

**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.

**FACTUM OF THE RECEIVER  
(Contempt – Penalty Hearing – Returnable September 14, 2022)**

September 9, 2022

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TO: **THE SERVICE LIST**

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**FACTUM OF THE RECEIVER**

**(Contempt – Penalty Hearing – Returnable September 14, 2022)**

**PART I - OVERVIEW**

1. This is the penalty phase of a contempt motion brought by KSV Restructuring Inc. in its capacity as the receiver and manager (the “**Receiver**”) of Xela Enterprises Ltd. (“**Xela**”). On June 29, 2022, Conway J. held Juan Guillermo Gutierrez in contempt of the Order of McEwen J. dated July 5, 2019 (the “**Appointment Order**”).

2. The Receiver seeks an order of 90 days’ imprisonment, a \$25,000 fine, and full indemnity costs of the contempt motion.

3. Deterrence and denunciation require that Mr. Gutierrez face an order of imprisonment. Mr. Gutierrez has not purged his contempt. He has acted in defiance of Court orders and the authority of the Receiver in this proceeding for years and has failed to take all the steps available to him to

ensure that the criminal complaint against the Receiver's representatives is withdrawn. Mr. Gutierrez's contempt and delay tactics have also interfered with the Receiver's efforts to investigate transactions that deprived Xela of all its value and transferred Xela's value to Mr. Gutierrez's family.

4. Only a significant sanction will deter Mr. Gutierrez's ongoing and unrelenting misconduct. The sanction sought is reasonable and proportionate in the circumstances.

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

### **A. LIABILITY HEARING**

5. On June 29, 2022, Conway J. held Mr. Gutierrez in contempt of Court. She found that Mr. Gutierrez intentionally breached the Appointment Order by swearing a declaration in support of a criminal complaint (the "**Declaration**") against representatives of the Receiver:

- (a) Mr. Gutierrez understood that he was not permitted to interfere with the Receiver's exercise of Xela's shareholder rights but did so intentionally;<sup>1</sup>
- (b) "he acted unilaterally and took matters into his own hands" rather than seeking relief or direction from this Court—even though he was an active participant in this Court's proceedings;<sup>2</sup> and

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<sup>1</sup> *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 4006 ("**Liability Decision**"), at [paras. 58 and 61](#)

<sup>2</sup> *Liability Decision*, at [paras. 55-57](#)

- (c) he knew “exactly what he was doing when he signed the Declaration,” in that the purpose of signing the Declaration was to file a criminal complaint in Panama against the Receiver’s Panamanian representatives.<sup>3</sup>
- (d) as a result:
  - (i) he purported to exercise authority on behalf of Xela contrary to the exclusivity granted to the Receiver in the Appointment Order;
  - (ii) he interfered with the Receiver’s exercise of its right to deal with the shareholdings of Xela, contrary to the restriction in s. 3(q) of the Appointment Order; and
  - (iii) he was “integrally involved in the bringing of a proceeding against the Receiver.”<sup>4</sup>

6. When considered in the context of Mr. Gutierrez’s conduct throughout this receivership, a “just” penalty necessitates a significant custodial sentence and a pecuniary award.<sup>5</sup>

## **B. LEGAL CONTEXT**

7. Having regard to the findings made at the liability hearing, this Court must consider the appropriate sanction.

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<sup>3</sup> Liability Decision, at [para. 33](#)

<sup>4</sup> Liability Decision, at [para. 61\(d\)](#)

<sup>5</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, at r. 60.11(5); *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, at [para. 89](#)

8. On a sanction hearing, the Court has broad discretion to make any order that is “just.”<sup>6</sup> A just penalty is a fact-specific inquiry involving the application of governing objectives and principles with consideration of established factors, assessed within their factual context.<sup>7</sup>

9. The purpose of a penalty in civil contempt is to enforce compliance with Court orders and to ensure societal respect for the Court.<sup>8</sup> Contempt of Court “rest[s] on the power of the court to uphold its dignity and process...The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.”<sup>9</sup>

10. Deterrence, both specific and general, is the most important objective in a civil contempt penalty.<sup>10</sup> The penalty for contempt should serve as a disincentive to the contemnor and others, who might be inclined to breach Court orders.<sup>11</sup>

11. At the penalty phase, courts are permitted to consider all evidence relevant to determining an appropriate penalty.<sup>12</sup> This can include the contemnor’s conduct leading up to and after a finding of contempt.<sup>13</sup> In assessing the evidence and determining the appropriate sentence, the Court should have regard to the following factors:

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<sup>6</sup> Rule 60.11(5), *Rules of Civil Procedure*; *Boily v. Carleton Condominium Corporation* 145, 2014 ONCA 574, at [para. 89](#)

<sup>7</sup> *College of Optometrists (Ontario) v. SHS Optical Ltd.*, 2008 ONCA 685, at [para. 103](#) (leave refused, [\[2008\] C.S.C.R. No. 506](#))

<sup>8</sup> *Boily v. Carleton Condominium Corporation* 145, 2014 ONCA 574, at [para. 79](#), citing *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065 (SCC), [1992 CanLII 29](#), at p. 1075

<sup>9</sup> *Carey v. Laiken*, 2015 SCC 17, at [para. 30](#) citing *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (SCC), 1992 CanLII 99, at [p. 931](#)

<sup>10</sup> *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 574, at [para. 105](#) citing *Niagara (Regional Municipality) Police Services Board v. Curran*, [2002] O.J. No. 179 (ONSC), 2002 CanLII 49405, at [para. 35](#)

<sup>11</sup> *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 574, at [para. 105](#)

<sup>12</sup> *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 574, at [paras. 121-128](#), citing *College of Optometrists of Ontario v. SHS Optical Ltd.*, 2008 ONCA 685 (see paras. [81-84](#), [103-104](#))

<sup>13</sup> *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, at paras. [106-107](#); *Thrive Capital Management Ltd. v. Noble 1324 Queen Inc.*, 2022 ONSC 4081, at [paras. 6-7](#)

- (a) the proportionality of the sentence to the wrongdoing;
- (b) the presence of mitigating or aggravating factors;
- (c) deterrence and denunciation;
- (d) the similarity of sentences in like circumstances; and
- (e) the reasonableness of a fine or imprisonment.<sup>14</sup>

### C. THE CHRONOLOGICAL FACTUAL CONTEXT

12. The Appointment Order was made in the context of a judgment in favour of Margarita Castillo.<sup>15</sup> The long history of the litigation, summarized briefly below, demonstrates that a significant penalty is necessary to deter future behaviour and ensure compliance with Court Orders.

13. The relevant history starts in 2015 with Newbould J.'s substantial findings of oppression against Mr. Gutierrez.<sup>16</sup> Following that judgment and a significant costs award made in 2015 (the "**Judgment Debt**" or "**Judgment**", as the case may be), the majority of the Judgment Debt remains outstanding seven years later.<sup>17</sup>

14. As McEwen J. found<sup>18</sup>, following the Judgment:

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<sup>14</sup> *Boily v. Carleton Condominium Corp.* 145, 2014 ONCA 574, at [para. 90](#)

<sup>15</sup> Liability Decision, at [para. 10](#)

<sup>16</sup> March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at para. 37, Exhibit X to Affidavit of Robert Kofman sworn September 8, 2022 (the "**2<sup>nd</sup> Kofman Affidavit**"), Further Supplementary Motion Record (the "**FSMR**"), Tab X, p. 1145, Caselines ("**CL**") [A2585](#); October 28, 2015 Reasons of Newbould J., 2015 ONSC 6671, at paras. 2, 16, 49-67, Exhibit B to the Affidavit of Robert Kofman, Sworn May, 4 2022 (the "**1<sup>st</sup> Kofman Affidavit**"), Supplementary Motion Record (the "**SMR**"), p. 15, CL [A16](#), [A18](#) and [A21-A25](#)

<sup>17</sup> Affidavit of Robert Kofman sworn September 8, 2022 (the "**2<sup>nd</sup> Kofman Affidavit**"), at para. 9, FSMR, Tab 1, p. 3, [CL A1443](#); Ms. Castillo's Notice of Motion for Appointment of Equitable Receiver dated January 15, 2019, Exhibit D to the 1<sup>st</sup> Kofman Affidavit, [CL A37](#)

<sup>18</sup> March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at para. 38, Exhibit X to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab X, p. 1145, [CL A2585](#)



- (a) shares of the Xela subsidiaries BDT & Arven were transferred to a trust (the “**EAI Transaction**”) benefitting Mr. Gutierrez’s family;
- (b) ATS was incorporated as a subsidiary to BDT with the sons as directors and officers. Xela was essentially shut down with certain assets sold to ATS; and<sup>19</sup>
- (c) LISA assigned most of the proceeds from the Avicola Litigation (the “**Assignment Transaction**”) to BDT.

15. In addition, in February 2020, LISA transferred its one-third interest in the Avicola Group to BDT—and therefore to the Trust (the “**Lisa Transaction**”) (collectively, the EAI Transaction, the Assignment Transaction, and the Lisa Transaction are the “**Reviewable Transactions**”).<sup>20</sup>

*(A) Non-Compliance with Court Orders*

16. Since virtually the outset of this receivership in July 2019, Mr. Gutierrez has failed to cooperate with the Receiver and has failed to comply with multiple orders. In addition to the behaviour which resulted in him being found in contempt, Mr. Gutierrez’s conduct throughout this proceeding shows a lack of respect for the Receiver, the Court, and the Court’s orders, all of which must be deterred and denounced.

17. On March 24, 2020, the Receiver obtained a production order requiring Mr. Gutierrez to answer 18 questions about the Reviewable Transactions. Mr. Gutierrez did not comply with the spirit of the Appointment Order which required Mr. Gutierrez to “forthwith advise the Receiver of

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<sup>19</sup> See also the Fourth Report of the Receiver dated January 18, 2021 (the “**Receiver’s Fourth Report**”), at ss. 4.1 to 4.2 (Exhibit 4 to the Contempt Proceedings), [CL A2995-A2999](#); March 25, 2021 Endorsement (unofficial transcription) of McEwen J, Exhibit X to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab X, p. 1119 [CL A2259](#)

<sup>20</sup> March 25, 2021 Endorsement, at para. 42, Exhibit X to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab X, p. 1146, [CL A2586](#)

the existence” of Xela’s electronic records.<sup>21</sup> Instead, he provided the same answer to 16 of the 18 questions. He said:

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.<sup>22</sup>

18. On August 28, 2020, the Receiver obtained an Order (on consent) compelling Mr. Gutierrez and ATS to provide the Receiver with cell phones, computers, and iPads containing Xela’s records.<sup>23</sup>

19. Mr. Gutierrez refused to comply with this Order. He took the position that his cell phone and iPad had “never been used to conduct business related to Xela” and that his cellphone was “used for personal purposes.”<sup>24</sup> However, this response directly contradicted prior sworn evidence that he constantly used his iPad and cellphone for Xela’s business.<sup>25</sup>

20. On October 27, 2020, this Court granted an Order setting out a protocol for the imaging and review of Mr. Gutierrez’s devices.<sup>26</sup>

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<sup>21</sup> July 5, 2019, Appointment Order (Exhibit F to the 1<sup>st</sup> Kofman Affidavit, which is Exhibit 2 to the Contempt Proceedings), at paras. 5-7, [CL A92-93](#)

<sup>22</sup> April 7, 2020 Cambridge Letter re Responses to Questions, Exhibit H to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab H, p. 853, [CL A2293](#); see also Receiver’s Fourth Report, at s. 3.2(2), Exhibit 4 to Contempt Proceedings, [CL A2990](#)

<sup>23</sup> August 28, 2020 Order of McEwen J. re Production, Exhibit I to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab I, p. 859, [CL A2299](#)

<sup>24</sup> September 29, 2020 Cambridge letter re Mr. Gutierrez’s Cellphone and iPad, Exhibit K to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab K, p. 875, [CL A2315](#); see also Receiver’s Fourth Report, s. 3.2(6), Exhibit 4 to Contempt Proceedings, at s. 3.2(6), [CL A2991](#)

<sup>25</sup> Transcript of Continued Examination in Aid of Execution of Juan Guillermo, August 30, 2018, Q. 951, 1069-1071, and 1093-1094, Exhibit C to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab C, pp. 139, 190-194, 200-204, CL [A1579](#), [A1630](#) and [A1640](#) ; see also Receiver’s Fourth Report, at s. 3.2(6), Exhibit 4 to Contempt Proceedings, [CL A2991](#)

<sup>26</sup> Order of McEwen J. re Protocol to Image Juan Guillermo Gutierrez’s Devices, Exhibit N to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab N, p. 882, [CL A2322](#)

21. Mr. Gutierrez was obliged to provide the devices for imaging by November 5, 2020. Mr. Gutierrez had travelled to Guatemala on October 26, 2020 and did not return to Canada until December 17, 2020. While he was in Guatemala, he swore the December 3, 2020 Declaration which is the subject of the contempt finding.<sup>27</sup>

22. When he did return to Canada on December 17, 2020, he did not immediately provide his devices for imaging, and when he did, he did so on the condition that the images be downloaded to a password protected hard drive that the Receiver could not access (the “**JG Hard-Drive**”).<sup>28</sup> This was not in compliance with the August 28, 2020 or October 27, 2020 Orders. As described by McEwen J.:

Juan Guillermo, contrary to the terms of the above orders, has refused to permit the devices to be imaged, without being uploaded to a password protected drive.<sup>29</sup>

23. On January 18, 2021, the Receiver brought a motion to compel production of the passwords to the JG Hard-Drive and access to emails on ATS’s servers. Two days later, on January 20, 2021, Mr. Hals filed the criminal complaint supported by the Declaration.<sup>30</sup>

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<sup>27</sup> December 3, 2020 Declaration sign by Mr. Gutierrez in Guatemala, Exhibit P to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab P, p. 898, [CL A2338](#); see also Receiver’s Fourth Report, s. 3.2(6), Exhibit 4 to Contempt Proceedings [CL A2991](#), and see also the February 28, 2022 Fifth Report of the Receiver (the “**Receiver’s Fifth Report**”), at s. 3.1(2)(i), Exhibit O to the 1<sup>st</sup> Kofman Affidavit, SMR, p. 1306, [CL A1317](#)

<sup>28</sup> 2<sup>nd</sup> Kofman Affidavit, paras. 28-29, FSMR, Tab 1, p. 7, [CL A1447](#); see also Receiver’s Fourth Report, at s. 6.1(3), Exhibit 4 to the Contempt Proceedings, [CL A3003](#)

<sup>29</sup> March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at para. 4, Exhibit X to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab X, p. 1143, [CL A2583](#)

<sup>30</sup> January 20, 2021 Criminal Complaint Certified (English), Exhibit T to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab T, p. 932, [CL A2372](#) and December 3, 2020 Declaration sign by Mr. Gutierrez, Exhibit P to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab P, p. 898, [CL A2338](#); see also Receiver’s Fifth Report, at s. 3.1(2)(i), Exhibit O to the 1<sup>st</sup> Kofman Affidavit, SMR, p. 1306, [CL A1317](#)

24. On February 9, 2021, the Receiver brought this contempt motion. On the same date, ATS brought a motion to discharge the Receiver. On February 10, 2021, McEwen J. expressed the view that the criminal complaint and supporting declaration were, *prima facie*, a collateral attack on the Appointment Order.<sup>31</sup> He ordered Mr. Gutierrez to withdraw his Declaration, take certain other steps and to do everything in his power to have the criminal complaint withdrawn.<sup>32</sup> On February 12, 2021, Mr. Gutierrez swore an affidavit purporting to comply with McEwen J.'s February 10, 2021 Order.<sup>33</sup>

25. Notwithstanding McEwen J.'s denunciation of his conduct on February 10, 2021, Mr. Gutierrez remained defiant of the production orders. Following a contested motion, on March 25, 2021, the Court found that Mr. Gutierrez had failed to comply with the prior Court orders and ordered him to immediately provide the Receiver with the passwords to unlock and access the data on the JG Hard-Drive. The Court also directed ATS to produce Mr. Gutierrez's emails in its possession to the Receiver within 14 days.<sup>34</sup>

26. Justice McEwen ordered substantial indemnity costs as a result of the failure to comply with the Orders:

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<sup>31</sup> February 10, 2021 Order and Endorsement of McEwen J., Exhibit L of the 1<sup>st</sup> Kofman Affidavit, SMR, p. 580, Caselines page [A580](#)

<sup>32</sup> 2<sup>nd</sup> Kofman Affidavit, at para. 34, FSMR, Tab 1, p. 8, [CL A1448](#); February 10, 2021 Order and Endorsement of McEwen J., 1<sup>st</sup> Exhibit L of the 1<sup>st</sup> Kofman Affidavit, SMR, p. 580, [CL A580](#)

<sup>33</sup> February 12, 2021 Affidavit of Juan Gutierrez, Exhibit W to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab W, p. 1001, [CL A2441](#)

<sup>34</sup> March 25, 2021 Endorsement of McEwen J. (Exhibit 13 to the Contempt Proceedings), Exhibit X to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab X, p. 1119, [CL A2559](#); March 25, 2021 Order of McEwen J., Exhibit Y to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab Y, p. 1149, [CL A2589](#)

Court orders ... cannot be ignored without consequence.... this is one of those rare cases where substantial indemnity costs are warranted. The actions of [Mr. Gutierrez] and ATS are worthy of sanction.<sup>35</sup>

...

[T]he Receiver incurred unnecessary and additional costs in responding to the non-compliance and allegations of [Mr. Gutierrez] and ATS.... Such relief is particularly sensible where the Court seeks to prevent abuses of the Court's procedure – in this case non-compliance with Court Orders and the commencement of the proceedings in Panama against Hatstone, which was supported by [Mr. Gutierrez].<sup>36</sup>

27. Notwithstanding this strong denunciation of their conduct, neither Mr. Gutierrez nor ATS complied with the March 25, 2021 Order even after leave to appeal was dismissed in July, 2021.<sup>37</sup>

28. They also both failed to pay the costs award within the 60 days provided for and refused to attend an examination in aid of execution in respect of the costs award (costs were eventually paid on December 6, 2021).<sup>38</sup>

29. Mr. Gutierrez thereafter raised a myriad of reasons why compliance with the March 2021 Order should be delayed or enjoined. For months, Mr. Gutierrez represented to the Court that at least \$5 million would be advanced by an investor (Taras Volgemut) to the benefit of the receivership and that as a result a motion to terminate the receivership would be brought.<sup>39</sup>

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<sup>35</sup> July 28, 2021 Endorsement of McEwen J. (unofficial transcription), Exhibit DD to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab DD, at p. 1195

<sup>36</sup> July 28, 2021 Endorsement of McEwen J. (unofficial transcription), at para. 19, Exhibit DD to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab DD, p. 1195, [CL A2635](#)

<sup>37</sup> July 9, 2021 Endorsement of the Divisional Court re Dismissal of Motion for Leave to Appeal, Exhibit BB to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab BB, p. 1189, [CL A2629](#)

<sup>38</sup> Kofman 2<sup>nd</sup> affidavit, at paras. 47-48, FSMR, Tab 1, p. 11, [CL A1451](#); see also the Receiver's Fifth Report, at s. 2.1(7), Exhibit O to the 1<sup>st</sup> Kofman Affidavit, SMR, p. 1306, [CL A1317](#)

<sup>39</sup> Endorsement of McEwen J. re Case Conference and Funding, Exhibit FF to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab FF, p. 1219, [CL A2659](#) and December 1, 2021 Affidavit of Taras Volgemut, Exhibit MM to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab MM, at p. 1247, [CL A2687](#); see also the Receiver's Fifth Report, Exhibit O to the 1<sup>st</sup> Kofman Affidavit, SMR, p. 1306, [CL A1306](#)

30. Case conferences were held in September and December, 2021 and January 24, 2022. Each time the promised funding did not materialize.<sup>40</sup> The funding has still not materialized.<sup>41</sup>

31. On December 14, 2021, Mr. Gutierrez voluntarily attended for an interview with the Panamanian prosecutor at the Panamanian consulate in Toronto. He did not advise the Receiver before attending the interview, nor did he instruct his lawyers to seek the direction of the Ontario Court before going to the interview.<sup>42</sup>

32. Mr. Gutierrez took no steps in the meeting with the prosecutor to correct the statements in his Declaration contrary to McEwen J.'s February 10, 2021 Order (which ordered him to take all steps within his power to have the criminal complaint withdrawn).<sup>43</sup> Instead, Mr. Gutierrez testified:

I did exactly what I was told, and its was do not get involved, and I did not get involved. I only said to the prosecutor that I was not in those meetings because she asked me specific questions, and she tried to ask more, and I told her I couldn't, I, I couldn't say anything else because I was under a court order not to get involved.<sup>44</sup>

...

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<sup>40</sup> 2<sup>nd</sup> Kofman Affidavit, paras. 41-42, 46, FSMR, Tab 1, pp. 10-11, [CL A1450](#); September 16, 2021 Affidavit of Taras Volgemut, Exhibit EE to the 2<sup>nd</sup> Kofman Affidavit, FSMR, p. 1214, [CL A2654](#); September 17, 2021 Endorsement of McEwen J. re Case Conference and Funding, Exhibit FF to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab FF, p. 1219, [CL A2659](#); December 1, 2021 Affidavit of Taras Volgemut, Exhibit MM to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab MM, p. 1247, [CL A2687](#); December 2, 2021 Endorsement of McEwen J. re funding and productions, Exhibit NN to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab NN, p. 1253, [CL A2693](#); January 24, 2022 Endorsement of McEwen J. re productions, Exhibit PP to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab PP, p. 1263, [CL A2703](#); March 2, 2022 Endorsement of McEwen J re productions and contempt motion, Exhibit QQ to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab QQ, p. 1265, [CL A2705](#); March 9, 2022 Endorsement of McEwen J. re productions, Exhibit SS to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab SS, p. 1272, [CL A2712](#); March 17, 2022 Endorsement of McEwen J. re compliance, Exhibit TT to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab TT, p. 1276, [CL A2716](#)

<sup>41</sup> March 25, 2022 Endorsement of McEwen J. re Compliance with Production Orders at para. 21, Exhibit WW to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab WW, p. 1338, [CL A2778](#)

<sup>42</sup> Transcript of Hearing – June 2, 2022, Cross-Examination of J. Gutierrez, q. 842-846, [CL A2938](#)

<sup>43</sup> February 10, 2021 Order of McEwen J., Exhibit L to the 1<sup>st</sup> Kofman Affidavit, SMR, p. 587

<sup>44</sup> Transcript of Hearing – June 2, 2022, Cross-Examination of J. Gutierrez, q. 801, [CL A2933](#)

Then I explained to her [the Prosecutor] the Justice McEwen's instructions, and, I say, I, I just came here to answer, to attest that I personally was not present in any of the meetings. That's all.<sup>45</sup>

33. It was put to Mr. Gutierrez at the contempt motion that he did not request the prosecutor to withdraw the criminal complaint. His answer was "I couldn't ask her that."<sup>46</sup> Mr. Gutierrez remained adamant and defiant during his cross-examination that there was nothing he could do to withdraw the criminal complaint. But he could have sought instructions from this Court as to what to do before attending a meeting with the prosecutor. He could have told the prosecutor that the Receiver was the rightful representative of Xela and that the Court had ratified the January 2020 Gabinvest Resolution, but he did none of that.

34. As to the production orders, they remained outstanding. Eventually, McEwen J.'s patience waned. Four case conferences were held in March 2022:

- (a) on March 2, 2022, McEwen J. noted:
  - (i) that "the long anticipated funds from Mr. Volgemut have still not arrived. This matter must move along for this reason and number of other reasons set out in the Receivers Fifth Report (see in particular page 3 para 3; pp. 13-14)"<sup>47</sup>; and
  - (ii) that productions were to be provided "immediately";
- (b) on March 9, 2022, McEwen J. ordered that "counsel for [Mr.] Gutierrez/ATS and the Receiver shall co-operate to ensure the smooth flow of documents occurs"<sup>48</sup>; and
- (c) On March 17, 2022, McEwen J. noted that this was "another case conference today with respect to the issue of compliance with my previous orders of Aug [28, 2020],

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<sup>45</sup> Transcript of Hearing – June 2, 2022, Cross-Examination of J.Gutierrez, q. 871, [CL A2941](#)

<sup>46</sup> Transcript of Hearing – June 2, 2022, Cross-Examination of J.Gutierrez, q. 873, [CL A2942](#)

<sup>47</sup> March 2, 2022 Endorsement of McEwen J. re productions and contempt motion, Exhibit QQ to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab QQ, p. 1265, [CL A2705](#)

<sup>48</sup> March 9, 2022 Endorsement of McEwen J. re productions, Exhibit SS to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab SS, p. 1272, [CL A2712](#)

Oct [27, 2020] and March [25, 2021].” His Honour ordered Mr. Gutierrez to provide the passwords to the JG Hard-Drive “forthwith”.<sup>49</sup>

35. On March 25, 2022, McEwen J. ordered Mr. Gutierrez to provide the passwords to the JG Hard-Drive by 5 pm on March 28, 2022 and ordered ATS to provide Mr. Gutierrez’s emails by 5 pm on the same date (the “**March 2022 Order**”).

36. In that context McEwen J. addressed the recent history of the proceeding, including a motion brought by Mr. Gutierrez to stay enforcement of the orders on the basis of alleged misconduct of the Receiver. Justice McEwen concluded that the motion was an attempt to delay compliance with the orders:

...

At today’s case conference counsel for Mr. Gutierrez advised that they wished me to defer the issues concerning access and production as they wished to bring a motion for injunctive relief staying the enforcement of my aforementioned orders, based on a draft Notice of Motion provided shortly before the case conference began.

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

...

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

I made the above order for a number of reasons.

...

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<sup>49</sup> March 17, 2022 Endorsement of McEwen J. re compliance, Exhibit TT to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab TT, p. 1276, [CL A2716](#)



[I]t bears noting that Mr. Gutierrez has for several months contested production of the passwords. Notwithstanding the three consent orders of Aug/20 and Oct 27/2020(2) Mr. Gutierrez did not make any production or provide passwords. This led to the March 25/21 order where I again, ordered the disclosure of Mr. Gutierrez's passwords (among other things). Again, there has not been compliance.

...

Fifth, compliance with my aforementioned Orders take a backseat in the fall of 2021 when Mr. Gutierrez claimed to have financing to pay the [Judgment Debt]. I paused the access production issues to determine if the funding could lead to resolution.

Many months have passed with Mr. Gutierrez offering various excuses as to why payment has not been made and financing not secured. The latest blames the action of the Receiver in Feb/22, but several months passed before that date without the promised funding arriving which was first promised in Sept/21.

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

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

Sixth, I have made no finding of any misconduct against the Receiver. I have however been critical of Mr. Gutierrez particularly with respect to the initiating of a criminal complaint in Panama against the Receiver's agents which I ordered be withdrawn. Mr. Gutierrez's involvement in the Panama matter was initiated without his Canadian solicitor's knowledge and I was of the view that the criminal complaint was a prima facie attack on my previous order in which specific rights were granted to the Receiver concerning the Panamanian company Gabinvest SA.

Seventh, it was only today that Mr. Gutierrez raised the issue of an injunction, after previous attempts to restrict Epiq's access failed. None of the issues raised in the draft Notice of Motion were mentioned in the earlier conferences. Of all of the issues only the elevated criminal charges against "the Nephews" has surfaced in the past few days.

In my view, given all of the above, I believe that the latest proposed motion is an attempt to further delay the compliance with my earlier orders concerning access/production.<sup>50</sup>

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<sup>50</sup> March 25, 2022 Endorsement (unofficial transcription) of McEwen J. re compliance with Production Orders, at paras. 5-24, Exhibit WW of the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab WW, pp. 1336-1338, [CL A2776](#)

37. Mr. Gutierrez sought leave to appeal the March 2022 Order.<sup>51</sup> No stay was granted.<sup>52</sup> The leave to appeal motion was abandoned by Mr. Gutierrez.<sup>53</sup>

38. On May 20, 2022, the parties and the Receiver attended another case conference before McEwen J. Mr. Gutierrez sought to schedule a motion to replace the Receiver. Justice McEwen did not schedule that motion. Justice McEwen reaffirmed his March 2021 Order and noted that:

My orders of March [2021] and March [2022] are clear and unequivocal. They must be complied with.<sup>54</sup>

39. Despite this endorsement, no productions were made.

40. The contempt motion was heard between May 30 and June 16, 2022. The reasons were released on June 29, 2022.

41. On July 6, 2022, counsel for Mr. Gutierrez wrote to Mr. Hals in which he advised that he had been “requested by Mr. Gutierrez to renew his clear and unequivocal request” in his letter to Mr. Hals of February 11, 2021 “to withdraw the criminal complaint in Panama and to ensure that his statement of December 3, 2020 not be used or relied upon...”<sup>55</sup>

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<sup>51</sup> 2<sup>nd</sup> Kofman Affidavit, at paras. 50-51, FSMR, Tab 1, p. 12, [CL A1452](#); Notice of Motion of Mr. Gutierrez for Leave to Appeal, Exhibit ZZ to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab ZZ, p. 1362, [CL A2802](#)

<sup>52</sup> 2<sup>nd</sup> Kofman Affidavit, at paras. 50-52, FSMR, Tab 1, p. 12, [CL A1452](#)

<sup>53</sup> 2<sup>nd</sup> Kofman Affidavit, at paras. 50-52, FSMR, Tab 1, p. 12, [CL A1452](#); April 29, 2022 Cambridge Email re Abandoning the Motion for Leave to Appeal, Exhibit AAA of the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab AAA, p. 1378, [CL A2818](#)

<sup>54</sup> May 20, 2022 Endorsement of McEwen J. re Form of Order and Motion to Replace Receiver, Exhibit BBB to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab BBB, p. 1389, [CL A2829](#)

<sup>55</sup> July 6, 2022 Letter from B. Greenspan to H. Hals re Juan Guillermo Gutierrez, Exhibit CCC2 to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab CCC2, p. 1397 [CL A2837](#)

42. There is no evidence that Mr. Gutierrez took any steps whatsoever after the contempt ruling to communicate with the Panamanian prosecutor to withdraw or correct his December 3, 2020 Declaration.

43. At the same time, the document production orders remained outstanding with no compliance from Mr. Gutierrez or ATS. On July 22, 2022, at another case conference, McEwen J. stated:

Significantly, Mr. Gutierrez has still, inexplicably, failed to comply with my production orders, long outstanding, nor did he provide any explanation in his case conference brief for failing to do so, or at the hearing for that matter.<sup>56</sup>

44. It was not until August 23, 2022, three days before a case conference with Conway J. to implement a timetable for the penalty hearing, that counsel for Mr. Gutierrez contacted counsel for the Receiver to make arrangements for compliance with the March 2021 and March 2022 Orders.<sup>57</sup>

45. Similarly, it was not until August 31, 2022 that ATS's counsel was in contact with counsel for the Receiver to make arrangements for compliance with the Order.<sup>58</sup>

46. Since August 2020, this Court has issued four formal production Orders against Mr. Gutierrez (August 28, 2020, October 27, 2020, March 25, 2021, and March 25, 2022) and numerous endorsements. Until the eve of this hearing, Mr. Gutierrez defied them all.

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<sup>56</sup> July 22, 2022 Endorsement of McEwen J. re Refusal to Schedule Motion, Exhibit EEE to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab EEE, p. 1406, [CL A2846](#)●

<sup>57</sup> 2<sup>nd</sup> Kofman Affidavit, at para. 61, FSMR, Tab 1, p. 14, [CL A1454](#)

<sup>58</sup> 2<sup>nd</sup> Kofman Affidavit, at para. 64, FSMR, Tab 1, p. 14, [CL A1454](#)

47. Mr. Gutierrez has engaged in a long and sustained course of deliberate conduct, which indicates a belief that he is not subject to the authority of this Court. The success of this (and any receivership) requires compliance with and respect for Court Orders.

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

#### ***(ii) The proportionality of the penalty to the wrongdoing***

48. Proportionality requires the penalty to fit the wrongdoing.<sup>59</sup> In this case, the gravity of Mr. Gutierrez's conduct is one of the gravest offences that could be perpetrated against this Court. There are no cases in Ontario in which the contemnor has participated in a scheme to imprison a court officer for carrying out this Court's orders. The Receiver, an officer of the court, is "a person who is charged with upholding the law and administering the judicial system."<sup>60</sup> By advancing criminal proceedings against an officer of this Court, Mr. Gutierrez's conduct transcends the limits of a dispute between litigants and constitutes an affront to the administration of justice as a whole.<sup>61</sup>

49. The seriousness of Mr. Gutierrez's contempt warrants the most severe sanction. The only proportionate penalty is a meaningful custodial sentence.

50. Indeed, courts have held that a custodial sentence is proportional in less egregious circumstances—such as mere interference with a court officer or disregard for court orders:

- (a) in *Sussex Group Ltd. v. Fangeat* and in *Central 1 Credit Union v. UM Financial Inc.*, the Court imposed a sentence of 6-months' imprisonment for deliberate

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<sup>59</sup> *Boily v. Carleton Condominium Corp.* 145, 2014 ONCA 574, at [para. 91](#)

<sup>60</sup> *Re D'Angelo Estate*, 2010 ONSC 7244, at [para. 30](#)

<sup>61</sup> *B.C.G.E.U. v. British Columbia (Attorney General)* ("**B.C.G.E.U.**"), 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at [para. 41](#); *United Nurses of Alberta v. Alberta (Attorney General)*, [1992 CanLII 99 \(SCC\)](#), [1992] 1 SCR 901

interference with a Court-appointed manager and receiver, respectively.<sup>62</sup> In those cases, the interference related to interference with managing the business of the company; there was no personal attack on the physical liberty of a court-officer, as in this case; and

- (b) complete disregard for other court orders may warrant a custodial sentence, especially when the non-compliance is part of a sustained course of conduct. In *Cellupica v. Di Giulio*, the Court imposed a 90-day sentence for a single breach of a Court order. The contemnor was evading payment of judgment debt and had refused to produce financial information. He was ordered to appear for examination in aid of execution, which he ignored. The Court held that a custodial sentence was required to preserve the integrity of the legal process and Court orders.<sup>63</sup>

**(iii) *The presence of mitigating and aggravating factors***

51. A sentence should be increased or reduced to account for aggravating or mitigating factors.<sup>64</sup> A party seeking to rely on a mitigating factor in contempt proceedings must establish that factor on a balance of probabilities.<sup>65</sup> In this case, there are no mitigating factors and several aggravating factors.

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<sup>62</sup> *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (ONSC), at paras. 67-69, Book of Authorities of the Receiver (the “BOA”), Tab 2; *Sussex Group Ltd. v. 3933938 Canada Inc.*, [2003] O.J. No. 2906 (ONSC), 2003 CanLII 49336, at [para. 55](#); *Central 1 Credit Union v. UM Financial Inc.*, [2012 ONSC 889](#); see also *Merchants Consolidated Ltd. (Receiver of) v. Canstar Sports Group Inc.*, 113 D.L.R. (4<sup>th</sup>) 505 (MBCA), [1994 CanLII 10974](#)

<sup>63</sup> *Cellupica v. Di Giulio*, 2011 ONSC 1715, at [para. 41](#)

<sup>64</sup> *Boily v. Carleton Condominium Corp.* 145, 2014 ONCA 574, at [para. 129](#)

<sup>65</sup> *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, at [paras. 50-52](#)

52. ***Attack on Court officers.*** The contempt found by this Court is a breach of the Appointment Order. It is an aggravating factor that Mr. Gutierrez “knew that the purpose of signing the Declaration was to file a criminal complaint in Panama” against the Receiver’s representatives.<sup>66</sup>

53. In *Sussex Group Ltd. v. Fangeat*, the Court counted as a significant aggravating factor the fact that the contemnor had undermined the Court-appointed Interim Manager’s mandate by attempting to deplete the corporation’s assets and personally enrich himself and related parties.<sup>67</sup>

54. ***Mr. Gutierrez’s family financially benefits from the contempt.*** When a contemnor benefits financially from their contempt, this will also be an aggravating factor.<sup>68</sup> In this case, Mr. Gutierrez’s family benefits from the Reviewable Transactions. The criminal complaint and Declaration protected (or delayed) the Receiver’s investigations into the Reviewable Transactions for the benefit of Mr. Gutierrez’s family.

55. ***It is impossible for the contempt to be purged.*** When he allowed his Declaration to be filed as part of the criminal complaint, Mr. Gutierrez started a process that was no longer within his control. When it is impossible for the contemnor to purge their contempt because of their own misconduct, this may constitute an aggravating factor on sentencing.<sup>69</sup> In *Manis v. Manis*, the Court of Appeal for Ontario upheld a six-month sentence for the breach of a single Court order. The contemnor was unable to remove and discharge a mortgage he had registered against his

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<sup>66</sup> Liability Decision, at [para. 33](#)

<sup>67</sup> *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (ONSC), at paras. 67-69, BOA, Tab 2; *Sussex Group Ltd. v. 3933938 Canada Inc.*, [2003] O.J. No. 2906 (ONSC), 2003 CanLII 49336, at [para. 55](#); *Merchants Consolidated Ltd. (Receiver of) v. Canstar Sports Group Inc.*, 113 D.L.R. (4<sup>th</sup>) 505 (MBCA), [1994 CanLII 10974](#)

<sup>68</sup> *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, at [para. 88](#); *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (ONSC), at paras. 21-22, BOA, Tab 2

<sup>69</sup> *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, at [para. 88](#); *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (ONSC), at para. 56, BOA, Tab 2

matrimonial home, as the Court had ordered him to do. This was not a mitigating factor because the inability to discharge the mortgage resulted from his own contemptuous conduct.<sup>70</sup>

56. **Breach of multiple court orders.** Ongoing defiance of other Court orders will also be an aggravating factor.<sup>71</sup> In *Korea Data Systems v. Chiang*, the Court imposed a custodial sentence of one year against Mr. Chiang and eight months against Ms. Chiang. They evaded payment of a judgment debt and then breached several production orders.<sup>72</sup> On appeal, the sentence was reduced because the Chiangs had not been given proper notice.<sup>73</sup> However, the Court of Appeal held that, but for the factual error with respect to notice, the sentences were entirely fit.<sup>74</sup>

57. Similarly, Mr. Gutierrez has refused to comply with several production Orders. He has engaged in a blatant and sustained course of conduct, which indicates a belief that he is not subject to this Court's authority. Mr. Gutierrez has had repeated reminders from McEwen J. that these Orders still stand and apply to him with full force.<sup>75</sup>

58. **There are no mitigating factors.** No mitigating factors are present.<sup>76</sup> Mr. Gutierrez has not apologized and did not plead guilty to contempt.<sup>77</sup> Instead, he denied knowing the

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<sup>70</sup> *Manis v. Manis*, [2001] O.J. No. 3672 (ONCA), 2001 CanLII 3851, at [paras. 30-31](#)

<sup>71</sup> *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, [2009] O.J. No. 888 (ONSC), 2009 CanLII 9423 at paras. [32-33](#), [44](#); *Niagara (Regional Municipality) Police Services Board v. Curran*, [2002] O.J. No. 179, [2002 CanLII 49405](#) (ONSC)

<sup>72</sup> *Korea Data Systems Co. v. Chiang*, [2009 ONCA 3](#)

<sup>73</sup> *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, at [para. 101](#)

<sup>74</sup> *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, at [para. 85](#)

<sup>75</sup> May 20, 2022 Endorsement of McEwen J. re Form of Order and Motion to Replace Receiver, Exhibit BBB to the 2<sup>nd</sup> Kofman Affidavit, FSMR, Tab BBB, p. 1389 [CL A2829](#)

<sup>76</sup> *IMAX Corp. v. Trotum Systems Inc.*, [2013 ONSC 743](#)

<sup>77</sup> *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, at [para. 87](#); *Niagara (Regional Municipality) Police Services Board v. Curran*, [2002] O.J. No. 179 (ONSC), at [para. 32](#); *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, [2009] O.J. No. 888, 2009 CanLII 9423 (ONSC), at [para. 22](#); *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534

Declaration's purpose, and he denied that he was fully aware of its contents.<sup>78</sup> Justice Conway made findings adverse on both points.

59. Mr. Gutierrez helped set in motion a criminal process that may have irreversible, life-changing consequences on the representatives of a Court officer. The potential consequences of his initial action are so grave—threatening the physical liberty of Court officers—that it cannot be mitigated by Mr. Gutierrez's supposed lack of control over the future process.

*(iv) Deterrence and denunciation*

60. Deterrence, both specific and general, is the most important objective in a contempt penalty.<sup>79</sup> Nothing to date has deterred Mr. Gutierrez from failing to comply with this Court's Orders. Justice McEwen's substantial indemnity costs Order in July 2021 did not deter Mr. Gutierrez. Three years after the Receiver's appointment, Mr. Gutierrez and his sons at ATS had not produced Xela's records. Only in the last three weeks have Mr. Gutierrez or ATS attempted to comply with the production Orders.

61. Courts show little regard to attempts to purge one's contempt on the eve of sentencing.<sup>80</sup> Complying with Court orders (which parties have disregarded for years) only after a finding of contempt does not demonstrate respect for the rule of law and Court orders. Mr. Gutierrez and ATS's compliance on the eve of this penalty hearing should not reassure this Court that deterrence and denunciation are no longer relevant.

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<sup>78</sup> Liability Decision, at [paras. 33](#) and [61\(d\)](#)

<sup>79</sup> *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 574, at [para. 105](#); *Oakley Manufacturing v. Bowman*, [2005] O.J. No. 5318 (ONSC), at para. 22, BOA, Tab 1

<sup>80</sup> *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, [2009] O.J. No. 888, 2009 CanLII 9423 (ONSC), at [para. 44](#)



(v) *The similarity of sentences in like circumstances*

62. A sentence should reflect sentences imposed in similar circumstances.<sup>81</sup> There is no similar case in Ontario. However, meaningful lengths of imprisonment have been ordered in the following, less egregious, circumstances:

- (c) in *Sussex Group Ltd. v. Fangeat*, a contemnor was sentenced to six-months' imprisonment for conducting business in a way that interfered with a Court officer's (Interim Manager's) mandate;<sup>82</sup>
- (d) in an associated decision, a contemnor was sentenced to six-months' imprisonment for failing to produce all relevant records;<sup>83</sup> and
- (e) in *Milligan v. Lech*, a contemnor was sentenced to 12 months' imprisonment for refusing to produce materials and attend for examinations.<sup>84</sup>

63. Courts have regularly imposed significant custodial sentences and financial penalties for failures to comply with production orders.<sup>85</sup> While no contempt case in Ontario involves such an affront to the Canadian justice system, cases have imposed significant custodial sentences and financial penalties.

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<sup>81</sup> *Astley v. Verdun*, 2014 ONSC 7136, at [para. 7](#); *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 574, at [paras. 110-111](#)

<sup>82</sup> *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (ONSC), BOA, Tab 2

<sup>83</sup> *Sussex Group Ltd v. Sylvester*, [2002] O.J. No. 4350, [2002 CanLII 27188](#) (ONSC); *Sussex Group Ltd. v. 3933938 Canada Inc.*, [2003] O.J. No. 2906, [2003 CanLII 49336](#) (ONSC)

<sup>84</sup> *Milligan v. Lech*, [2006] O.J. No. 4700, 2006 CanLII 39457 (ONCA), at [para. 3](#)

<sup>85</sup> *Ontario Securities Commission v. Robinson*, [2010 ONSC 225](#); *Thrive Capital Management Ltd. v. Noble 1324 Queen Inc.*, [2022 ONSC 4081](#); *Cellupica v. Di Giulio*, [2011 ONSC 1715](#)

(vi) *The reasonableness of imprisonment and a fine*

64. Imprisonment is reasonable where it is necessary to achieve the penalty objectives. In this case, a consideration of the relevant factors in context shows the reasonableness of a significant custodial sentence and a pecuniary award.

65. A breach of a Court order that shows disrespect for the Court's authority or a flagrant disregard for this Court's orders will attract a custodial sentence and financial penalty.<sup>86</sup> In this case, a significant custodial sentence and financial penalty are warranted.

66. The evidence for each of the relevant factors support the penalties sought. The penalties are proportionate to the wrongdoing; there are numerous aggravating factors and no mitigating factors; no other form of judicial sanction will deter Mr. Gutierrez; the conduct is an egregious affront to the Canadian judicial system; and the penalties are reasonable in the circumstances.

**PART IV - ORDER REQUESTED**

67. The Receiver requests an Order:

- (a) imprisoning Mr. Gutierrez for 90 days; and
- (b) requiring him to pay a fine of \$25,000 as well as the Receiver's full indemnity costs.

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<sup>86</sup> *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at [paras. 85, 87, 95](#); *Oakley Manufacturing Inc. v. Bowman*, [2005] O.J. No. 5318 (ONSC), at paras. 21-24, BOA, Tab 1; *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, [2009] O.J. No. 888, [2009 CanLII 9423](#) (ONSC); *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (ONSC), at para. 77, BOA, Tab 2; *Cellupica v. Di Giulio*, 2011 ONSC 1715, at [paras. 48-49](#); *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, [2009] O.J. No. 888, 2009 CanLII 9423 (ONSC), at [para. 44](#)

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9<sup>th</sup> day of September, 2022.

per *Derek Knoke*

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the Receiver, KSV Restructuring Inc.

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

1. *Astley v. Verdun*, [2014 ONSC 7136](#)
2. *Boily v. Carleton Condominium Corporation 145*, [2014 ONCA 574](#)
3. *Business Development Bank of Canada v. Cavalon Inc.*, [2017 ONCA 663](#)
4. *Carey v. Laiken*, [2015 SCC 17](#)
5. *Cellupica v. Di Giulio*, [2011 ONSC 1715](#)
6. *Central 1 Credit Union v. UM Financial Inc.*, [2012 ONSC 889](#)
7. *College of Optometrists (Ontario) v. SHS Optical Ltd.*, [2008 ONCA 685](#)
8. *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, [2008 ONCA 534](#)
9. *IMAX Corp. v. Trotum Systems Inc.*, [2013 ONSC 743](#)
10. *Korea Data Systems Co. v. Chiang*, [2009 ONCA 3](#)
11. *Manis v. Manis*, [2001] O.J. No. 3672, [2001 CanLII 3851](#) (ONCA)
12. *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, [2009] O.J. No. 888, [2009 CanLII 9423](#) (ONSC)

13. *Merchants Consolidated Ltd. (Receiver of) v. Canstar Sports Group Inc.*, 113 D.L.R. (4<sup>th</sup>) 505, [1994 CanLII 10974](#) (MBCA)
14. *Milligan v. Lech*, [2006] O.J. No. 4700, [2006 CanLII 39457](#) (ONCA)
15. *Niagara (Regional Municipality) Police Services Board v. Curran*, [2002] O.J. No. 179, [2002 CanLII 49405](#) (ONSC)
16. *Oakley Manufacturing Inc. v. Bowman*, [2005] O.J. No. 5318 (ONSC)
17. *Ontario Securities Commission v. Robinson*, [2010 ONSC 225](#)
18. *Re D'Angelo Estate*, [2010 ONSC 7244](#)
19. *Sussex Group Ltd v. Sylvester*, [2002 CanLII 27188](#), [2002] O.J. No. 4350 (ONSC)
20. *Sussex Group Ltd. v. 3933938 Canada Inc.*, [2003] O.J. No. 2906, [2003 CanLII 49336](#) (ONSC)
21. *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (ONSC)
22. *Thrive Capital Management Ltd. v. Noble 1324 Queen Inc.*, [2022 ONSC 4081](#)
23. *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, [1992 CanLII 99](#) (SCC)
24. *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, [1992 CanLII 29](#) (SCC)

## **SCHEDULE “B”**

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

#### **R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE under Courts of Justice Act, R.S.O. 1990, c. C.43**

##### **Contempt Order**

##### **Motion for Contempt Order**

60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made. R.R.O. 1990, Reg. 194, r. 60.11 (1).

[...]

##### **Content of Order**

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

- (a) be imprisoned for such period and on such terms as are just;
- (b) be imprisoned if the person fails to comply with a term of the order;
- (c) pay a fine;
- (d) do or refrain from doing an act;
- (e) pay such costs as are just; and
- (f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.  
R.R.O. 1990, Reg. 194, r. 60.11 (5).

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

**MOVING PARTIES' FACTUM  
(Contempt – Penalty Hearing – Returnable September 14, 2022)**

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