 2.4(6), MR, at p. 27, Compendium, Tab 7

also threatened to commence criminal and civil proceedings against the Receiver's representatives in Panama.<sup>23</sup>

**(iii) Receiver obtains a second disclosure order**

27. By this Court's March 24, 2020 endorsement, the Court ordered Juan Guillermo to cause information about the EAI Transaction and the first LISA Transaction to be produced to the Receiver.<sup>24</sup>

28. On April 7, 2020, Juan Guillermo responded through Cambridge LLP. The responses consistently provided:

I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.<sup>25</sup>

29. Each of these statements contradicts Newbould J.'s findings of fact and is inconsistent with the sworn-evidence of LISA's long-time President (as set out below).

30. On March 31, 2020, the Receiver served a copy of the second disclosure order on LISA's directors: Harald Johannessen (Juan Guillermo's brother-in-law<sup>26</sup>), Lester C. Hess Jr., and Calvin Shields.<sup>27</sup>

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<sup>23</sup> Receiver's Third Report, at s. 2.4(7) and (8), MR, at p. 27, Compendium, Tab 7

<sup>24</sup> Receiver's Third Report, s. 3.0(1), MR, at p. 29, Compendium, Tab 7

<sup>25</sup> Receiver's Third Report, s. 3.1(1), MR, at p. 30, Compendium, Tab 7, and see Appendix "H" of the Third Receiver's Report, MR, at p. 109, Compendium, Tab 7(h)

<sup>26</sup> "Mr. Johannessen is the brother-in-law of Juan Guillermo": Second Supplement to the Second Report of the Receiver, at s. 2.0(3), MR, Tab 3, at p. 445, Compendium, Tab 6

<sup>27</sup> Receiver's Third Report, s. 3.2(1), MR, at p. 30, Compendium, Tab 7

31. On April 15, 2020, the Receiver received a copy of a letter from Juan Guillermo to Mr. Johannessen in which Juan Guillermo purported to ask LISA to comply with the second disclosure order.<sup>28</sup>

32. On April 27, 2020, Mr. Johannessen sent a letter to Juan Guillermo (but not the Receiver):

- (a) He refused to recognize the Receiver's authority;
- (b) He refused to acknowledge the changes to LISA's Board of directors;
- (c) He made unsupported allegations against the Receiver's Panamanian counsel;
- (d) He raised allegations without evidence of monies purportedly paid to Margarita by the Cousins (or related entities); and
- (e) He made an offer to resolve the Receiver's request for information – and, presumably, avoid this court's disclosure orders – by agreeing to a “bilateral legal team” (English translation) for the purpose of recovering LISA's unpaid dividends related to the Avicola Litigation.<sup>29</sup>

33. LISA's directors refuse to recognize and comply with this court's orders. Given the transfer of the Company's value to the benefit of Juan Guillermo's family and the unresponsiveness (or refusal of) the Receiver's requests for information about the Transactions, the Receiver has been unable to fulfill its purpose – to control and manage the Company's business and assets to satisfy the Judgment Debt.<sup>30</sup>

#### **E. JUAN GUILLERMO CONTROLLED THE COMPANY**

34. The findings of Newbould J. and the evidence of the only other director of the Company establishes that the business of the Company (which is the management and control of its direct and indirect subsidiaries) have been under Juan Guillermo's control and direction.

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<sup>28</sup> Receiver's Third Report, s. 3.2(2), MR, at p. 30, Compendium, Tab 7

<sup>29</sup> Receiver's Third Report, at s. 3.2(3), MR, at pp. 30-31, Compendium, Tab 7

<sup>30</sup> Appointment Order, at paras. 1-2 and 25, MR, at pp. 35 and 45, Compendium, Tab 1

35. In his reasons, Newbould J. found that day-to-day management of the Company's wholly-owned subsidiaries are controlled by Juan Guillermo:

Despite [its] separate legal identity, the respondents [Juan Arturo and Juan Guillermo] have historically treated Tropic [the Company's direct subsidiary] and Fresh Quest [the Company's indirect subsidiary] **like any other Xela subsidiary**. **As CEO, the day-to-day management of both Tropic and Fresh Quest [direct and indirect subsidiaries] are controlled by Juan [Guillermo]**. [Emphasis added.]<sup>31</sup>

36. Justice Newbould also found that the business of the Company's direct and indirect subsidiaries were addressed at the Company's Board meetings.<sup>32</sup> As the ultimate shareholder of its subsidiaries, management of the direct and indirect subsidiaries occurred at the level of the Company under Juan Guillermo's control.

37. Justice Newbould's findings are supported by the Company's only other director<sup>33</sup> and LISA's long-time President (from 1998-2019<sup>34</sup>) and current LISA-director, Calvin Shields. Mr. Shields testified under oath in an examination in aid of execution on behalf of the Company on November 27, 2018 (which was conducted by Margarita's counsel prior to applying for the receivership). Mr. Shields testified that:

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<sup>31</sup> *Castillo v. Xela*, 2015 ONSC 6671 ("*Castillo v. Xela*"), at paras. [16](#) and [55](#), Compendium, Tab 2

<sup>32</sup> *Castillo v. Xela*, paras. [16](#) and [55](#), Compendium, Tab 2

<sup>33</sup> Xela Enterprises Ltd.'s Answers Provided in Response to Questions Received from KSV Kofman Inc., in its Capacity as Court-Appointed Receiver of Xela, on August 22, 2019, Part I, Q. 6 (p. 2), Compendium, Tab 13

<sup>34</sup> Exhibit "U" to the MR to Appoint (Examination in Aid of Execution of Calvin Shields, dated July 27, 2017), Q. 118 and 124 ("**Shields' Jul. 27, 2017 EAE**"), MR to Appoint, p. 298, Compendium, Tab 8; see also Appendix "D" to the First Receiver's Report (p. 79 of the Receiver's First Report, being the Answer Chart of the Applicant to U/T from the Cross-Examination of Juan Guillermo, June 26, 2019, U/T #19, Q. 343), Compendium, Tab 14; see also, Answer to U/T of Calvin Shields provided at his July 27, 2017 examination in aid of execution – Directors Xela and Subsidiaries, March 22, 2018, Compendium, Tab 15

- (a) Juan Guillermo is “still involved” with the Company’s direct and indirect subsidiaries;<sup>35</sup>
- (b) Juan Guillermo, not Mr. Shields, was the person who would know about the status of the Avicola Litigation and the location of LISA’s most valuable asset – its share certificates in the Avicola Group;<sup>36</sup> and
- (c) In the face of questions about the Company and its subsidiaries, Mr. Shields’s U.S. lawyer (and a former Company officer), Juan Jose Rodriguez, suggested that questions about the Company and its subsidiaries would better be directed to Juan Guillermo. Mr. Rodriguez added: “I assume that you have the ability to compel [Juan Guillermo] to answer questions and obtain a contempt.”<sup>37</sup>

#### **F. A REVIEW OF THE TRANSACTIONS IS NECESSARY TO FULFILL THE RECEIVER’S PURPOSE**

38. The result of the Transactions was to transfer all known-value from the Company to the Trust for the benefit of Juan Guillermo’s immediate family.<sup>38</sup> Despite having significant assets and cashflow for years, the Company has no value, no real assets, and no cashflow. Juan Guillermo alleges that it cannot pay its most basic obligations.<sup>39</sup> In his own examination in aid of execution on August 30, 2018 (conducted by Margarita’s counsel before applying for the receivership), he went so far as to say, the Company “no longer exists”.<sup>40</sup>

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<sup>35</sup> Exhibit “FF” to the MR to Appoint (Examination in Aid of Execution of Calvin Shields, dated November 27, 2018) (“**Shields’ Nov. 27, 2018 EAE**”), Q. 371 (370-373), MR to Appoint, p. 651, Compendium, Tab 9

<sup>36</sup> Shields’ Nov. 27, 2018 EAE, Q. 394, 400-405, 451, MR to Appoint, pp. 660, 663-664, 678, Compendium, Tab 9

<sup>37</sup> Shields’ Nov. 27, 2018 EAE, Q. 376, MR to Appoint, p. 654, Compendium, Tab 9

<sup>38</sup> Receiver’s Third Report, at s. 2.3(7) and 2.5(4)(a), MR, at pp. 26 and 27, Compendium, Tab 7

<sup>39</sup> Affidavit of Juan Guillermo, sworn August 21, 2020 (“**Juan Guillermo’s August 21, 2020 Affidavit**”), at para. 20, in the Responding Motion Record of Cambridge LLP, dated August 21, 2020 (“**RMR**”), at p. 9, Compendium, Tab 11

<sup>40</sup> Exhibit “BB” to the MR to Appoint (Examination in Aid of Execution of Juan Guillermo, dated August 30, 2018) (“**Juan Guillermo’s Aug. 30, 2018 EAE**”), Q. 740, MR to Appoint, p. 458. He then states that he is still the President because the company is not liquidated: Juan Guillermo’s Aug. 30, 2018 EAE, Q. 769, M.R. to Appoint, at p. 469, Compendium, Tab 10



39. This is untenable considering: (i) its significant assets and cashflow prior to the Judgment Debt<sup>41</sup>; (ii) the control exercised by Juan Guillermo over the Company and its direct and indirect subsidiaries; and (iii) the beneficiaries of the Transactions are Juan Guillermo's family.

40. The Transactions occurred after the Judgment Debt and during ongoing litigation with Margarita.<sup>42</sup> The initial share transfer in the EAI Transaction appears to have been for inadequate consideration.<sup>43</sup> The beneficiaries of the LISA Transactions were on both sides of the transaction (Juan Guillermo or his family members).<sup>44</sup> The Receiver has uncovered no commercially reasonable basis for the Transaction, other than to benefit Juan Guillermo and his immediate family.<sup>45</sup> The Company's creditors and the Judgment Debtor were, and are, prejudiced by the Transactions.<sup>46</sup>

41. The Receiver is of the view that conducting a review of the Transactions is necessary to fulfill its purpose and advise the court what, if any, further steps are necessary to satisfy the Judgment Debt.

#### **G. JUAN GUILLERMO'S LATEST AFFIDAVIT**

42. Juan Guillermo's latest affidavit does not address the issues on this motion. It does, however, raise new concerns for the Receiver:

- (a) Juan Guillermo purports to act for the Company. He holds himself out as having authority to negotiate on behalf of the Company with the Receiver as it relates to

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<sup>41</sup> Exhibit "B" to the MR to Appoint (the Company's non-consolidated financial statements for 2011, 2012, 2013, and 215), MR to Appoint, at pp. 43-105

<sup>42</sup> Receiver's Third Report, at s. 2.1, MR, at p. 24, Compendium, Tab 7

<sup>43</sup> Receiver's Third Report, at s. 2.2(5), MR, at p. 25, Compendium, Tab 7

<sup>44</sup> Receiver's Third Report, at s. 2.3 (3), MR, at p. 26, Compendium, Tab 7

<sup>45</sup> Receiver's Third Report, at s. 2.3(4), MR, at p. 26, Compendium, Tab 7

<sup>46</sup> Receiver's Third Report; MR, at p. 26, Compendium, Tab 7

the Company's business and assets.<sup>47</sup> This misconceives the role of the Receiver. The Receiver *is* the Company with respect to rights to the Company's business and assets. Juan Guillermo has no authority to deal with the Company's business and assets. That power is suspended by the receivership<sup>48</sup>;

- (b) Juan Guillermo attempts to broker a deal between BDT and the Receiver, which further supports Newbould J.'s finding (as well as the statements of LISA's long-time President) that Juan Guillermo is currently exercising direction and control of BDT and the Company's other direct and indirect subsidiaries (while claiming that he cannot make any of them comply with this court's orders). This raises concerns about the veracity of Juan Guillermo's sworn evidence that he "requested assistance from LISA" and urged LISA and its management "to cooperate with the Receiver in every respect and to the fullest extent possible";<sup>49</sup> and
- (c) Despite asserting that he is the President of the Company, Juan Guillermo claims that he is "informed by ATS" and "verily believe[s] that the [Company's] servers have been unused since approximately 2017."<sup>50</sup> Juan Guillermo implies that he has no personal knowledge about the Company's own servers. It is unclear how Juan Guillermo would not have personal knowledge about when the Company's servers stopped being used or where they were stored (since he is – and has been for some time – the only officer and employee of the Company).

43. Juan Guillermo's latest affidavit only increases the Receiver's concerns that Juan Guillermo is not doing "everything in [his] power to respond to [the Receiver's] requests."<sup>51</sup>

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

44. On this motion:

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<sup>47</sup> Juan Guillermo's August 21, 2020 Affidavit, at paras. 10 and 17, RMR, at pp. 4 and 6-7, Compendium, Tab 11

<sup>48</sup> *Ontario (Securities Commission) v. Greymac Credit Corp.*, 41 O.R. (2d) 328 (Div. Ct.) ("*Greymac*"), at [para. 60](#), Compendium, Tab 17

<sup>49</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 5, RMR, at p. 3, Compendium, Tab 11

<sup>50</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 23, RMR, at p. 9, Compendium, Tab 11

<sup>51</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 13, RMR, at p. 5, Compendium, Tab 11

- (a) The limited relief sought by the Receiver must be granted – it should have control over the documents and servers of and related to the Company. Any assertion of a Company privilege against the Receiver is misplaced; and
- (b) Any other privilege is hardly articulated in such a way that a limited protocol cannot address.

#### **A. THE RESPONDENT’S POSITION**

45. Juan Guillermo refuses to provide unfettered access to the Company’s decommissioned servers or to Cambridge LLP’s files. He attempts to assert the Company’s privilege against the Receiver. This misconceives the role of the Receiver and the powers conferred by this court.

46. Juan Guillermo and Cambridge LLP also assert privilege on behalf of third parties’ information.<sup>52</sup> This misconceives the law of privilege.

47. Juan Guillermo provides no evidence to respond to the Receiver’s assertion that the Company has a current server.<sup>53</sup> An adverse inference is appropriate: the Company has an active server, but Juan Guillermo has refused to provide information about where it is.

#### **B. CONTROL OF THE COMPANY’S DOCUMENTS AND SERVERS**

48. A receiver can view all documents that could be demanded by the company itself. Records that can be demanded by the company “cannot be denied” to the receiver.<sup>54</sup> This includes the company’s privileged material (in its possession) as well as the records of the company’s lawyer.

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<sup>52</sup> Juan Guillermo’s August 21, 2020 Affidavit, at paras. 24-25, RMR, at p. 10, Compendium, Tab 11

<sup>53</sup> Receiver’s Third Report, at s. 4.0(5), MR, at p. 31, Compendium, Tab 7

<sup>54</sup> *Russell & DuMoulin, Re*, 9 B.C.L.R. (2d) 265 (BCSC) (“*Russell & DuMoulin*”), at [para. 13](#), Compendium, Tab 16

49. The Appointment Order authorizes the Receiver to obtain the Company's privileged information:

- (a) Paragraph 3(i) of the Appointment Order authorizes the Receiver to represent the Company in respect of litigation.<sup>55</sup> The Receiver cannot conduct the Company's litigation without being privy to the Company's privileged information, particularly information to which litigation privilege might otherwise attach;
- (b) Paragraph 5 of the Appointment Order compels all the Company's "current and former ... legal counsel" (among others) to provide immediate and continued access to the Company's Property;<sup>56</sup>
- (c) Paragraph 6 of the Appointment Order requires legal counsel to provide all the Company's Records.<sup>57</sup> The scope of "Records" is very broad and has no time limits. Records, essentially, includes everything related to the Company; and
- (d) Paragraph 7 of the Appointment Order compels third parties to give "unfettered access" to the Receiver of the Company's Records that are stored electronically (such as on servers).<sup>58</sup> It prohibits anyone from altering, erasing, or destroying these electronic Records without the Receiver's consent.

50. Any one of the above provisions in the Appointment Order granted the Receiver the right to the Company's privileged information – whether on the Company's Servers or in the possession of the Company's legal counsel. In any event, assertion of the Company's privilege against the Receiver would defeat the intentions of the Appointment Order.

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<sup>55</sup> Appointment Order, para. 3(i), MR, at p. 37, Compendium, Tab 1

<sup>56</sup> Appointment Order, para. 5, MR, at p. 39, Compendium, Tab 1

<sup>57</sup> Appointment Order, para. 6, MR, at p. 39, Compendium, Tab 1

<sup>58</sup> Appointment Order, para. 7, MR, at p. 40, Compendium, Tab 1

51. In *Russell & DuMoulin, Re*, the court stated that a company’s privileged information, including the records of the company’s lawyer:

[F]all within the expression ‘property of the Company’ in the order of [this court]. The receiver-manager is vested with the power to manage the affairs of the company and conduct its business .... The receiver-manager must have the right to obtain and make use of those records which would be available for use by the company ... to enable him to exercise that power in the place and stead of the company officers.<sup>59</sup>

52. Juan Guillermo rejects the Receiver’s request for Cambridge LLP to deliver up its files. The basis for this refusal is his claim that Cambridge LLP acts for him personally.<sup>60</sup> However, this claim is contradicted and unsustainable:

- (a) *Cambridge LLP’s December 31, 2019 Retainer Letter*. Cambridge LLP stated, “We have been retained by the Respondent, Xela Enterprises Ltd.”<sup>61</sup>
- (b) *Prior Motion Record*. Although Cambridge LLP’s August 21, 2020 Responding Motion Record is purportedly delivered on behalf of Juan Guillermo, its prior motion record, dated March 22, 2020, was delivered on behalf of the Company. The Receiver did not receive a notice of appearance from Cambridge LLP for Juan Guillermo, who has been unrepresented since early 2019 and is a judgment debtor in his individual capacity. Juan Guillermo has testified repeatedly that he has no money and no access to money (that would allow him to hire a lawyer);<sup>62</sup>
- (c) *Cambridge LLP’s May 4, 2020 letter*. In the letter’s headings, Cambridge LLP reports on “Collection by Xela” and “Cooperation by Xela” (emphasis added).<sup>63</sup> It

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<sup>59</sup> *Russell & DuMoulin*, at [para. 13](#), Compendium, Tab 16

<sup>60</sup> Juan Guillermo’s August 21, 2020 Affidavit, para. 27, RMR, at p. 11, Compendium, Tab 11

<sup>61</sup> Cambridge LLP’s December 31, 2019 Retainer Letter, Compendium, Tab 12

<sup>62</sup> Juan Guillermo’s Aug. 30, 2018 EAE, Q. 669-670, 672, 705 (among others), MR to Appoint, at pp. 433, 434, 442

<sup>63</sup> Appendix “M” to the Receiver’s Third Report (“**Cambridge LLP’s May 4, 2020 Letter**”), MR, at pp. 162 and 163, Compendium, Tab 7(m)

then sets out the Company's report on the Avicola Litigation and on the Receiver's efforts to obtain the Company's Property and Records.

Cambridge LLP repeatedly refers to the Company in the first person when discussing the Company's present and future intentions and/or actions. It says (emphasis added):

- “While Xela cannot speak for BDT, we understand that ...”,<sup>64</sup>
- “Xela and [Juan Guillermo] intend to continue cooperating with the Receiver”;<sup>65</sup> and
- “[W]e would request that the Receiver provide Xela with two categories of information.”<sup>66</sup>

(d) Juan Guillermo's August 21, 2020 Affidavit. In the affidavit filed by Cambridge LLP in response to this motion, Cambridge LLP is held out as representing the Company (emphases added):

- The Receiver's motion is a “is a surprise to Xela”;<sup>67</sup>
- “The May 4 Letter also set out the position regarding what Xela understood the remaining outstanding issues to be”;<sup>68</sup>
- The May 4, 2020 letter “shows good faith on Xela's part ... in trying to resolve all remaining issues”;<sup>69</sup>
- “Xela is prepared to work with the Receiver to resolve issues to document disclosure”;<sup>70</sup>
- “Xela's counsel [Cambridge LLP] is prepared to provide contact information and any consent necessary to give the Receiver unimpeded access to the storage unit in Barrie”;<sup>71</sup>
- “Xela will consent to providing the Receiver with unimpeded access to [the Company's Property and Records]”;<sup>72</sup>

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<sup>64</sup> Cambridge LLP's May 4, 2020 Letter, MR, at p. 163, Compendium, Tab 7(m)

<sup>65</sup> Cambridge LLP's May 4, 2020 Letter, MR, at p. 163, Compendium, Tab 7(m)

<sup>66</sup> Cambridge LLP's May 4, 2020 Letter, MR, at p. 164, Compendium, Tab 7(m)

<sup>67</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 2, RMR, at p. 1, Compendium, Tab 11

<sup>68</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 11, RMR, at p. 4, Compendium, Tab 11

<sup>69</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 12, RMR, at p. 5, Compendium, Tab 11

<sup>70</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 20, RMR, at p. 8, Compendium, Tab 11

<sup>71</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 20, RMR, at p. 9, Compendium, Tab 11

<sup>72</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 21, RMR, at p. 9, Compendium, Tab 11

- “Xela and I object to the notion that Xela may not assert its own privileges against the Receiver in these circumstances”;<sup>73</sup>
- “Xela believes the Receiver’s desire to retrieve Xela’s documents from ATS is counterproductive to the ultimate cause”;<sup>74</sup>
- “[T]he Receiver’s attitude toward Xela and me ....”<sup>75</sup>

53. Based on all the foregoing, Cambridge LLP purports to act for the Company. Juan Guillermo affirms this throughout his latest affidavit. His single statement that Cambridge LLP acts for him is not consistent with the bulk of the material filed. Particularly concerning is the suggestion that the Receiver requires “consent” to access the Company’s Property and Records. This is an affront to this court’s orders.

54. Even if privilege may have previously attached to Cambridge LLP’s files (which is denied), it was implicitly waived by the contents of the Responding Motion Record. The Receiver put access to Cambridge LLP’s files at issue in its motion record. Despite doing so, Cambridge LLP and Juan Guillermo did not unequivocally refute this claim. Instead, they affirmed it repeatedly. As such, even if privilege previously attached to Cambridge LLP’s files (which is denied), the statements in its August 21, 2020 responding motion record that refer to Cambridge LLP as the Company’s counsel demonstrate that privilege cannot be maintained as against the Receiver. Cambridge LLP’s files are the Records and Property of the Company. Pursuant to paragraphs 5 and 6 of the Appointment Order, Cambridge LLP must produce all its files to the Receiver.

55. One of Juan Guillermo’s primary bases for the assertion of the Company’s privilege is a concern about disclosure of privileged information to Margarita and the Cousins.<sup>76</sup> This

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<sup>73</sup> Juan Guillermo’s August 21, 2020 Affidavit, at para. 25, RMR, at p. 10, Compendium, Tab 11

<sup>74</sup> Juan Guillermo’s August 21, 2020 Affidavit, at para. 26, RMR, at p. 10, Compendium, Tab 11

<sup>75</sup> Juan Guillermo’s August 21, 2020 Affidavit, at para. 28, RMR, at p. 11, Compendium, Tab 11

<sup>76</sup> Juan Guillermo’s August 21, 2020 Affidavit, at para. 25, RMR at p. 10, Compendium, Tab 11

misconceives the role of the court-appointed Receiver and the law of privilege. The Receiver has not requested (and does not request) a waiver of privilege to permit it to share the Company's privileged information with Margarita, the Cousins, or anyone else.<sup>77</sup> The Receiver intends to preserve the Company's privilege. The Receiver requires the information sought to fulfill its duties to the court and the purposes for which it was appointed. If, in the opinion of the Receiver, a waiver of privilege is required, it will subsequently request the court's authorization to do so.

56. The Receiver should have control over the documents and servers of and related to the Company. This limited request is to put the Receiver in the position it should have been all along so that it can do its job.

**C. THIRD PARTIES: COMMUNICATION OF PRIVILEGED INFORMATION IS A WAIVER OF PRIVILEGE**

57. Juan Guillermo raises the spectre that, if the order is granted, "third party" privileged information may be accessed, but he does not identify which third parties or why the Company would be in possession of such third party information.

58. Solicitor-client privilege protects direct communications between a lawyer and client in connection with the provision of legal advice. The privilege is waived when the communication is intentionally sent to a third party.<sup>78</sup>

59. An intentional communication of privileged information to a third party is a waiver of privilege.<sup>79</sup> If a third-party shared privileged information with the Company (or vice-versa), then

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<sup>77</sup> Contrary to what is contained in Juan Guillermo's August 21, 2020 Affidavit, at para. 27, RMR, at p. 11, Compendium, Tab 11

<sup>78</sup> Robert W. Hubbard, et. al., *Law of Privilege in Canada*, (Thomson Reuters Canada Ltd: Toronto, 2020), "Summary of Solicitor-Client Privilege", at s. 11.10, Compendium, Tab 18

<sup>79</sup> *Law of Privilege in Canada*, "Summary of Solicitor-Client Privilege", at s. 11.10, Compendium, Tab 18



privilege was waived. Given Juan Guillermo's assertions that he has no control over EAI, EAI subsidiaries, and LISA, among others – any communications between Juan Guillermo (or anyone at the Company) and one of the Company's subsidiaries (direct or indirect) cannot be privileged information. Juan Guillermo cannot claim that the Company's subsidiaries are acting independently – and then claim privilege over those communications.

60. Moreover, Juan Guillermo's proposal would violate the law of privilege. He states, "I cannot identify those third parties without accessing and reviewing the data."<sup>80</sup> He proposes to protect the privilege of third parties by violating it on their behalf.

61. In summary, the information sought is either the Company's privileged information, which the Receiver is authorized to review, or privilege was waived by the third party when it sent its privileged information to the Company (or vice versa). Alternatively, any third-parties' privileged information will not be protected by permitting Juan Guillermo to review it before the Receiver does. Juan Guillermo should not be permitted to determine whether any of the information sought is someone's privileged material that can be withheld from the Receiver.

**D. THE INFORMATION SOUGHT IS NECESSARY FOR THE RECEIVER TO CARRY OUT ITS DUTIES**

62. Alternatively, if this court determines that a waiver of privilege is required to permit the Receiver to obtain the Company's privileged information, a waiver should be granted.

63. A receiver is entitled to all documents necessary for it carry out its duties under the appointment order.<sup>81</sup> Waivers are granted where the waiver is necessary for the receiver to fulfill

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<sup>80</sup> Juan Guillermo's August 21, 2020 Affidavit, at para. 24, RMR, at p. 10, Compendium, Tab 11

<sup>81</sup> *Greymac*, at paras. [57-58](#) and [60](#), Compendium, Tab 17

the purpose for which it was appointed.<sup>82</sup> In *Russell & DuMoulin, Re*, the court affirmed a waiver of privilege to the extent necessary for the receiver to fulfill its purposes.<sup>83</sup>

64. The information sought is necessary for the Receiver to fulfill its purpose and carry out its duties under the Appointment Order. It is necessary because the Company's assets and business have been removed from the Company. The Receiver must fulfill its obligations as a court-appointed officer to advise the court why it is, or is not, reasonable that the Company cannot satisfy the Judgment Debt. Requests for information have been inadequate, thwarted, and refused. Attempts to exercise the Company's shareholder rights have been blocked. The directors of the Company's direct and indirect subsidiaries (some of whom are the family of Juan Guillermo) have refused to recognize this court's orders. The information sought is necessary for the Receiver to discharge its duties to the court.

#### **PART IV - ORDER REQUESTED**

65. The Receiver respectfully requests that the order be granted in the form attached as Schedule "C" to this factum.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of August, 2020.




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per Peter H. Griffin




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per Monique J. Jilesen

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<sup>82</sup> *Greymac*, at [para. 60](#), Compendium, Tab 17

<sup>83</sup> *Russell & DuMoulin, Re*, at [para. 13](#), Compendium, Tab 16

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Lawyers for the Receiver

**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

1. *Castillo v. Xela*, 2015 ONSC 6671
2. *Ontario (Securities Commission) v. Greymac Credit Corp.*, 41 O.R. (2d) 328 (Div. Ct.)
3. *Russell & DuMoulin, Re*, 9 B.C.L.R. (2d) 265 (B.C.S.C.)
4. Robert W. Hubbard, et. al., *Law of Privilege in Canada*, (Thomson Reuters Canada Ltd: Toronto, 2020)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

#### *1. Courts of Justice Act, R.S.O. 1990, c. C.43*

##### *Injunctions and receivers*

**101** (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

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

##### DIRECTIONS

**41.05** A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee.

...

##### INTERIM ORDER FOR PRESERVATION OR SALE

**45.01** (1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party. R.R.O. 1990, Reg. 194, r. 45.01 (1).

(2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.

**SCHEDULE “C”**

**DRAFT ORDER**

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE  
JUSTICE MCEWEN

)  
)  
)

FRIDAY, THE 28<sup>TH</sup>  
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 AND DECLARES** as counsel to the Company, Cambridge LLP, shall deliver up access to all files in these proceedings for inspection by the Receiver within 14 days of this Order.

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*(Signature of Judge)*

MARGARITA CASTILLO  
Applicant

-and- XELA ENTERPRISE LTD. et al.  
Respondents

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

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

PROCEEDING COMMENCED AT  
TORONTO

**ORDER**

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Lawyers for the Receiver

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

**MOVING PARTY'S FACTUM  
(Receiver's Access to ATS Documents, returnable August  
28, 2020)**

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