

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.

FURTHER SUPPLEMENTARY MOTION RECORD OF THE RECEIVER
(Contempt - Penalty Hearing returnable September 14, 2022)

September 8, 2022

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Lawyers for the Receiver, KSV Restructuring Inc.

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

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

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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.

**AFFIDAVIT OF ROBERT KOFMAN
(sworn September 8, 2022)**

I, Robert Kofman, of the City of Toronto, in the Province of Ontario, MAKE OATH AND
SAY:

1. I am the President of KSV Restructuring Inc. (“**KSV**”). KSV is the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all the property, assets and undertaking of Xela Enterprises Ltd. (“**Xela**”). As such, I have knowledge of the matters contained in this affidavit.

2. I swore an affidavit in this proceeding on May 4, 2022 (the “**First Affidavit**”). This affidavit is supplementary to the First Affidavit.

3. On October 28, 2015, Newbould J., of the Ontario Superior Court of Justice (the “**Court**”) granted judgment against Juan Gutierrez, his now-deceased father (Arturo Gutierrez), and Xela Enterprises Ltd. (“**Xela**”) (among others) in the amount of \$4.25 million in favour of his sister, Margarita Castillo (the “**Judgment**”). A copy of the October 28, 2015 Judgment and a copy of Newbould J.’s reasons are attached as Exhibits “A” and “B”, respectively, to my First Affidavit.

4. On December 21, 2015, Mr. Gutierrez, Arturo Gutierrez, and Xela were ordered to pay costs in the amount of \$889,858.21 (collectively with the October 28, 2015 Order, the “**Judgment Debt**”). A copy of Newbould J.’s costs Order is attached as Exhibit “C” to my First Affidavit.

5. In November 2016, Arturo’s Technical Services Ltd. (“**ATS**”) was incorporated in Canada. I understand that ATS’s directors are Mr. Gutierrez’s two sons, Andres and Thomas.

6. Mr. Gutierrez appealed the Judgment. On December 30, 2016, the appeal of the Judgment was dismissed by the Divisional Court. Mr. Gutierrez brought a motion to stay the Judgment Debt and the Divisional Court Order. A copy of the December 30, 2016 Order of the Divisional Court is attached hereto as **Exhibit “A”**.

7. According to evidence obtained in this proceeding from Mr. Gutierrez and ATS, in 2017, Xela transferred its information technology and servers to ATS.¹

¹ See the Fourth Report of the Receiver dated January 18, 2021, at s. 4 (which is Exhibit 4 to the Contempt Proceedings)

8. On July 6, 2017, McEwen J. dismissed the motion for a stay of the Judgment and the Divisional Court Order. A copy of the July 6, 2017 Endorsement of McEwen J. is attached hereto as **Exhibit “B”**.

9. Various enforcement actions were pursued by Ms. Castillo. However, by 2019, the majority of the Judgment Debt remained outstanding.

10. On January 15, 2019, Ms. Castillo commenced an application to appoint a receiver and manager over Xela.

11. On July 5, 2019, the Court granted an Order, appointing KSV Kofman Inc.² (“**KSV**”) as the Receiver and Manager (in such capacity the “**Receiver**”) of Xela (the “**Appointment Order**”). A copy of the Appointment Order is attached as Exhibit “F” to my First Affidavit.

12. After its appointment, the Receiver identified three transactions of interest which are described in the Receiver reports as follows:

- (a) in April 2016, Xela’s direct, wholly-owned subsidiary (“**EAI**”, a Barbados company) sold, conveyed, or transferred the shares of BDT Investments Inc. (“**BDT**”) and Corporacion Arven, Limited (“**Arven**”)—both wholly-owned indirect subsidiaries of Xela with revenue-generating businesses—to Arturo Gutierrez, who transferred the purchased assets to the ARTCARM Trust in

² KSV Kofman Inc. changed its name to KSV Restructuring Inc. on August 30, 2020

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Barbados (the “**Trust**”). The beneficiaries of the Trust are Mr. Juan Gutierrez’s wife, mother, and four children, including Andres and Thomas;

- (b) in January 2018, LISA S.A. (“**LISA**”) assigned the majority of the proceeds from the Avicola Litigation (a lawsuit which seeks, among other things, \$400 million in unpaid dividends from the Avicola Group) to BDT; and
- (c) in February 2020 (when Harald Johannessen Hals was its President and one of its three directors—and during the pendency of these proceedings), LISA transferred its one-third interest in the Avicola Group to BDT—and therefore to the Trust.

These three sets of transactions are collectively referred to as the “**Reviewable Transactions**”.

13. On October 29, 2019, the Receiver obtained an Order, requiring production of information and documents related to the first two Reviewable Transactions. A copy of the October 29, 2019 Order of McEwen J. is attached as Exhibit “H” to the First Affidavit. A copy of the October 29, 2019 Endorsement of McEwen J. is attached hereto as **Exhibit “D”**.

14. On January 16, 2020, the Receiver held a Gabinvest S.A. (“**Gabinvest**”) shareholder’s meeting at which resolutions were passed to remove the directors of Gabinvest—Mr. Hals, Jose Eduardo San Juan, and David Harry—and replace them with three members of Hatstone’s law firm (the Receiver’s Panamanian counsel)—namely, Alvaro Almengor, Manuel Carrasquilla, and Lidia Ramos (the “**January 2020 Gabinvest Resolution**”).

15. On March 3, 2020, the Receiver brought a motion before the Court seeking an order, among other things, approving and ratifying the January 2020 Gabinvest Resolution.

16. Mr. Gutierrez opposed the Receiver's motion and served a motion record containing affidavits of Mr. Gutierrez and Mr. Hals both sworn March 22, 2020. A copy of the March 22, 2020 Motion Record of Juan Guillermo Gutierrez is attached hereto as **Exhibit "E"**.

17. On March 26, 2020, McEwen J. issued a consent Order dated March 24, 2020, requiring, among other things, Mr. Gutierrez to produce various documents within his power, possession and control and requiring Mr. Gutierrez to answer 18 questions relevant to the Reviewable Transactions. A copy of the March 24, 2020 Endorsement of McEwen J was attached as Exhibit "K" to my First Affidavit. A copy of the March 24, 2020 Order of McEwen J. is attached hereto as **Exhibit "F"**. A copy of the March 26, 2020 Endorsement of McEwen J., is attached hereto as **Exhibit "G"**.

18. On April 7, 2020, counsel for Mr. Gutierrez provided a response to the questions ordered be answered pursuant to the March 24, 2020 Order. A copy of the letter from Mr. Gutierrez's counsel dated April 7, 2020 is attached hereto as **Exhibit "H"**.

19. On August 28, 2020, the Receiver obtained an Order on consent against Mr. Gutierrez and ATS—compelling them to produce Xela's documents and devices, including cell phones, computers, and iPads. A copy of the August 28, 2020 Order of McEwen J. is attached hereto as **Exhibit "I"**.

20. On September 11, 2020, Mr. Gutierrez claimed privilege over certain documents and produced certain documents, including, among other things, Panamanian orders and Mr.

Gutierrez's affidavits sworn in this proceeding. A copy of the September 11, 2020 letter and index of documents is attached hereto as **Exhibit "J"**. Cambridge LLP ("**Cambridge**"), legal counsel for Mr. Gutierrez, responded that they would not produce Mr. Gutierrez's cellphone or iPad because they have "never been used to conduct business related to Xela" and because the cellphone is "used for personal purposes." A copy of Cambridge's September 29, 2020 letter is attached hereto as **Exhibit "K"**.

21. Mr. Gutierrez had previously testified that he used his iPad and cellphone for Xela's business. A copy of the transcript of the Continued Examination in Aid of Execution of Mr. Gutierrez, held October 30, 2018, is attached hereto as **Exhibit "C"** (see Q. 951, 1069-1071, and 1093-1094).

22. On October 27, 2020, ATS consented to an Order to image servers in ATS's possession on which were stored Xela's documents. A copy of October 27, 2020 Order of McEwen J. regarding ATS is attached hereto as **Exhibit "M"**.

23. On October 27, 2020, Mr. Gutierrez consented to an Order to image his iPad and iPhone on which were stored Xela's documents. The Order required Mr. Gutierrez to provide the Receiver's agent with all devices used by him within seven business days. A copy of October 27, 2020 Order of McEwen J. regarding Mr. Gutierrez is attached hereto as **Exhibit "N"**

24. At the time the Order was made, Cambridge advised the Receiver that Mr. Gutierrez was travelling to Guatemala on October 26, 2020 to care for his sick mother-in-law and would return November 2, 2020 at which time Cambridge would pick up the devices and meet with the

Receiver's IT representative for "imaging within the [Court-ordered] timeline." A copy of Cambridge's October 25, 2020 email is attached hereto as **Exhibit "L"**.

25. On November 1, 2020, Cambridge advised counsel for the Receiver that Mr. Gutierrez was not returning on November 2, 2020. A copy of Cambridge's November 1, 2020 email is attached hereto as **Exhibit "O"**.

26. On November 5, 2020, the Receiver's representative imaged ATS's operational servers (on which is located a copy of Xela's servers as at 2017, called the "**Blue Network Servers**") and took possession of non-operational servers.

27. On December 3, 2020, Mr. Gutierrez swore a declaration in Panama (the "**Declaration**"). A copy of the Declaration is attached hereto as **Exhibit "P"**.

28. Mr. Gutierrez returned to Canada on December 17, 2020. The Receiver was advised of Mr. Gutierrez's return on December 19, 2020. A copy of the December 19, 2020 email and letter to the Receiver from Cambridge is attached hereto as **Exhibit "Q"**.

29. Mr. Gutierrez provided his iPad and iPhone for imaging on January 5, 2021 but 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**").

30. On January 8, 2021, Cambridge delivered an affidavit sworn by Mr. Gutierrez on January 7, 2021 pursuant to paragraph 2 of the October 27, 2020 Order. A copy of the Affidavit of Mr. Gutierrez, sworn January 7, 2021 is attached hereto as **Exhibit "R"**.

31. On January 18, 2021, the Receiver brought a motion to compel production of the passwords to the JG Hard-Drive, unfettered access to the Blue Network Servers, and Mr. Gutierrez's emails on ATS's active servers (the "**Investigative Powers & Recognition Order Motion**"). A copy of the January 18, 2021 Notice of Motion of the Receiver is attached hereto as **Exhibit "S"**.

32. On January 20, 2021, Mr. Hals filed the criminal complaint against the Hatstone directors and filed the Declaration of Mr. Gutierrez. A copy of the January 20, 2021 Criminal Complaint is attached hereto as **Exhibit "T"**.

33. On February 9, 2021, the Receiver brought a motion for contempt against Mr. Gutierrez in relation to the criminal complaint and sought an urgent case conference. On the same date, Mr. Gutierrez brought a motion to substitute KSV with a new receiver. A copy of the February 9, 2021 Notice of Motion of Mr. Gutierrez is attached hereto as **Exhibit "U"**. Also, on February 9, 2021, ATS and BDT brought a motion to compel the Receiver to accept a promise of future payment of the Judgment Debt and a discharge of the Receiver. A copy of the February 9, 2021 Notice of Motion of ATS and BTD is attached hereto as **Exhibit "V"**.

34. On February 10, 2021, McEwen J. ordered Mr. Gutierrez to withdraw his Declaration, ordered Mr. Hals to withdraw the criminal complaint, and ordered Mr. Gutierrez to do everything in his power to have the criminal complaint withdrawn. The Endorsement and Order of McEwen J. is attached as Exhibit "L" to my First Affidavit.

35. On February 12, 2021, Mr. Gutierrez swore an affidavit in response to McEwen J.'s February 10, 2021 Order. A copy of the affidavit of Mr. Gutierrez, sworn February 12, 2021, is attached hereto as **Exhibit "W"**.

36. On March 25, 2021, the Court made an Order (the “**March 2021 Order**”) in respect of the Investigative Powers & Recognition Order Motion directing Mr. Gutierrez to immediately provide the Receiver with all encryption codes, keys, passwords, or any other such information or knowledge necessary to unlock and access the data on the JG Hard-Drive. The Court also directed ATS to, within 14 days, provide the Receiver with an electronic copy of all emails sent or received by Mr. Gutierrez at any email address maintained on ATS’s servers to the date of the Order, along with any encryption codes, keys, or passwords used to secure the emails. A copy of the March 25, 2021 Endorsement of McEwen J. is attached hereto as **Exhibit “X”**. A copy of the March 25, 2021 Order of McEwen J. is attached hereto as **Exhibit “Y”**. A copy of the March 25, 2021 Order of McEwen J. regarding recognition in Panama is attached hereto as **Exhibit “Z”**. The Court did not grant the relief sought by Mr. Gutierrez, ATS, or BDT in respect of their February 9, 2021 notices of motion.

37. Mr. Gutierrez and ATS sought leave to appeal the March 2021 Order. A copy of the April 9, 2021 Notice of Motion for leave to appeal is attached hereto as **Exhibit “AA”**. The Divisional Court dismissed their motions for leave to appeal on July 9, 2021. A copy of the July 9, 2021 Endorsement of the Divisional Court is attached hereto as **Exhibit “BB”**.

38. On July 28, 2021, the Court ordered, in respect of the March 2021 Order, that, within 60 days:

- (a) Mr. Gutierrez pay costs of \$80,000;
- (b) ATS pay costs of \$45,000;
- (c) Mr. Gutierrez and ATS, jointly and severally, pay costs of \$30,000; and

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- (d) Mr. Gutierrez and ATS (67% and 33%, respectively) pay disbursements of \$13,964.93.

A copy of the July 28, 2021 Costs Order of McEwen J is attached hereto as **Exhibit “CC”**. A copy of the July 28, 2021 Endorsement of McEwen J. is attached hereto as **Exhibit “DD”**.

39. On August 3, 2021, the Receiver sought a case conference before McEwen J. to address compliance with the March 2021 Order, which case conference was scheduled for September 17, 2021.

40. The Receiver made demand for payment of the costs awards, but such costs were not paid within 60 days. A copy of the September 28, 2021 email from Lenczner Slaght LLP demanding payment is attached hereto as **Exhibit “GG”**.

41. On September 16, 2021, Mr. Gutierrez delivered an affidavit from Taras Volgemut in which Mr. Volgemut gave evidence that, based on information received from Mr. Gutierrez, he was prepared to “invest in litigation for the benefit of BDT” related to the dividends owed to LISA and, as part of that investment, to pay the unsatisfied portion of the Judgment Debt as well as approved costs of the receivership. A copy of the Affidavit of Taras Volgemut, sworn September 16, 2021 is attached hereto as **Exhibit “EE”**.

42. On September 17, 2021, the Receiver and the parties attended a case conference to deal with compliance with the March 2021 Order and the Volgemut funding. A further case conference was scheduled for December 2021. A copy of the September 17, 2021 Endorsement of McEwen J. is attached hereto as **Exhibit “FF”**. A copy of the Affidavit of Taras Volgemut, sworn December 1, 2021 is attached hereto as **Exhibit “MM”**.

43. On October 27, 2021, the Receiver served Notices of Examination in Aid of Execution in respect of the outstanding costs Order. Copies of the Notices of Examination in Aid of Execution are attached hereto as **Exhibits “II” and “JJ”**.

44. On November 4, 2021, counsel for Mr. Gutierrez wrote to the Receiver to question the purpose of the Examination in Aid of Execution. A copy of the November 4, 2021 letter from Brian Greenspan is attached hereto as **Exhibit “KK”**. Counsel for the Receiver replied on November 5, 2021. A copy of the November 5, 2021 Lenczner Slaght letter is attached hereto as **Exhibit “LL”**. Neither ATS nor Mr. Gutierrez attended the Examinations.

45. On December 6, 2021, Mr. Gutierrez made payment in accordance with the July 28, 2021 costs Order.

46. The Receiver and the parties attended for seven more case conferences between December 2, 2021 and March 17, 2022 to deal with compliance by Mr. Gutierrez and/or ATS with the March 2021 Order and the Volgemut funding. Copies of the Endorsements of McEwen J dated December 2, 2021, January 24, 2022, March 2, 2022, March 9, 2022 and March 17, 2022 are attached hereto as **Exhibit “NN”, “PP”, “QQ”, “SS” and “TT”**, respectively.

47. On December 14, 2021, Mr. Gutierrez attended at the Panamanian consulate in Toronto for an interview with the Panamanian prosecutor by videoconference. A copy of the December 14, 2021 Summary of Interview of Mr. Gutierrez is attached hereto as **Exhibit “OO”**.

48. On March 25, 2022, prior to a scheduled case conference, Mr. Gutierrez delivered a draft notice of motion for an injunction and a case conference brief. A copy of the March 25, 2022 case conference brief of Mr. Gutierrez is attached hereto as **Exhibit “UU”**. A copy of the March 25,

2022 draft Notice of Motion for an injunction is attached hereto as **Exhibit “VV”**. Mr. Gutierrez sought an urgent injunction to stay the March 2021 Order.

49. Later on the morning of March 25, 2022, the Receiver and the parties attended at the case conference with McEwen J. at which the Court ordered Mr. Gutierrez to provide the Receiver’s IT agent (“**Epiq**”) with all passwords to unlock the JG Hard-Drive by 5 pm on March 28, 2022, and the Court ordered ATS to provide Epiq with Mr. Gutierrez’s emails on ATS’s servers by 5 pm on March 28, 2022 (the “**March 2022 Order**”). A copy of the March 25, 2022 Endorsement of McEwen J. is attached hereto as **Exhibit “WW”**. A copy of the March 25, 2022 Order of McEwen J. is attached hereto as **Exhibit “XX”**.

50. Mr. Gutierrez sought a stay of the March 2022 Order pending a motion for leave to appeal to the Divisional Court. A copy of the March 28, 2022 Notice of Motion for a stay pending motion for leave to appeal is attached hereto as **Exhibit “YY”**.

51. On March 31, 2022, Mr. Gutierrez delivered a notice of motion for leave to appeal the March 2022 Order. A copy of the March 30, 2022 Notice of Motion for leave to appeal is attached hereto as **Exhibit “ZZ”**. The leave to appeal motion was scheduled to be heard the week of May 2, 2022.

52. On April 29, 2022 (after the Receiver delivered its materials and factum in accordance with the agreed upon timetable), Mr. Gutierrez abandoned the motion for leave to appeal the March 2021 Order. A copy of Cambridge’s email dated April 29, 2022 is attached hereto as **Exhibit “AAA”**.

53. 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 and requested submissions from counsel about Mr. Gutierrez's request. A copy of the May 20, 2022 Endorsement of McEwen J. is attached hereto as **Exhibit "BBB"**.

54. On May 30-31 and June 2 and 16, 2022, Conway J. heard the Receiver's February 2021 contempt motion in respect of the Declaration and criminal complaint as it relates to a breach of the Appointment Order.

55. On June 29, 2022, Conway J. held Mr. Gutierrez in contempt of Court for breaching the Appointment Order.

56. On July 8, 2022, the registrar scheduled a case conference before Conway J. to be held on August 26, 2022.

57. On July 17, 2022, the Court scheduled a full-day penalty hearing before Conway J. to be held on September 14, 2022.

58. On July 19, 2022, Mr. Greenspan sent the Receiver an email and a letter from Mr. Greenspan to Mr. Hals dated July 6, 2022. A copy of the July 19, 2022 cover email and July 6, 2022 letter is attached hereto as **Exhibit "CCC"**.

59. On July 21, 2022, the parties and the Receiver attended a case conference before McEwen J. Mr. Gutierrez delivered a case conference brief in support of his request to schedule a motion to replace the Receiver. A copy of the July 21, 2022 Case Conference Brief of Mr. Gutierrez is

attached hereto as **Exhibit “DDD”**. Justice McEwen did not schedule Mr. Gutierrez’ motion. A copy of the July 21, 2022 Endorsement of McEwen J. is attached hereto as **Exhibit “EEE”**.

60. On July 25, 2022, Mr. Hals sent the Receiver a letter in Spanish. The original letter (and an unofficial English translation of the letter) is attached hereto as **Exhibit “FFF”**.

61. On August 23, 2022, Mr. Gutierrez’s counsel contacted counsel for the Receiver to make arrangements for compliance with the March 2022 Order.

62. On August 26, 2022, Mr. Gutierrez’s counsel and counsel for the Receiver attended for a case conference before Conway J. to set a timetable for the exchange of materials for the September 14, 2022 penalty hearing.

63. On August 30, 2022, the password to the JG Hard-Drive was provided to Epiq.

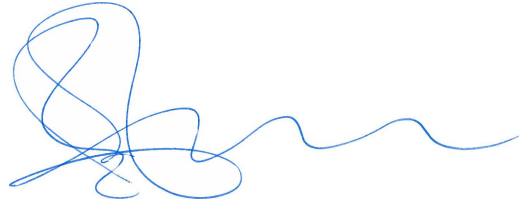
64. ATS has consistently taken the position that Mr. Gutierrez had asserted a claim of privilege over the emails in ATS’s possession, which are subject to the March 2021 Order. Copies of Weir Foulds’ emails dated September 30, 2021 and March 8, 2022 are attached hereto as **Exhibits “HH” and “RR”**, respectively. Following the March 2022 Order, ATS did not provide Epiq with Mr. Gutierrez’s emails. On August 31, 2022, ATS advised the Receiver that it is making arrangements to comply with the March 2021 Order and the March 2022 Order. I am advised by Epiq that, at the time of swearing this affidavit, ATS has uploaded some data to Epiq’s secure file transfer protocol. However, the volume of data is approximately one-third what Epiq was initially told would be uploaded. Epiq has reached out to ATS today to determine whether ATS has uploaded all data required by the March 2021 Order.

SWORN by Robert Kofman at the City of Kelowna, in the Province of British Columbia, before me on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

Shane Ramnanan
Licensed Paralegal P07510



ROBERT KOFMAN

This is Exhibit "A" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Divisional Court File No. 65/16

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

THE HONOURABLE
JUSTICE MOLLOY
JUSTICE DAMBROT
JUSTICE VARPIO

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FRIDAY, THE 30th
DAY OF DECEMBER, 2016

BETWEEN:

MARGARITA CASTILLO

Respondent / Applicant

- and -

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

Appellants / Respondents

ORDER

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

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

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

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

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

ENTERED AT / INSCRIT A TORONTO
 ON / BOOK NO.: 22
 LE / DANS LE REGISTRE NO.:
 16
 FEB 09 2017
 PER / PAR: M.O.

U. Waralus.

 A/Assistant - Registrar

MARGARITA CASTILLO
Respondent / Applicant

-and-

XELA ENTERPRISES LTD. ET AL.
Appellants / Respondents

Divisional Court File No. 65/16

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

Proceeding commenced at Toronto

ORDER

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Lawyers for the Applicant,
Margarita Castillo

This is Exhibit "B" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

FILE/DIRECTION/ORDER

BEFORE JUDGE McEwen ACTION # CU-11-01062-00CL

Castillo

Plaintiff(s)

-v-

Xela Enterprises Ltd. et al
Defendant(s)

CASE MANAGEMENT: YES [] NO []

COUNSEL: Leon/Woycheshyn - PHONE NO. _____
Applicant PHONE NO. _____
Richard/Mendelzon - PHONE NO. _____
Respondents

ORDER [] DIRECTION FOR REGISTRAR

[] REPORTED SETTLED ADJOURNED TO TRIAL SCHEDULING COURT _____

[] NO ONE APPEARED ADJOURNED TO TO BE SPOKEN TO COURT _____

The moving respondents (Xela, Juan Guillermo and Arturo) bring this motion seeking an order to stay the execution of the Divisional Court Order dated Dec 30/16 which affirmed the decision of Justice Newbould dated Oct 28/15.

6 July 17
DATE

McEwen
JUDGE'S SIGNATURE

Court File Number: _____

Superior Court of Justice
Commercial List

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Judges Endorsement Continued

In his decision Justice Newbould held that the Applicant had been oppressed¹ and ordered that the moving respondents purchase her 100 Common Shares in Tropic for the amount of \$4,250,000.00

The moving respondents and others have commenced another action against the Applicant and others (CO11-9177001) claiming \$400 million in damages and specific relief against the Applicant. That action is currently bogged down in jurisdictional disputes.

It also bears noting that Newbould J. severed the Tropic claim from the Applicant's claim against Xela and decided the issue (which was upheld).

The moving respondents now submit that the execution of the

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1. within the meaning of s. 243 of the OBCA -

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Judges Endorsment Continued

Divisional Court order be stayed until there has been a determination of the Applicant's liability in the aforementioned action ("the Action")

I disagree and for the reasons below dismiss the motion.

Insofar as the governing law is concerned, the parties agreed that the test for exercising discretion to award a stay under s. 106 of the CTA is set out by the Div. Ct in [24-7902 Ont] In re US Carlisle 2003 Carswell Ont 6433. In Carlisle, the court generally held that the bar for a stay is a high one and ought to be used only in very rare circumstances. It added that it should only be granted where the court seeks to avoid an oppressive or vexatious result, but also

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Judges Endorsment Continued

in Circumstances where it would not
cause an injustice to the plaintiff.

The moving respondents submit that
more recent case law of this court
have applied a "broader test" that
simply looks at the equities. Having
reviewed the case law I disagree and
even if I am wrong, in my view,
the equities favour the Applicant.
In any event, as I have noted,
Carlisle is the binding authority.

The main thrusts of the moving
respondents' submissions are that the
Applicant is one of the key defrs
in the Action; the proceedings and
the Action are intricately linked and
that the Applicant was involved in a
conspiracy against the moving
respondents that involved her, amongst
other things, stealing corporate

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Judges Endorsement Continued

documents and now facing criminal charges. Accordingly, they submit that it would be inconsistent with the interests of justice to allow the Applicant to collect the money awarded by Justice Newbould at this time.

While the moving ~~of~~th respondents have made serious allegations against the Applicant I do not believe that I should exercise my discretion in their favour and stay the execution of the Div. Cert' order for the following reasons:

- Justice Newbould and, later, the Div. Cert' allowed the Applicant's claim regarding Tropic to proceed separately for the reasons set out. Chief amongst those reasons is the fact that the ~~Action~~ does not include the Tropic

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Judges Endorsment Continued

issues.

- While these reasons are not binding upon me, they are highly persuasive. The reasons set out a number of reasons as to why the Tropic issue had little to do with the Xela issue and the Action In Vire regard Justice Newbould characterized the moving respondents' accusations of a conspiracy ^{as} ~~was~~ "speculative at best." Little has changed since then.
- The moving respondents could have brought a motion to join the two proceedings. They did initiate such a motion, but it was later abandoned.
- Justice Newbould's decision set out numerous examples of aggressive and inappropriate conduct by the moving respondents against the Applicant.
- A stay of the execution could result in real prejudice to the

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Judges Endorsment Continued

Applicant as the moving respondents could take further steps to diminish her shareholding in Tropic. As set out by Justice Newbould the moving respondents past actions made it clear that the Applicant cannot expect to be properly treated.

• It also cannot be said that the Applicant may have received money that some day may be shown to be inappropriate. As a result of Justice Newbould's order the moving respondents will pay the money in exchange for the Applicant's Tropic shares.

• It also bears noting that much of Tropic's supporting affidavit contains unconfirmed hearsay and investigations with respect to critical issues concerning the alleged conspiracy

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Judges Endorsment Continued

This ^{part} of course is inadmissible.

• With respect to the allegation of stolen documents, we must question how this can be said to be an accurate assertion against a Director and shareholder, but in any event, the moving respondents have done little to show what it is that the Applicant should not have disclosed in those documents.

In all of the above circumstances I find that the moving respondents have failed to satisfy the test in Carlisle or even establish that the equities favour a stay. Indeed the moving respondents have continued to take steps prejudicial to the Applicant when Thopre sold Fresh Quest in Oct/15 in/around the time Justice Newbold released his

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Judges Endorsment Continued

decision.

Overall, given Justice Newbould's clear findings of oppression in the specific Trade claim, I cannot conclude that it would be oppressive or vexatious, or an abuse of process to enter the settlement now or, as noted, that the equities favour the moving respondents. In fact, based on the above, given the actions of the moving respondents and the glacial pace of the Action any further delay would likely cause an injustice to the Applicant.

Last, I should reiterate that the claims of wrongdoing against the Applicant were largely before Justice Newbould. The later criminal complaint, initiated by ~~the~~ Juan, is also essentially based on information that

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Judges Endorsment Continued

was before Justice Newbould as well.

The motion is dismissed. The Applicant shall have her costs on a partial indemnity basis in the amount of \$15,000.00 for fees plus HST and disbursements of \$291.29.

At the hearing the Applicant sought an order to compel the respondents to attend at an examination in aid of execution. Since no motion was brought by the Applicant, I decline this relief sought.

McE...

This is Exhibit "C" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

- and -

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

Defendants

This is the Continued Examination in Aid
of Execution of JUAN GUILLERMO GUTIERREZ, personally
and on behalf of the corporate Defendants herein, taken
at the offices of Network Reporting & Mediation, 100
King Street West, Suite 3600, Toronto, Ontario, on the
30th day of August, 2018.

A P P E A R A N C E S:

WILLIAM BORTOLIN

Solicitor for the Plaintiff

JUAN GUILLERMO GUTIERREZ - 126

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No under advisements noted in transcript

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1 --- UPON COMMENCING AT 10:06 A.M.

2 JUAN GUILLERMO GUTIERREZ; Sworn

3 EXAMINATION BY MR. BORTOLIN:

4 664. Q. You're under oath?

5 A. Yes.

6 665. Q. And you, I assume, received the Notice
7 of Examination requiring you to attend today?

8 A. Yes.

9 666. Q. Did you bring any documents with you
10 there are responsive to the Notice of Examination?

11 A. No, there is no documents to bring
12 because everything you asked for has been provided
13 before or it does not exist.

14 667. Q. We'll get to some more specific things,
15 although perhaps some of the things could be brought
16 up to date, but we'll get to that when we get to that.
17 So the general overview of what we'll be doing today
18 is as on the last exam, you'll be asked, as Mr.
19 Woycheshyn on the last exam did, asking about your
20 assets, your income and your spending.

21 And you're prepared to answer questions
22 about those things today?

23 A. I already answered all the questions
24 before.

25 668. Q. You've advised us previously that your

1 only bank account was a joint account with your wife
2 at TD Bank. Is that still correct?

3 A. Yes, it is.

4 669. Q. And is that an account to which you
5 still have access to funds?

6 A. No, it's actually drawn on a line when
7 you froze it about a year ago.

8 670. Q. Can you explain what you mean by that?

9 A. That bank account had a line of credit
10 as part of it, like an overdraft facility, and I was
11 drawing on that one when you froze it last year. So,
12 there's no availability of funds at all, besides its
13 frozen.

14 671. Q. And so, there are no other bank
15 accounts of which you have access to funds from?

16 A. I told you already no. I told you that
17 last year; I don't have another bank account; I never
18 had a different bank account. I only had one bank
19 account because I didn't need another one. I just ran
20 my affairs through one bank account. I don't know how
21 many times I have to explain it to you for you to
22 understand it. There's none -- no other ones.

23 672. Q. And that will not be the last question
24 that you hear me ask today that you've been asked
25 before, and the reason I'm asking them is because you

1 answered them last year and I'm asking them today and
2 things could change.

3 You had RRSPs, which you provided us with
4 account statements for. My question is have you drawn
5 any money out of the RSPs since last July?

6 A. No. You froze all my bank accounts.
7 I'm not like your side of the equation that I don't
8 play by the rules, I respect the rules. I'm doing
9 what I've been instructed to do, so I'm not touching
10 any of my assets at all. I don't have any assets, by
11 the way because you already took them all away.

12 673. Q. Well the RSP's that's not true; is it?

13 A. No, the RSP is the only thing is there
14 and is untouched.

15 674. Q. So, I have your evidence then that you
16 haven't created any new RSP's in the last year?

17 A. How would I, if you froze all my assets
18 and took all my money away from me? I can't put
19 anything anywhere, so the answer is no. No change
20 from last year on any of the questions you asked me,
21 with the exception of all the assets I had at that
22 time that you took from me.

23 That's the only answer. The only change has
24 been you took my cars away, you forced my house to be
25 sold and you forced me to forfeit or sell my half of

1 the cottage; I have no assets left. So there's no
2 changes. You can ask all the questions you want, but
3 I'll tell you already; no changes from last time
4 because I haven't done anything.

5 675. Q. Well I will ask the questions anyway,
6 but I appreciate that as an overview answer and we'll
7 see if it can help speed things up at any point today.
8 You mentioned the house; that is the house that was
9 sold at 2 Gordon Road, and I understand that sale
10 closed on August 20th. Is that right?

11 A. That's correct.

12 676. Q. And I understand though that you're not
13 required to vacate until the end of November. Is that
14 right?

15 A. That's correct.

16 677. Q. So, where will be your primary
17 residence from now until the end of November?

18 A. I don't know.

19 678. Q. Will it be one of either 2 Gordon Road
20 or 174 Amber Bay Road?

21 A. Gordon Road no, because I just sold it;
22 you just told me. I sold the house, you already told
23 me that, so why am I going to live there after I'm
24 supposed to leave the house when the new buyer takes
25 over?

1 679. Q. But my question was until they take
2 over. Until they take over the house.

3 A. Well until then we're spending time --
4 I'm still in the house until November 30th. At that
5 time I don't know at this point where I'm going to
6 live because I have no other place to go and I don't
7 have the money to buy another place, so I don't know
8 what I'm going to do.

9 680. Q. Can you not reside at 174 Amber Bay
10 Road?

11 A. That's my wife's property. I
12 presumably can stay there.

13 681. Q. You don't have a plan one way or
14 another where you're going to stay after November?

15 A. No, I don't know.

16 682. Q. I mention 174 Amber Bay Road and we
17 talked about 2 Gordon Road. Just to confirm, there's
18 no other residences that you own or lease?

19 A. I already told you last year I don't
20 and I know you've done all your research; you didn't
21 find anything because there's no other assets. I
22 never had a house anywhere else, I never had any other
23 properties other than those two properties and you
24 took them away from me already, so I have no
25 properties, period.

1 You can ask as many times as you want, but
2 there's none.

3 683. Q. So where did you stay last winter?

4 A. Last winter? At 2 Gordon Road.

5 684. Q. And that's true for the past few years;
6 you've stayed in Toronto over the winters?

7 A. I work, I wasn't retired so I was
8 working and my place of work is here. I travel a lot,
9 but I stay here. So I live there for over 20 years.

10 685. Q. So no vacation homes?

11 A. No vacation homes.

12 686. Q. No timeshares or anything like that?

13 A. No.

14 687. Q. How did you get here today?

15 A. I drove.

16 688. Q. What did you drive?

17 A. My wife's car. I don't have a car
18 because you took my cars away.

19 689. Q. And I think you've answered it, but I
20 just want to confirm so your evidence is that you do
21 not own or lease any motor vehicles?

22 A. You took my cars away and I don't have
23 any leases. I had before but you took my things away,
24 so what else you want me to tell you?

25 690. Q. Just say yes or no would suffice.

1 A. I already told you. You know it would
2 be nice if when you talk to me you look at me, because
3 looking at the floor, looking at the side kind of,
4 it's kind of weird. You talk to somebody who doesn't
5 look at you, especially if you're asking me questions.
6 Like, you're kind of questioning me like I'm not
7 telling you the truth, but you don't even look at me.

8 691. Q. Thank you for that advice. The
9 question I'm asking is, and it's just a yes or no; do
10 you own or lease any motor vehicles?

11 A. I already told you -- you took my cars
12 away; what else you want me to tell you? I answered
13 the question already. And I'm not going to tell you a
14 different thing, because the truth is only one. And I
15 told you already you took my cars away; what else you
16 want me to say?

17 And I know you were at the auction too when
18 they were auctioned, so you know, so why you insist on
19 asking the same question over and over again?

20 692. Q. Because I just want a yes or no answer
21 and you're not giving me one.

22 A. Because I already answered to you, sir.
23 The answer is very simple; you took my cars away, so I
24 have to drive around with my wife when she lets me use
25 her car, or sometimes my kids. They have their own

1 cars.

2 693. Q. I understand what you're telling me.
3 My question is a yes or no question; do you own or
4 lease any motor vehicles?

5 A. I already told you; you took my cars
6 away -- that's the answer. I'm not going to give you
7 a different answer because I'm not going to start
8 telling you anything different than the truth. You
9 took my cars away; you were there with my brother-in-
10 law, enjoying every second of it when the cars were
11 auctioned. So that's it, that's the answer. What
12 else do you want me to say?

13 694. Q. I'm going to ask you to listen to my
14 question closely, because it's a yes or no answer and
15 you've yet to give me a yes or no answer. Do you own
16 or lease any motor vehicles?

17 A. You took my cars away and you know it,
18 you were there. Look at my eyes when you're asking
19 me, because I'm telling you the truth. You took my
20 cars away. What else you want me to tell? You want
21 me to invent something?

22 695. Q. I want you to tell me yes or no whether
23 you own or lease any motor vehicles?

24 A. I already answered that question and
25 I'm not answering anymore times the same thing.

1 696. Q. Well you keep telling me the same
2 thing, I agree, but it's not a yes or no answer to my
3 simple question; do you own or lease any motor
4 vehicles?

5 A. You took my cars away. You ask the
6 question again and I'm going to remain quiet. Okay?

7 697. Q. I'll take that as a refusal.

8 --- REFUSAL

9 A. Take it any way you want; I don't know
10 what that means. But the truth, and please make sure
11 this is written, the truth is you took my vehicles
12 away. I am without a car right now, so what do you
13 want me to say?

14 I'm so happy for that and you're simply
15 enjoying it -- why are you smiling? When the cottage
16 was auctioned you were there smiling happily, enjoying
17 every second. That's why you don't look at me when
18 you're asking me questions. Right?

19 698. Q. I look where I look because I'm
20 thinking and reading my notes.

21 A. Are your notes on the floor? Are your
22 notes through the window?

23 699. Q. I'll ask the questions today, thank
24 you. Did you review the transcript from your last
25 examination in July?

1 A. Back then, yes.

2 700. Q. When you say back then yes; what do you
3 mean?

4 A. When I got a copy of it I read it and
5 then I read it again.

6 701. Q. Did you have anything that you wanted
7 to correct from that transcript that seemed wrong to
8 you?

9 A. I don't remember. I don't have it with
10 me. I don't remember what it said.

11 702. Q. If there was something you wanted to
12 correct would you have communicated that?

13 A. I would've said that to Mr. Mendelzon,
14 who was my lawyer at the time.

15 703. Q. I can go through the list, but from
16 what you've told me it sounds like it would be a short
17 list so I'll just ask the question generally. Is
18 there anything that you've bought since last July
19 other than ordinary necessities of life; food, rent
20 and that sort of thing?

21 And I'll just give you an idea of what I'm
22 talking about; anything like boats, jewelry, watches,
23 pens, paintings -- anything along those lines?

24 A. No. I don't have money, you took my
25 money away. You froze my bank accounts; how will I

1 buy anything? I haven't bought absolutely anything.

2 704. Q. So no shares of a corporation, no
3 securities or investments of any kind?

4 A. I already told you, you took all my
5 money away. You froze my bank account, the only one I
6 had. How would I buy anything, and I didn't buy
7 anything. I didn't buy stuff like that before anyway,
8 so the answer I told you already.

9 705. Q. Since last July have you become a
10 shareholder in any new corporations?

11 A. How would I be able to do that if I
12 don't have any money? The answer is absolutely no. I
13 already told you I didn't buy shares, I didn't buy
14 cars, I didn't buy -- not even clothing I bought. So,
15 you want to ask the question again? The answer is no,
16 I didn't buy nothing like that, so get over that --
17 it's true.

18 706. Q. Have you become the beneficiary of a
19 trust since last July?

20 A. Absolutely not.

21 707. Q. Have you become the trustee of a trust
22 since last July?

23 A. No.

24 708. Q. We don't have your name on the record.
25 You're Juan Guillermo Gutierrez?

1 A. Yes.

2 709. Q. I am showing you a document that was
3 provided to me following your last examination. Do
4 you recognize it?

5 A. I don't remember this document but it
6 looks like something done when we got the second
7 mortgage for the house.

8 710. Q. Right. And is that your signature
9 beside applicant's signature at the bottom of the
10 page?

11 A. Yeah, it is. And that mortgage
12 precedes by a lot the lawsuit, the judgment, so I
13 don't know.

14 711. Q. This is dated November 17, 2016.
15 Correct?

16 A. What's the date -- oh, yes, 2016.

17 712. Q. That does not, you'll agree with me,
18 come before October 2015?

19 A. It was before you froze my bank
20 accounts and everything, you know?

21 713. Q. But it was not before the judgment.

22 A. I don't remember the date of the
23 judgment, but I had to take this mortgage because I
24 had no money for anything and we needed to continue
25 living, and then you froze all my bank accounts and

JUAN GUILLERMO GUTIERREZ - 141

1 this is one of the reasons the house had to be sold
2 too -- that mortgage was paid with -- you know when my
3 house was sold because you guys put me in the position
4 where I could no longer have banking relationships
5 because your client, my sister, accused me of money
6 laundering and all kinds of things.

7 Told the banks, the banks don't want to work
8 with us; destroy our business, destroy the business I
9 was running, destroy me, affected all of our
10 executives, cost about 2000 people's jobs, by the way.

11 I hope you enjoy that when you learned that.
12 All because of this lawsuit of you. And then I had to
13 sell my house, and the house was very difficult to
14 sell because the buyers that were interested they all
15 kind of find out about this judgment, about all this
16 thing and they didn't want to be involved.

17 So finally we got the sale, and when we get
18 the sale 50% of the equity belongs to my wife because
19 she owned half the house; 50% to me which was going to
20 your side. What happened, you guys extorted my wife,
21 it's an extortion what you did, because what happened
22 is that you demanded that I pay \$425,000 or you
23 wouldn't approve the sale, which would destroy the
24 sale.

25 So we had to agree on that. So my wife

1 didn't get 50% of the equity. She suffered a severe
2 loss because all she got was 250 when your side got
3 425. And that was because you hold us hostage,
4 because if we wouldn't agree on that the sale would
5 not be able to happen.

6 Continue smiling; I know you're enjoying
7 this every second. You took everything away from me
8 already. I have nothing else, nothing left for me.
9 So I hope you're happy because I know that's what you
10 guys wanted.

11 714. Q. My question was whether November 17,
12 2016 was before or after the judgment against you?

13 A. I think you know the answer -- come on,
14 don't play games with me.

15 715. Q. I thought I did too, but you told me
16 that this came before the judgment.

17 A. Don't play games with me. I told you
18 this mortgage was obtained for the purpose of just
19 paying expenses, and had nothing to do -- it was long
20 before the bank accounts were frozen or anything like
21 that.

22 And by the way, I tried to pay this judgment
23 several times. I was in your office and you were
24 sitting there and I went to make an honest
25 proposition, and I sent forward more than one proposal

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1 -- keep smiling -- keep smiling, because I'm telling
2 you the truth here. On more than one and you know
3 because you were sitting on that table -- I proposed a
4 very real solution to pay this judgment. And what did
5 I get; insults. I got my brother-in-law, who
6 shouldn't be there, because he wasn't part of this
7 deal.

8 He stood up and told me, bye-bye cottage
9 sent a clear message and that's why you were at the
10 auction and having so much fun when it finally was put
11 for auction, because that's what they wanted to do.
12 They could've get the whole payment because we had the
13 path for solution, and I proposed it seriously through
14 a lawyer, in a very formal way.

15 Denied it, so the purpose was to force me
16 out of the house, force my wife to lose the cottage,
17 and took my cars away, froze my bank accounts,
18 destroyed my reputation, so now what? Keep smiling,
19 you're smiling because you're enjoying this or it's
20 just that's what you're supposed to do, you know?

21 You took everything away from me, so you can
22 ask me a million questions; I have nothing. I don't
23 have a house, I don't have a cottage, I don't have
24 vehicles. I don't have shares left -- I didn't buy
25 anything new. The company I was running is completely

1 out of business now thanks to the actions of my
2 sister. So what else you want me to do? If you want
3 you can take my eyes, you can take my ears, you can
4 sell my organs, if that's what you guys want to finish
5 me completely -- that's fine.

6 But I can't give you what I don't have,
7 okay? So, I made a proposal to Margarita more than
8 once to solve this situation without having to fight
9 anymore, and without any of this crap. And what she
10 does; she says no. She says no to everything.

11 And when we sold the house she took money
12 away from my wife, who has nothing to do with this.
13 And you know what else she's done, she's broke my
14 mother's heart.

15 My mother is not the day she doesn't cry
16 because of this thing. She is completely under siege.
17 I don't have means to support my mother and my mother
18 has nothing -- and you keep smiling -- you're really
19 enjoying the harm you have caused us.

20 And you guys also know that this lawsuit was
21 all bogus from the beginning. But I never had a
22 trial, did I? Did I have a trial? Could I speak in
23 front of the judge? Was I cross-examined in front of
24 the judge? The answer is no.

25 And by law, by law I have the right for a

1 trial and you know it, and Mr. Leon and Woycheshyn
2 know very well. Everybody has according to the law
3 the right to a trial. Summary judgments are only
4 valid in the cases of non-substance, non-substantial
5 amounts and this is a substantial amount.

6 In the cases of agreement by the parties --
7 was no agreement; we were demanding a trial. And the
8 third one is in the case of uncontroverted evidence.
9 In this case was zero uncontroverted evidence. All
10 the evidence was controverted, because nothing my
11 sister said was true.

12 And we told our side, she told her side;
13 nothing balanced, how in hell would anybody be able to
14 tell the truth from reading two documents that are
15 just letters, without looking at the eyes and the
16 faces of who you are cross-examining?

17 How can a judge make a decision of this
18 magnitude? You know, he destroyed a lot of lives, a
19 lot of lives with this action. And we never had our
20 trial. I never had an opportunity to tell my case in
21 front of a judge.

22 716. Q. Are you finished?

23 A. Of course you guys were very successful
24 in keeping that from happening, but that is the truth.
25 I never had the opportunity to tell my side of the

1 story. My dad who was accused of being senile; the
2 judge never, never heard my dad talking to find out
3 that he wasn't senile. My dad was a very generous
4 man. Anything, everything my sister has come from my
5 dad.

6 Your fees came from money that my cousins
7 gave her, and you know what that money came from?
8 From the dividends of our companies down south. And I
9 told that in my first cross-examination on the case;
10 and that was never in front of the judge, it was never
11 in front of anybody.

12 All this is a big conspiracy, part of a much
13 bigger case that's been fought down in South America
14 and Guatemala precisely on a very large company that's
15 being expropriated.

16 And how did they manage to expropriate it,
17 because your office prepared a bogus lawsuit against
18 one of our employees in the accounting -- sorry in the
19 IT department and our IT guy was a junior person in
20 the IT, stole information from our computer service
21 and gave it to my sister's husband, Ricardo, to avoid
22 being sued in a lawsuit that Mr. Woycheshyn drafted
23 knowing there was nothing in it.

24 But this young kid, a 30-year-old guy was so
25 scared that he stole the information and gave it to

1 you. And what did you guys do? You put that as an
2 annex on the lawsuit that my sister filed against my
3 father and myself and the company, which had
4 absolutely nothing to do with anything she was
5 arguing, and even included information that was
6 covered by attorney-client privilege and your lawyers
7 should know that.

8 You didn't care; you put it there. And why
9 did you put it there, so a Guatemalan lawyer could
10 come to the record, take copies of it and use it in
11 Guatemala as an excuse. And you know what is
12 happening now; all of those exclusions or
13 expropriations are being reverted by the courts over
14 there, because following the course of the law
15 everything has been proven that we were right and they
16 were wrong.

17 And that is the whole thing. And this whole
18 conspiracy was cooked in your office and you know
19 that. I don't know if you know that, but Jason
20 Woycheshyn and Jeffrey Leon, absolutely they cooked
21 it. So, you guys know everything. You know I have
22 nothing left.

23 The objective of this was to destroy my
24 father and destroy me so the other guys in Guatemala
25 who own two thirds of the business could take our

1 third of the business for them.

2 717. Q. Are you finished?

3 A. Yeah, for now. But I'm just telling
4 you facts, facts that I was never allowed to tell in
5 front of a judge. And I want to ask one confirmation
6 right now.

7 718. Q. No.

8 A. You said that I'm going to get a copy
9 of this transcript. Did you say that when we started?

10 719. Q. Yes.

11 A. So, when am I going to get it?

12 720. Q. I don't know.

13 A. How long does it take to have a
14 transcript made? A week?

15 721. Q. We'll discuss this later ---

16 A. No, no, no.

17 722. Q. The function -- no, stop talking.

18 A. Listen, I'm not a lawyer so do not come
19 with me with all this technical crap. You have to
20 tell me I'm going to get one, yes, I want to know
21 when.

22 723. Q. I don't have to answer that question.
23 Here's how today works ---

24 A. Yes, you have to.

25 724. Q. Here is how today works; I ask

1 questions, you answer those questions.

2 A. I already answered your question.

3 725. Q. You have not answered any of my
4 questions.

5 A. Of course I did.

6 726. Q. You have spoken an awful lot, but you
7 have answered exactly none of my questions.

8 A. I exactly answered. I told you I have
9 no assets, I told you I didn't buy nothing. I told
10 you I don't have any bank accounts. I also told you
11 why and I also told you the reasons that we are here,
12 and I'm going to keep telling you everything that you
13 should know, if you don't know it, because you're just
14 in the firm, maybe you don't know all the stuff that
15 your superiors have cooked and done improperly.

16 But the damages you have incurred, made us
17 incurred -- forget only economical, the emotional
18 damage that my dad, you know, my dad died -- my dad
19 died accused by his daughter of oppression when every
20 penny she has came from my father.

21 She has a house because my father bought it
22 for her. You know, when my brother-in-law split from
23 the family business when he stopped working in my
24 father's business, at that time my sister had a
25 mortgage.

1 And my dad to protect her paid her mortgage.
2 Gave her the money to pay the mortgage. And you know
3 where that money came from? He came to me and asked
4 me to mortgage my house to get the money for that.
5 And I lost my house now to that mortgage -- and you
6 keep smiling.

7 727. Q. You can keep accusing me of smiling,
8 I'm not smiling. Here's how today works; I ask
9 questions, you answer questions. I don't know what
10 question you thought you were just answering, but why
11 don't we just start over with me asking questions and
12 you answering them. Can we do that?

13 A. You have to tell me when I'm going to
14 get my transcript. If not, we're going to be here all
15 day. Until you tell me that I'm not going to answer
16 any more questions.

17 728. Q. Okay, then I'll ask them all and you
18 can refuse them all. I'm going to ask the questions.
19 This document that I put in front of you, we may as
20 well mark it as Exhibit 1, an application, information
21 to DX Financial Canada Ltd., dated November 17, 2016.
22 That's Exhibit number 1.

23 --- EXHIBIT NO. 1: Application/Information DX Financial
24 (Canada) dated November 17, 2016.

25 BY MR. BORTOLIN:

1 729. Q. We were talking about the date of this
2 document earlier, but what I wanted to take you to --
3 in it was where you stated "assets" on this document.
4 Where it says "Cash in which bank, \$50,000 TD" does
5 that correspond to the joint account we talked about
6 earlier?

7 A. It's the only bank account I ever had.

8 730. Q. So, yes?

9 A. I think it's an obvious answer; it's
10 the only bank account I've had -- yes, that's the only
11 account I have. It cannot be in anywhere else.

12 731. Q. The real estate line, I'm guessing that
13 includes 2 Gordon Road and 174 Amber Bay Road. Is
14 that right?

15 A. I assume so. I don't know for sure, I
16 have to check the numbers; I don't remember them off
17 the top of my head on that date.

18 732. Q. Would there be anything else that it
19 could've included as of November 17, 2016?

20 A. No, nothing else. I don't have another
21 asset.

22 733. Q. And the vehicles line item that says
23 \$300,000; we talked about the vehicles being sold
24 earlier. There's no other vehicles included in that
25 that you still have?

1 A. No, not that I know. You guys took all
2 my cars away. The only car we have in our garage
3 right now is my wife's car, okay? So I don't have
4 another car that I know.

5 734. Q. And what does other assets 3 million
6 dollars; what did that refer to?

7 A. I think that's just an estimation on
8 the preferred shares I had in the company. Now you
9 can scrap that because that company is worth nothing
10 now.

11 735. Q. By the company you mean Xela?

12 A. Yes.

13 736. Q. So, as of November 17, 2016 you were
14 expecting value in those shares that you no longer
15 expect?

16 A. Yes. I can't expect any more value
17 after what my sister did to the company, you know?
18 You know my sister published for five consecutive days
19 in newspapers in Guatemala that I was a dishonest
20 person, a thief, a money launderer -- all kinds of
21 unspeakable things. And you know about that too
22 because we shared it with you and nothing happened.
23 Right?

24 And after that, how do you expect the
25 company to be worth anything; I was the president of

1 the company. And she also accused all our executives
2 of money laundering in 2011, a case that has been
3 dismissed because it was bogus and complete
4 fabrication. But when all that stuff happened the
5 value of the company disappeared. You can't run a
6 company that way.

7 737. Q. So when all the stuff you just
8 described happening you said 2011, so this statement
9 is dated November 2016 and you thought the company had
10 value in November 2016?

11 A. At that time we still thought that it
12 had value -- I thought, but obviously I was wrong,
13 because now I know that the company right now is
14 completely inexistence; we no longer operate.

15 738. Q. So what has brought you to the
16 realization between November 2016 and now? What is
17 the new information you've received that's convinced
18 you the company's not worth anything?

19 A. I have no office, we have no money.
20 The company is -- all our business is pretty much
21 gone. The only -- we don't have a business running,
22 so you tell me is a company that doesn't operate
23 anymore, that doesn't have any property, because the
24 company doesn't own land, doesn't own buildings,
25 doesn't own houses, doesn't own an office. A company

1 that doesn't operate at all has any value?

2 739. Q. I was going to come to this later, but
3 it does have subsidiaries; doesn't it?

4 A. Well the only subsidiaries that
5 potentially are worth something are in the middle of
6 that litigation down in Central America, the one that
7 Margarita, my sister, was aiding with this whole case.

8 And the money that's paid your fees from
9 came from that also. In the case, as I stated before,
10 it was fabricated by a Guatemalan lawyer, a Guatemalan
11 accountant who is her nephew, Mr. Leon, Mr. Woycheshyn
12 and my sister and her husband in your office, and
13 another lawyer named Catherine Kay from Stikeman
14 Elliott came into that meeting; she admitted it in the
15 cross-examination at the beginning of this case, and
16 she was in the meeting and admitted being in that
17 meeting where they agreed on how the fees were going
18 to be paid to Bennett Jones and to Stikeman Elliott,
19 and the money was coming from a credit, a loan that my
20 sister got from a bank named Granai Thompson or GTC
21 Bank in Guatemala.

22 My sister in her cross-examination confirmed
23 that she got a four million dollar loan from them,
24 without any guarantees other than her signature. You
25 know, in Guatemala it's illegal to have loans without

1 security. No bank in the world will give somebody who
2 is not a resident, doesn't have any assets, doesn't
3 have a bank account, and had no relationship with that
4 bank in her whole life, and hasn't lived in the
5 country for 30 years wouldn't get a four million
6 dollar loan on her signature. And she did.

7 How did they get it? They took money that
8 belonged to our company that was being withheld
9 illegally by one of the companies that is part of the
10 litigation in Central America. They took that money,
11 put it in a bank account, get a GIC and gave it as a
12 back-to-back for the four million dollar loan, which
13 was used to pay fees to Bennett Jones. And that was
14 agreed on your office.

15 740. Q. My question was what you learned
16 between November 2016 and today to convince you that
17 the Xela shares or that Xela was worth nothing. And I
18 didn't hear you tell me anything that you learned
19 between November 2016 and today to convince you that
20 Xela was worth nothing. Did I miss something?

21 A. Yeah, the company no longer exists.
22 November 2016 we were still in the office. We still
23 were hoping to be able to get things resolved. We
24 were still trying to rescue our business from the
25 crisis it was in, but it was not possible.

1 741. Q. And what you're talking about rescuing
2 the business, are you talking about resolving the
3 litigation with your cousin regarding Avicola?

4 A. Repeat the question?

5 742. Q. And when you talk about trying to
6 resolve things, are you talking about resolving the
7 Avicola issue?

8 A. Resolving with whom?

9 743. Q. With whomever. We've talked about this
10 before; you've given testimony about it before, about
11 the expected value of settling litigation with your
12 cousin.

13 A. Obviously for Xela resolving the case
14 with the cousins would have allowed Xela to pay the
15 judgment. But Xela can't pay the judgment because
16 it's a completely unviable operation; it has no
17 business. And the case has not been settled -- has
18 not been resolved yet.

19 744. Q. What I was just getting at was the
20 expectation that you had or the hope that you had in
21 2016 that Xela could turn things around, and what I
22 was asking is if that was based on optimism about
23 resolving things with respect to Avicola?

24 A. In 2016, around this time my optimism
25 was to be able to rescue our business operations by

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1 being able to raise any financing to try to get our
2 operations back going. We had an absolute
3 impossibility to raise any money because of these
4 lawsuits, and because of this judgment, and because of
5 my sister's publications in 2015, and because
6 everything else she's told everybody.

7 She just talks to people and knows everybody
8 and they all hear the most horrible things about my
9 dad and myself and the company. So, she made the
10 business totally unviable, and in December 2016 we
11 were forced to close our office.

12 You know? And then I did have some cash, as
13 you can see there, but guess what; I had to pay legal
14 fees that Xela couldn't pay. I had to pay the
15 settlement to the landlord. All the money came from
16 personal money that we had at the time. That's why we
17 have nothing left.

18 That's why I have a negative balance in my
19 bank account when you froze it last year. I was
20 trying to rescue the business from the damage your
21 side did, and failed; I couldn't do it. It was
22 impossible. The banks would not finance us; no
23 investors would want to work with any of our projects
24 because nobody wants to get involved in the middle of
25 this kind of situation.

1 So, this is like committing suicide. That's
2 why last year I came up with a proposal. We have a
3 possibility now that we didn't have a year ago, but we
4 had it at the beginning of this year, and still very
5 viable to recover some dividends that would come from
6 the case with the cousins.

7 Margarita didn't want to hear about it. As
8 a matter fact you were there. She told me we were
9 never going to win that. She told me that day, in
10 front of you and Jeffrey Leon, who was on an iPad
11 connection, because he was on a beach somewhere, and I
12 ---

13 745. Q. I want to pause you. No, I want to
14 stop you, because what you're ---

15 A. Let me finish the question. You asked
16 me a question; I'm going to finish it.

17 746. Q. You're describing a settlement meeting,
18 and that's privileged.

19 A. What happened is that in that meeting
20 she told me there's no way, no way you're going to be
21 able to win against the cousins. There's no way
22 you're going to collect a penny from them. That's
23 what she told me, so then she knows we are totally
24 unviable.

25 747. Q. I'm going to ask you generally to stick

1 to the questions that I'm asking you. I'm going to
2 ask that again, and I'm especially going to ask you
3 not to volunteer information that's subject to
4 settlement privilege. So, I will focus my questions
5 and not try to make you tell me anything that's
6 privileged, but I'm going to particularly ask you not
7 to talk about settlement privilege conversations.

8 Turn to another document that was also
9 provided to us following your last examination. This
10 was provided in response to questions about amounts
11 paid to you on account of your father's shareholder
12 loan to Xela.

13 A. M'hmm.

14 748. Q. Do you recognize this?

15 A. This I don't recognize this paper.
16 This, I don't know who prepared it, but...

17 749. Q. I will tell you that I received it from
18 your lawyers as an answer to an undertaking about a
19 question with respect to the precise amounts that you
20 received on account.

21 A. This must have come from an accounting
22 somewhere.

23 750. Q. But you haven't seen this before?

24 A. I don't remember seeing this form. I
25 probably seen it -- I know the numbers, more or less.

1 I know what I got and I don't get.

2 751. Q. It's the numbers I'm curious to ask
3 about. So, you estimated that the shareholder loan
4 amounts you received were about 20 to 27,000 a month
5 when you were last examined in July. But over this
6 period of time, from October 2015 to August 2016 that
7 it would total probably a little over \$200,000.

8 Looking at it here, the columns total
9 \$659,000, so I'm hoping you can help me understand
10 that discrepancy?

11 A. Well, I really don't know what the
12 numbers are without looking at the context. I didn't
13 prepare this document, so I cannot answer about this
14 document because it's not a document that I prepared
15 myself, so I don't know the context of these numbers.
16 So I can't answer that.

17 752. Q. Well I thought I just provided you with
18 the context, which is that it was a question about the
19 shareholder loan.

20 A. I understand what you're saying, I
21 understand what you're saying, the context is you got
22 this document on an undertaking. But, the dates and
23 numbers; I don't know what these numbers and dates
24 refer to. I have to see the complete information.

25 753. Q. So this chart was provided on behalf of

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1 you as an answer to a question that was put to you.
2 So, if you can't explain to me what this chart means
3 who can?

4 A. Maybe Mr. Mendelzon put this chart -- I
5 don't know who -- I could explain any of these things
6 if I had the context, but how can I tell you? It says
7 for example 25th of March 2016, \$207.92. Do you
8 remember what you spent on the 25th of March of 2016;
9 if you get something for \$200? How would I remember
10 just from looking at dates and numbers and be able to
11 answer questions on that?

12 754. Q. Well that wasn't the question that I
13 asked you though; my question was about the total
14 numbers.

15 A. Well the same thing applies. The thing
16 is that a lot of things were paid through me at that
17 time because the company, as I say, was not viable at
18 one point. But I cannot tell you what each of these
19 is, and I cannot tell you what the exact amount is.

20 But I can tell you the company owed me a lot
21 of money, because I did sell my Tropic shares to the
22 company in exchange of preference shares. I didn't
23 get a penny for that. Like I worked very hard for
24 that company and I went long periods of time without
25 even collecting salary because we had no cash flow.

1 So when there was cash flow I would get re-
2 compensated for the times that I didn't collect. I
3 haven't received a penny from the company since around
4 October -- I don't know the date -- in 2016. On the
5 contrary; I have paid bills for the company since
6 then.

7 755. Q. So when you were examined last July you
8 could remember the approximate amounts that you
9 received on account of this loan. And I'll tell you,
10 this was described to us as Arturo's loan and these
11 amounts being gifted to you from Arturo on account of
12 the loan. Is that right?

13 A. Yes. That's correct, and there was
14 also some money owed to me from money that I had put
15 in in the past. I don't remember the exact numbers
16 for that.

17 756. Q. So that wasn't the context of the
18 question that this was supposed to be answering, but
19 are you describing it to me now that some of this
20 money is probably not on account of Arturo's loan and
21 it was money that was separately owed to you?

22 A. No, I'm not sure. I can't tell you,
23 because I don't recognize the specific numbers. I
24 can't tell you, you know, I really don't know.

25 757. Q. Setting aside the specific numbers,

1 your advice previously was guessed \$20-\$27,000 a month
2 in amounts on account of this loan totaling about
3 \$200,000 over this period of time since we described
4 October 2015 to August 2016. Is it possible that you
5 were mistaken and the actual number is 660,000?

6 A. I don't think so. I only got what I
7 got on a monthly basis, so there may be other accounts
8 that were -- I don't know what these numbers are. How
9 can I answer this, if I don't even know these numbers?

10 758. Q. Well I can't tell you what the numbers
11 that your counsel provided on your behalf to me mean.
12 So, I will ask you for an undertaking to make whatever
13 inquiries you have to make to figure out who made this
14 chart and what these numbers are, to describe to me --
15 -

16 A. I already answered the question -- I
17 don't know what it is, and I cannot ask anybody else,
18 because the people who worked at the time in the
19 company no longer work there. So, I don't know what
20 these numbers are, unless you give me -- unless I have
21 the context.

22 759. Q. I'm asking. You gave it to me.

23 A. Well then you have the answer already.

24 760. Q. Well no, my question is ---

25 A. See, if I gave it to already then you

1 already know the answer.

2 761. Q. No, I don't know the answer. Having it
3 is not answering my question. My question is to
4 understand what it means and how to reconcile it with
5 the answer that you gave that this was supposed to
6 support. You gave the answer that you received about
7 \$200,000. This is \$660,000.

8 A. That's what I was receiving on a
9 regular basis. These numbers, I don't recognize this
10 number. I see numbers -- numbers are numbers. I
11 don't know what these numbers exactly mean, and what
12 they were for. Unless I know what they were for I
13 cannot answer the question.

14 Now if you're asking me if I got more money
15 from the company, the answer is no, I didn't get more
16 money from the company than there was the normal
17 payments until the company had no more money to pay
18 me.

19 And then, in order to be able to continue
20 operations, continue paying rent, continue paying the
21 salaries of the employees, I withdrew from the payroll
22 and from all these collections. And from there on I
23 got nothing else from the company.

24 And you can see what -- the last day I got
25 something was like August last year.

1 762. Q. Well, that wasn't a response to the
2 question. The question was specifically over this
3 period of time, that's why it cuts off. So, I
4 understand you don't know the answer. I hear you on
5 the fact you don't know the answer. My request is for
6 an undertaking to you to inquire through your counsel,
7 I assume, because your counsel assisted in preparing
8 this, but to inquire ---

9 A. I don't have counsel now because I
10 can't afford counsel.

11 763. Q. How this total reconciles with the
12 answer you gave in your prior testimony, that the
13 amounts you received totalled approximately \$200,000?

14 A. I already answered -- I don't know
15 these answers.

16 764. Q. My question wasn't whether you knew, it
17 was whether you would undertake to make inquiries to
18 find out the answer.

19 A. I don't know what undertaking means, so
20 I'm not going to commit to anything, because I don't
21 want to be stabbed in the back by you guys, with all
22 these technical things that I don't know. I'm not a
23 lawyer and I can't afford one right now, so I'm here
24 answering your questions in good faith.

25 And I'm telling you what I know, and I can't

1 tell you what I don't know.

2 765. Q. Okay, I will not use the word
3 undertaking if that makes it more difficult. I'm
4 asking if you will make inquiries about how this
5 number on this chart reconciles with the evidence you
6 gave previously and to advise me of what you learned
7 from those inquiries.

8 A. I will attempt to find out.

9 MR. BORTOLIN: Thank you.

10 --- UNDERTAKING

11 BY MR. BORTOLIN:

12 766. Q. Do you still have the job title of
13 being president and CEO of Xela?

14 A. Yes.

15 767. Q. But I take it from your evidence that
16 you're not doing any work in that capacity?

17 A. Sorry, I was taking a note.

18 768. Q. I take it from your evidence that
19 you're not doing any work in the capacity of president
20 and CEO of Xela?

21 A. There's no activity -- I'm just there.

22 769. Q. Did you say you're just there?

23 A. Well the company is not liquidated, so
24 the company has to have a president -- somebody there,
25 so the company is still alive but it's not

1 operational; is totally lacking operations, hoping
2 that we can resolve the case down south one day. And
3 then that might bring life back. But there's no
4 operations. We're not buying, we're not selling
5 anything, we're not producing anything.

6 770. Q. And you're describing Xela or the
7 entire Xela family of companies?

8 A. I'm describing Xela and its companies.

9 771. Q. And just to give that some context ---

10 A. I'm describing what I know, because by
11 the way I just want to state on the record that I'm
12 not here to answer any questions about the company,
13 because I'm here to answer questions about myself.

14 772. Q. Understood.

15 A. And that was the only thing you
16 summoned me here for.

17 773. Q. Right.

18 A. And I'm here to answer your questions
19 about myself. If you're going to ask questions about
20 the company, I'm not going to answer anything.

21 774. Q. I'm going to ask questions and they
22 were asked last time and they were answered; there was
23 no refusal to these questions last time about your
24 role within those companies and your employment status
25 -- that is what those questions are directed towards;

1 you, not specifically the company.

2 I'm about to bring a new document -- before
3 I do, I just want to make sure I don't forget to mark
4 the document entitled JGG Drawings, October 2015 to
5 August 2016 as an exhibit, number 2.

6 --- EXHIBIT NO. 2: JGG Drawings, October 2015 to August
7 2016.

8 BY MR. BORTOLIN:

9 775. Q. And these I promise I will -- you have
10 copies already, otherwise I would've provided you with
11 copies again after the examination. Now, the document
12 I'm going to show to you is one that was marked as
13 Exhibit L to your last examination. And do you
14 recognize this as an organizational chart for Xela?

15 A. I'm not going to answer any questions
16 about Xela, because I'm not here in the capacity as
17 president of Xela or a representative of Xela. I'm
18 here only in the capacity of myself. So ask me
19 questions about what I do, what performance I've done,
20 but I'm not going to answer any questions pertaining
21 to the company.

22 776. Q. And I promise my follow-up questions
23 are going to be specifically about you and your role
24 in these companies. I just want to clarify for the
25 record, when I say Xela I didn't define what I meant

1 by that. I meant Xela Enterprises Ltd. You
2 understand that's what I was referring to earlier?

3 A. Yes.

4 777. Q. And that's the company that you're a
5 president and CEO of?

6 A. Correct.

7 778. Q. And so, I've referred you to an
8 organizational chart and you didn't want to answer if
9 you recognized it. But, the questions I'm going to
10 ask you, if it makes you willing to answer the
11 question, the question I'm going to ask you about your
12 role within these companies, so on that basis will you
13 acknowledge for me that you recognize this
14 organizational chart?

15 A. I refuse to answer that question,
16 because I'm not here to answer anything that has to do
17 with the company or its business.

18 --- REFUSAL

19 779. Q. And again, my questions are going to be
20 directed towards your role in these companies.

21 A. Okay, ask me your questions. But I'm
22 not going to recognize or not recognize this paper you
23 gave me, because I'm not here on the representation of
24 the company, so I'm not going to make any statements
25 that pertain to the corporation.

1 780. Q. I'm going to ask you to look at this
2 chart and tell me if you recognize any of these
3 companies as ones of which you are an officer or
4 director?

5 A. I'm an officer and director of Xela
6 Enterprises.

7 781. Q. Anything else?

8 A. No. I'm of Xela only, and I was in
9 Tropic International also. I'm not in any of the
10 other companies.

11 782. Q. You're also an officer and director of
12 Xela International; are you not?

13 A. Yes.

14 783. Q. So ---

15 A. That one? That's what I said; I'm of
16 Xela and Tropic. And none of the other companies you
17 have in that paper I have role of director or officer
18 or anything.

19 784. Q. I'm going to show you a document. This
20 is not one that you provided to me, but it is one that
21 was provided as an answer to an undertaking by Calvin
22 Shields. It is entitled "Directors Xela and
23 Subsidiaries"? And I understand that this was not
24 provided as an answer to questions that you were asked
25 on your last exam. But it does identify companies of

1 which you are an officer and director.

2 So my question is whether you were involved
3 at all in preparing this document.

4 A. My answer is very simple; I'm not going
5 to answer any questions that have to do with the
6 company. I'm not going to answer any questions that
7 are related with the testimony of anybody else. I'm
8 here to answer for myself.

9 And I'm telling you I'm not a director of
10 any other company right now, other than Xela and
11 Tropic.

12 785. Q. And I think it's fair and directly
13 responsive to that to ask you if you were involved in
14 preparing a document that identifies which companies
15 you, as an individual, are an officer or director of?

16 A. No.

17 786. Q. The answer is no, you were not
18 involved?

19 A. I was not involved in preparing this
20 document. I never saw it before. This comes from the
21 examination of a third person, and I wasn't present,
22 so I cannot answer or comment on anything he might've
23 said or not.

24 787. Q. Right and I'm not asking you to comment
25 on what he said; I'm asking -- it describes things

1 about you and I'm asking for your evidence,
2 specifically because you didn't give this evidence;
3 I'm asking for your evidence whether it's true or not
4 as it relates to you. And what I specifically want to
5 turn your attention to in this is on the second page
6 there's a company, Empresas Arturos International
7 (Barbados). You've not opened the document?

8 A. I'm not going to answer any questions
9 that relate to the company or the testimony or the
10 evidence presented by anybody else. I already told
11 you that I'm only a director and executive on the
12 Xela's companies, the two Xelas and on Tropics and not
13 on others.

14 In the past, years back, I was in some
15 companies but not anymore. I haven't been a director
16 for a long time.

17 788. Q. How many years back?

18 A. I don't remember, but as I said I'm not
19 going to answer any questions about his testimony or
20 about his evidence or about the business, and that's
21 final. I'm not going to answer any of those
22 questions.

23 789. Q. Again, my questions are about you.

24 A. I already answered. I am not the
25 director of any company that is not Xela Enterprise,

1 Xela International or Tropic.

2 790. Q. And so, you're telling me you are not
3 the VP of Finance of Empresas Arturos International?

4 A. I am not.

5 791. Q. Have you ever been the VP Finance of
6 Empresas Arturos International Barbados?

7 A. I've been on the board of that company
8 years ago, but not anymore.

9 792. Q. How many years' ago?

10 A. I don't remember, but it's a long time
11 ago.

12 793. Q. Well, I don't know what your definition
13 of a long time ago is. Can you please say three
14 years, five years, 10 years?

15 A. I don't know. Listen, since this
16 lawsuit came up and since my sister accused me of
17 money laundering; she published a letter for five
18 consecutive days in all newspapers in Guatemala,
19 saying that I am a money launderer; how can I be on
20 the board of any companies without causing harm to
21 those companies? I withdrew from all my positions in
22 every company except from the Xela companies and
23 Tropic.

24 794. Q. So, if you're describing things that
25 happened in 2011, your guess would be you stopped

1 being a director sometime around 2011?

2 A. I don't know, I don't remember. And
3 I'm not going to answer issues of the companies. I
4 told you that, so you can't insist, but if you ask me
5 that question again I'm not answering.

6 795. Q. Well, I'm not here to argue with you,
7 but let me again explain because I appreciate you
8 don't have the benefit of counsel here with you today
9 to advise you on whether to answer questions, whether
10 they're appropriate questions or not.

11 And with that in mind I'm trying to be
12 careful to ask only appropriate questions. The reason
13 that I'm asking about your role as an officer and
14 director of these companies, is because it relates to
15 your employment and money you may be making as an
16 officer or director of these companies.

17 A. Those companies never paid me anything.

18 796. Q. Never at any point in time?

19 A. No.

20 797. Q. And when we say those companies?

21 A. Any company -- the only company that
22 paid me ever was Xela Enterprises. At one point, I
23 don't remember if Xela International at one point may
24 have made some payment to me, but it would be part of
25 the same package.

1 798. Q. And you are not -- I take it, because
2 you've been clear about it -- an officer or director
3 of any of the Xela subsidiaries. Do you have any
4 effective ability to tell them what to do?

5 A. No. By the way, I'm going to clarify
6 that -- I never did, not even when I was on some
7 boards. I was never president of any of those
8 companies, and all those companies have their own
9 management and their own businesses, and they were
10 subsidaries but they were not run from Xela.

11 We had very clear lines of commandment, and
12 the people are presidents and directors they run the
13 companies.

14 799. Q. And again, I want to frame this as
15 relevant. The reason I'm asking is the relevance of
16 this that I'm getting towards is whether you had any
17 ability to control the funds of the Xela subsidiaries,
18 so just to give you that background as to why I'm
19 asking that question; why it's relevant to you.

20 As Xela, could you not have changed the
21 officers and directors of any of those subsidiaries at
22 any time, if you disagreed with what they were doing?

23 A. I'm not going to answer corporate
24 questions, because I don't know what you're trying to
25 fabricate here. The answer is I wasn't telling them

1 exactly what to do. I was just running Xela, and Xela
2 is the one who paid me. I never got any money from
3 any of the subsidiaries, and that's all I'm going to
4 tell you. I'm not running the companies, and I was --
5 I'm not going to answer any more questions on the
6 company because I already told you -- you called me
7 here to answer questions about me, not about the
8 business.

9 --- REFUSAL

10 BY MR. BORTOLIN:

11 800. Q. And we've been over that many times,
12 and again what I was getting at was whether you had
13 the ability to control the subsidiaries, including the
14 money that they controlled -- that's what I'm getting
15 at. I'm not ---

16 A. I already answered you, no. What else
17 you want me to say? You want me to yell? I'll yell.
18 The answer is no. I don't control the cash of the
19 companies. That's why we have a Board of Directors
20 and that's why we have a structure for managers.

21 We're professional company; we have
22 shareholder meetings every quarter, everything was
23 transpiring. My sister was a member of the board.
24 Her husband was a member of the board before her, and
25 she sat in the board when he was a member; she was

1 sitting in the board as a guest invited by my father
2 so they would know everything.

3 They know already all the answers. They
4 know perfectly well; we were transparent and we ran
5 these businesses very clean and transparent, according
6 to the rules, like everything else we do; by the book.
7 And by playing by the book then people like you guys
8 that don't play by the book, managed to get a judgment
9 against us without allowing us to have a trial, you
10 know?

11 And that's illegal here in Canada; it's
12 against my human rights. I have the right to be in
13 front of a judge, how many times did I have that
14 chance in this case? Zero. And how many times we ask
15 for that chance? Hundreds of times -- I don't know
16 how many times.

17 And how many times your side of the equation
18 opposed it; every single time. So I'm not going to
19 answer any more questions because I know what you're
20 trying to do; you're trying to trap me in something
21 and I'm not going to play that game.

22 Ask me questions about my personal
23 situation, and what has changed since July to date;
24 that's all I'm going to answer. You ask me any other
25 questions you can take them as a refusal as of now.

1 801. Q. I'm not being sneaky at all, I'm being
2 very, very explicit to you about the purpose of my
3 questions, which is to determine whether you
4 personally have the ability to access or control funds
5 of the Xela subsidiaries?

6 A. I already told you no, so what else you
7 want? What else you want?

8 802. Q. Right, that's an answer. And I'm
9 testing you on that because you've told me that you
10 can't do that and that seems difficult to accept,
11 because you're the president and CEO of the parent
12 company; you must have some ability to control the
13 subsidiaries -- that's what I'm suggesting to you.

14 A. Listen, you can imagine whatever you
15 want to imagine. I'm not that kind of administrator;
16 I was never, okay? And I'm not going to answer more
17 questions about how the business operated, because as
18 I told you already, you asked me that question and I
19 told you. I was not -- I never tell them what to do
20 and I'm not going to answer your questions anymore on
21 that line.

22 So, if you want to ask them, just dictate
23 the questions so they are all on the record and you
24 can put no to all of them for the refusal. If you're
25 going to ask me anything that has to do with business.

1 You summoned me here, and the summons is
2 very clear, it says, on the quality of Juan Gutierrez
3 personally, not in my quality or my position in the
4 company. So I'm not answering questions about the
5 company, period.

6 --- REFUSAL

7 803. Q. It is your source of employment. It is
8 a potential source of income and assets to you. I'm
9 entitled to ask questions about it; you can refuse
10 them, that's fine. What I just want and I will move
11 on from this shortly, but I just want to get
12 clarification on what your evidence was and what you
13 were going to tell me.

14 You were willing to tell me that you have
15 not exercised any control over the subsidiaries. And
16 I want to understand if it's your evidence that you
17 didn't because you couldn't or it's your evidence that
18 you didn't because that's just not the type of person
19 you are?

20 A. That's not how we run the businesses,
21 and I'm not going to answer this question again
22 because I already did.

23 804. Q. Well, I gave two alternative
24 explanations for your answer and I think you gave me
25 the answer that you didn't because that's just not

1 something you would do. Is the right?

2 A. You're going to twist this any way you
3 want, so why do you keep asking the same question? I
4 already told you, I already answered the question. I
5 wasn't telling anybody what to do exactly. We draw
6 the lines in the Board of Directors like a company
7 should be run, transparently, and the managers and the
8 directors and the presidents of the subsidiaries run
9 their businesses and they report to us.

10 And I just make sure that they are doing
11 their job. And this is the last time I tell you, I am
12 not going to answer again because you're trying to
13 trick me into something here, and I'm not a lawyer; I
14 don't know what you're trying to do, but I can see
15 this why you asked me without even looking me in the
16 eye.

17 You ask looking everywhere else but my eyes,
18 and when I'm answering you the question at least have
19 the decency and respect to look at me when I'm
20 answering, because I'm telling you the truth. I'm
21 looking at you in the eyes, and the answer is no, I
22 wasn't telling them what to do with the money.

23 I wasn't directing that way, that's not how
24 we run the business. And this is the last time I say
25 and the last time I'm going to answer anything that

1 you ask me that has to do with the company, the
2 subsidiaries or this chart or anything else, that has
3 to do with the business or somebody else's testimony.

4 805. Q. My questions are directed towards your
5 source of assets or income. I'm trying to determine
6 whether the Xela subsidiaries are a potential source
7 of assets and income over which you have control.
8 You're telling me that you -- whether or not you have
9 that control you don't exercise it. Is that right?

10 A. I already answered the question.

11 806. Q. I'm just trying to get a simple answer
12 because you keep -- you give me ---

13 A. No, because you're trying to trick me
14 into something, I'm not stupid. I'm not going to fall
15 into your tricky questions; I know how you guys
16 operate. I've suffered through that before, okay? I
17 was cross-examined by Jason last time. I was cross-
18 examined by Leon on a prior time.

19 And I know exactly how you play. And I know
20 how it reads in the text. It doesn't read the way it
21 happened on the table. That's why I am mentioning
22 when you don't look at me in the eye I mention it,
23 because anybody who's going to read this transcript is
24 going to read words. It's not going to read
25 reactions, and you're being sneaky in your questions

1 and you know that.

2 So I'm not answering any more. I told you,
3 I already answered the question when you read the
4 transcript you're going to see I answered the question
5 the first time you asked it. So, I'm not going to say
6 anything else, because you're trying to make me say
7 things so find me in a little contradiction somewhere;
8 I'm not going to give you that pleasure, because the
9 answer is only one and I already gave it. So I'm not
10 saying anything else about this.

11 --- REFUSAL

12 807. Q. You haven't answered my question, but
13 I'll take it as a refusal. We referred ---

14 A. It's not a refusal, so I object to that
15 term because I answered the question.

16 808. Q. We'll agree to disagree. We referred
17 several times to subsidiaries ---

18 A. So make sure that my objection is on
19 the record.

20 809. Q. She records everything. We referred to
21 the subsidiaries several times. You refused to
22 acknowledge when I put in front of you an
23 organizational chart of the subsidiaries. I can list
24 them one-by-one without reference to the chart, but I
25 would like it to be quicker and easier if we can just

1 agree to refer to this chart as setting out Xela
2 subsidiaries. We agree to that?

3 A. Not agree to that, because I don't know
4 what you're trying to do.

5 810. Q. I'm trying to make the record clear,
6 because ---

7 A. I know what you're trying to do; you're
8 trying to trick me into something. Okay?

9 811. Q. Stop interrupting me when I'm asking
10 questions, please?

11 A. No. Stop trying to trick me with your
12 silly little manoeuvres, you know? I'm not going to
13 answer questions about the company -- you ask me about
14 me personally. And I don't have shares in any of
15 those companies, okay?

16 I don't even have common shares of Xela, if
17 that's your question, I only have ---

18 812. Q. It wasn't a question.

19 A. Okay? So I don't have any assets. You
20 took my house, my cars, my cottage from me; you left
21 my whole family on the street now. Destroyed our
22 company, the business that I was running with all
23 these fake allegations and insults, you know other
24 allegations that we were laundering money? All these
25 things that your lawyers, your law firm supported my

1 sister doing. And you got paid with money that was
2 taken from one of the subsidiaries of this company,
3 and that's how you got paid and maybe you don't even
4 know that, but Jeffrey Leon certainly did. And so did
5 Jason Woycheshyn, you know? If I miss-pronounce his
6 name I apologize, because I don't know how to
7 pronounce it.

8 But the truth of the matter is they know
9 exactly how this case evolved; it's a fabrication and
10 you were successful. You were successful because my
11 lawyers were not successful in persuading the judge to
12 give us a fair trial.

13 We never had a trial. I never had an
14 opportunity to be in front of a judge and tell my side
15 of the story, nor did my dad. My dad will never have
16 that chance now; he's dead two years' now.

17 813. Q. My question, which I was trying to
18 finish, was that we referred several times to Xela
19 subsidiaries. I am referring mainly to the
20 organizational chart that was marked as Exhibit L to
21 your last examination, and you will refuse to
22 acknowledge the document, so I'll mark it for what's
23 called identification, which means you're not
24 admitting anything about it, as Exhibit A.

25 --- EXHIBIT NO. A: Organizational Chart regarding Xela

1 and subsidiaries.

2 BY MR. BORTOLIN:

3 814. Q. And I am referring to an answer to
4 undertaking received from Calvin Shields entitled
5 "Directors Xela and Subsidiaries", which I will mark
6 for identification as Exhibit B.

7 --- EXHIBIT NO. B: Directors Xela and Subsidiaries.

8 BY MR. BORTOLIN:

9 815. Q. And my question is, when you referred
10 to subsidiaries what companies are you talking about?
11 You don't have to refer to these documents if you
12 don't want to; when you referred to Xela subsidiaries,
13 what companies are you talking about?

14 A. I'm not going to answer any more
15 questions about the company. I'm here to respond
16 about my assets, about my personal situation, about my
17 ability to pay this judgment. That's what I'm here
18 for, not to answer questions about the companies.

19 816. Q. Right, and that is exactly what my
20 question is directed towards; your ability to get
21 assets ---

22 A. I don't have any shares of those
23 companies.

24 817. Q. Stop interrupting me while I'm asking
25 these questions.

1 A. No, no, listen; stop this game. You're
2 asking me the same question over and over and I
3 already told you; I don't control those companies. I
4 don't have shares in those companies and look at me
5 when I'm answering, so you know I'm telling you the
6 truth, don't look at the paper.

7 I don't control those companies and I don't
8 have shares in those companies; I cannot cash those
9 companies for my personal -- I have nothing, so what
10 else do you want me to tell you?

11 818. Q. I've moved on from asking that
12 question. My question now is just to clarify for the
13 record when we talked about those companies and those
14 subsidiaries what companies are we talking about? And
15 I want to refer to those companies as being the ones
16 listed in front of you.

17 A. I'm not going to refer to this because
18 -- I'm not answering on the company's behalf, period.
19 Do you want me to tell you in Spanish, maybe you
20 understand it that way? I'm sorry, but asking the
21 same question over and over again and I already
22 answered it, so move on.

23 819. Q. My question which you have not answered
24 is, you gave several answers referring to subsidiaries
25 and I asked questions referring to subsidiaries. I

1 explained I'm referring to the ones listed in these
2 documents that I marked for identification as Exhibit
3 A and B. You gave me answers and they're important
4 answers.

5 You've repeated them many, many times, but I
6 just want to know that we're talking about the same
7 thing. When you say those subsidiaries or those
8 companies that we're talking about the same companies.

9 If you don't want to refer to these
10 documents then just tell me when you say those
11 companies what do you mean?

12 A. I'm not going to answer questions about
13 the business, period. I refuse to answer that
14 question.

15 820. Q. This was a question about which
16 companies you control and had access to money from.
17 That is the purpose for my question.

18 A. Xela Enterprises and Xela
19 International, that's it. I already know that. I
20 already told you I don't know how many times. It's
21 the only companies I'm director of.

22 821. Q. So you mentioned Xela International.
23 To the extent that Xela International has money or has
24 assets, you have some ability to control those?

25 A. We don't have anything basically. The

1 company is pretty much out of business. I'm just
2 trying to do what I can to keep it alive, with the
3 hope that we will be able to resolve the -- I'm not
4 going to answer anymore. You're getting me to say
5 things on the company side; I'm not going to answer
6 about the company.

7 You see, that's why I'm telling you you are
8 tricking me, so this is zip, no more. I'm not going
9 to tell you any more things that have to do with the
10 names of companies, performance of companies,
11 relationship between companies, who directed --
12 nothing with the company.

13 Ask me about my personal, fine. Anything
14 else you're wasting our time here; I'm not going to
15 tell you anything because I don't have to, because I
16 came here to answer questions about myself not about
17 the company.

18 --- REFUSAL

19 822. Q. And I understand that you're in a
20 position where you don't have counsel here, and I'm
21 taking that as an obligation on my part to be
22 responsible in the questions that I'm asking to make
23 sure that they're not inappropriate to ask you.

24 The questions that I've asked about what
25 roles you have in which subsidiaries, you may not

1 recall it, but last July we went through this entire
2 chart marked as an exhibit and identified which of the
3 company's you were an officer or director of while
4 your counsel was sitting there and there was no
5 objection to those questions. I'm not trying to trick
6 you or ask something inappropriate by asking about it
7 now. Why don't we take a 10-minute break?

8 A. Why don't we don't take any breaks and
9 just finish this thing?

10 823. Q. We're not close to being finished.

11 A. Well then, continue.

12 824. Q. I would like to take a 10-minute break.

13 A. I don't want to take a break, please,
14 please continue. Why do we have to take a break and
15 waste our time; just continue.

16 825. Q. We're going to take a break.

17 --- A BRIEF RECESS (11:17 A.M.) ---

18 --- UPON RESUMING (11:32 A.M.) ---

19 CONTINUED EXAMINATION BY MR. BORTOLIN:

20 826. Q. I want to move on from what we just
21 talked about, but I just want to tie off one point to
22 make sure we're clear on it. You were very clear to
23 me that you had not received any money directly from
24 the Xela subsidiaries. I just want to make sure that
25 your evidence is also that you haven't received any

1 kind of indirect money, for example paying expenses
2 for you or anything like that from Xela subsidiaries,
3 other than the ones you described from Xela and Xela
4 International?

5 A. No.

6 827. Q. That's correct that you haven't
7 received anything?

8 A. No, I haven't received anything. I
9 told you that already.

10 828. Q. And I just want to be clear, direct or
11 indirect, just so there's no confusion there. What
12 has been your source of income over the past year,
13 since last July?

14 A. I have none.

15 829. Q. Just to take an example of something
16 like gas for a car; how does that get paid for?

17 A. From my wife's savings and also from my
18 mother's help.

19 830. Q. And so, things like food and water,
20 meals; is that the same answer?

21 A. Yes. The answer is I don't have any
22 source of revenue, so right now I'm not paying for
23 anything myself -- I can't.

24 831. Q. You don't have any employment outside
25 of the Xela family of companies?

1 A. No.

2 832. Q. You testified last July also about
3 getting some support from your wife's savings. The
4 evidence you gave was that she hasn't been doing any
5 work for a very long time. Do you remember giving
6 that evidence?

7 A. She does jobs -- she works part-time
8 sometimes, like she does her own -- she's an interior
9 designer, so she does some designs from time to time.

10 833. Q. And that's what I want to understand,
11 because the last time you testified in July your
12 evidence was she hadn't worked in a very long time,
13 but then we asked you to let us know if you recalled
14 any differently.

15 And further to that undertaking we received
16 an explanation that she was self-employed as an
17 interior designer, selectively working on a project-
18 to-project basis. And so I'm just trying to reconcile
19 those two things.

20 Is your evidence that she's been actually
21 working continuously for a long period of time?

22 A. I'm not here to talk about her.

23 834. Q. Well I'm asking about your evidence
24 that you gave in your answer to undertaking and I'm
25 asking you to explain it.

1 A. Yeah, I already told you she's an
2 interior designer and she does work when she has
3 opportunities -- that's it.

4 835. Q. Right, but your evidence last July was
5 that she hasn't been doing any work for a very long
6 time. If you want I can show you where it is in the
7 transcript, if it helps?

8 A. Yeah, I already answered the question.

9 836. Q. Well you're giving me two different
10 answers -- we've received two different answers. One
11 is, she hasn't done any work in a very long time, and
12 then one is she works part-time. So I'm trying to
13 understand which is the answer?

14 A. When she has an opportunity she does a
15 job. I'm not answering questions on her behalf
16 either; she's not part of the judgment either. So,
17 I'm not answering any more. I already told you -- you
18 already know the answer, so why are you asking me?

19 837. Q. Well I'm asking because as I said I
20 have two different answers. And to explain the
21 relevance of my question, I'm asking ---

22 A. No, I know what you're trying to do
23 here, you're trying to create some trick -- the answer
24 is simple. I already gave you the answer in July and
25 I already gave you the answer now -- move on, next

1 question.

2 838. Q. You're giving me two different answers,
3 and again, you're describing ---

4 A. I'm not giving you two different
5 answers; I told you she is self-employed as an
6 interior designer and she does work from time to time.
7 I didn't know when she was employed in the past or
8 not. I'm not answering questions on her behalf; she's
9 not here and she's not part of the judgment and has
10 nothing to do with this.

11 839. Q. My questions are directed towards your
12 sources of income. You told me before, last year, you
13 told me again ---

14 A. And I already answered to you ---

15 840. Q. Stop ---

16 A. --- I haven't received anything from
17 the company since last August, and everything that's
18 being spent for the family survival has been coming
19 from my wife's savings. What else you want me to tell
20 you?

21 841. Q. Right. This is my question about your
22 source of income ---

23 A. I don't have a source of income.

24 842. Q. You just described to me it's your
25 wife's ---

1 A. I don't have a source of income, and
2 that's the answer. You're asking me about my source
3 of income; I'm telling you I have none. You killed
4 the company with your actions, so I have none.

5 843. Q. You're not letting me finish my
6 questions and that's making it difficult for the
7 reporter and it's making it difficult for me, and it's
8 making today much longer than it needs to.

9 Let me start over; this is a straightforward
10 question. You've described your wife as a source of
11 income for you personally, as your primary source of
12 income?

13 A. She's not giving me money, she is
14 paying for the expenses -- I live in the house.

15 844. Q. Okay, income is a poor word choice; I
16 take that, but the primary source from which you were
17 funding your daily living expenses?

18 A. I'm not funding daily -- she is funding
19 the family living expenses. I just live in the house
20 now. I have nothing; you took everything away from
21 me, so I can't contribute now.

22 845. Q. And that's what I'm getting at, and I
23 just want to understand and I'm being transparent
24 about the reason for this is that I'm trying to
25 reconcile your evidence about all your money coming

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1 from your wife with what your evidence was about what
2 her own source of money is, because you also gave
3 evidence last July that everything she has come from
4 you, or I'll be more precise with the quote.

5 What you said and I can take you to the
6 quote, I don't want to be sneaky about this -- it's
7 question 173 which I'll put in front of you. The
8 question was, "How do you help her?" Answer; Well,
9 when she needs, because she doesn't have any source of
10 income, so when she needs something I help her with
11 that". And you were describing your wife there.
12 Right?

13 A. Yeah, at that time?

14 846. Q. At that time being July of last year;
15 July 2017?

16 A. Yeah, at that time, until you froze my
17 bank account, until you took all my assets away.

18 847. Q. So, as of July 2017 or before July 2017
19 your wife was relying on money from you -- now you
20 don't have money but she has money. This is what I'm
21 trying to understand. How it's possible that she has
22 money that didn't come from you?

23 A. Well, you have to ask her and she's not
24 part of this case. If you're asking about how she got
25 the money to buy my share of the cottage, because I

1 know that's where you're going to, well she got a
2 second mortgage on the cottage in order to be able to
3 pay that. That's how it was done.

4 848. Q. Can you provide me with any evidence of
5 that mortgage?

6 A. I didn't handle that mortgage; it's not
7 my mortgage. I'm not an owner of the cottage anymore.

8 849. Q. Right, no, but from what ---

9 A. That's out of my possibility; I don't
10 control that.

11 850. Q. From what you just described to me, the
12 mortgage was taken out on the property to finance the
13 purchase of your interest in the property. Is that
14 right?

15 A. Correct.

16 851. Q. And so, when that financing was taken
17 out you were a joint owner of the property, so I'm
18 going to suggest to you that you must have been ---

19 A. No, you're mistaken. I was
20 expropriated from that by you and forced into an
21 auction, and then she negotiated a mortgage and the
22 mortgage was -- she got the money at the time that the
23 property became hers and then it was all done -- I
24 don't know how but she has her lawyer and her lawyer
25 handled the whole thing.

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1 So, she couldn't get a mortgage until she
2 bought me out, because you froze the house. I
3 couldn't get a mortgage myself either. You already
4 know all this. You already know all this.

5 852. Q. No, I don't know what you're describing
6 to me. It sounds to me like what you've just
7 described is a Catch-22; that she couldn't get the
8 mortgage until she bought the house, but she couldn't
9 have paid for the house until she had the mortgage.
10 So, which one of those things came first?

11 A. I don't know; you have to ask her. She
12 got a mortgage on the cottage. The mortgage -- I
13 don't know how it was done because I wasn't there. I
14 wasn't handling it; you have to ask her lawyer, you
15 know? She get a mortgage from a private lender; one
16 of my sons helped her do all that.

17 And then, I don't know how they documented;
18 I wasn't part of it. I didn't handle it.

19 853. Q. So I'll just make sure I understand
20 your evidence. Is that you did not sign any papers in
21 support of a mortgage?

22 A. No.

23 854. Q. Do you know who the private lender was?

24 A. No.

25 855. Q. And do you know what the mortgage was

1 secured against?

2 A. No. I assume it's on the cottage, but
3 I don't know. As I told you I wasn't the one who
4 handled that.

5 856. Q. And the reason I'm having trouble
6 understanding this is because until that auction
7 completed you were still an owner of the property.
8 So, I'm suggesting to you that it doesn't make sense
9 that someone could mortgage the property without you
10 being involved.

11 A. I wasn't involved. I did not sign the
12 mortgage, if that's what you're asking.

13 857. Q. I did and you answered that -- that's
14 fair.

15 A. I couldn't answer -- you froze me out
16 completely, so you expropriated me from my property,
17 okay? Then my wife was going to lose her share, so my
18 son arranged for her to get financing, a private
19 lender, and the terms of the conditions that they
20 arranged is something that she did, not me.

21 858. Q. And the reason that you're not telling
22 me more than that is because you're refusing to tell
23 me more than that, or because you don't know?

24 A. I already answered that question. I
25 told you I didn't handle that thing. So, I cannot

1 tell you what I didn't do, okay?

2 859. Q. Right, I understand you can't tell me
3 what you didn't do, but and this may be a question you
4 refuse to answer, and if so then I'll just take it as
5 a refusal ---

6 A. I'm not refusing to answer; I already
7 answered.

8 860. Q. Right, but my question is more to the
9 specifics of who the private lender was and what the
10 security was for the loan?

11 A. I wasn't -- I didn't do it, so I don't
12 know. I can't answer the question; I already told you
13 that.

14 861. Q. You told me you didn't do it, but I
15 didn't know if perhaps you had talked to your wife
16 about where she was getting this money from and
17 learned about it that way, but you're telling me you
18 just don't know?

19 A. I'm not going to answer that question
20 anymore. I already told you -- you have the answer;
21 read the answer in prior questions you have the
22 answer. So you ask the question again and again,
23 because I know what you're trying to do, and that's
24 why you never look at me when you ask your questions
25 and when I answer you look at the papers; because what

1 you're trying to do is you're trying to ask the
2 question so many times that as I'm answering it's
3 impossible to say the exact same words and then you're
4 going to try to pick words to try to trick me into
5 something.

6 I don't have a lawyer here to protect me, so
7 I'm protecting myself, so I'm not going to tell you
8 more about it; I already answered your question.

9 --- REFUSAL

10 862. Q. There's no tricks here. The objective
11 is for me to understand your assets and your income
12 and your spending.

13 A. My assets and my income is zero -- what
14 else you want?

15 863. Q. And I'm asking questions directed
16 towards that. When I asked you questions right now
17 about the mortgage, I'm testing what you're telling me
18 that your wife is your source of income and that she
19 provides you with money.

20 A. She's not my source of income. I'm
21 just living in the house and she's kind enough to let
22 me live there and feed me.

23 864. Q. She funds your expenses. That's fair
24 enough. I don't mean to misstate what you told me
25 earlier.

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1 A. You see you're trying to trick me with
2 your statements and your questions.

3 865. Q. Again, I'm not trying to trick you.

4 A. Yes, you are.

5 866. Q. My questions, and I'm being very
6 explicit about the purpose of my question, is to
7 understand your source of income and I'm trying to get
8 -- it does not make sense to me that your wife who
9 doesn't have her own sources of income is able to pay
10 for things without any help from you, or without you
11 being involved.

12 And so, when I'm asking questions about that
13 I'm trying to get to the bottom of how that makes
14 sense and how that could be true. And, it will go
15 quicker if you just answer the questions. A lot of
16 the questions I'm asking you're just not answering.

17 A. I'm answering very clearly to you. I
18 do not have a source of income. I do not have any
19 investments. I don't have anything else that I had in
20 July of last year; I lost all my assets, thanks to you
21 and your side of the equation, without me having the
22 right of a trial which is an abuse of my human rights,
23 by the way.

24 This is like a Banana Republic situation,
25 not like Canada and I'm horrified. It horrifies me to

1 think that somebody can be put in a position I've been
2 placed, without even having the opportunity to tell
3 his story in front of a judge. I never had that
4 benefit. And that is absolutely unheard of, at least
5 not in this country.

6 And now you're trying to trick me with
7 questions, and I already told you I have no assets, I
8 have no income; I have no sources of income. I didn't
9 handle my wife's mortgage and that's all I have to
10 tell you; I cannot answer any other questions.

11 You have to ask your questions about what I
12 know and what I do. I already told you.

13 867. Q. Right. And I understand your evidence
14 is that you have no money, you have no assets, but
15 it's not my job to take your word for it. So I'm
16 trying to get to the bottom of that, because what's
17 happened is your wife, who has no other source of
18 income that we're aware of, came up with on very short
19 notice \$790,000 to buy a house.

20 So, I'm trying to get to the bottom of where
21 that money came from and whether or not -- I
22 understand you're telling me you're not a source of
23 it, but I'm trying to test whether that's true. So,
24 the question to come back to where I was before ---

25 A. So you're accusing me to saying a lie?

1 That's what you're saying?

2 868. Q. I'm cross-examining you -- that's my
3 job.

4 A. And I tell you I don't know -- I didn't
5 handle that. She has a property, she got a second
6 mortgage on that property and she tried to save her
7 house. Where do you want her to go and live; under a
8 rock? Under the bridge at the -- you want us to go
9 and move and live under the Gardiner Expressway?

10 You know, of course people have to find ways
11 to go work around, and she did what she had to do. It
12 had nothing to do with me; I didn't give her anything;
13 I didn't sign anything; I didn't help her in any way,
14 shape or form.

15 And I'm not going to tell you anymore. I'm
16 not lying; I have not told you a lie, and look at me
17 when I'm answering you because you're just looking at
18 the wall. You know, I'm telling you the truth and
19 you're trying to put words in me; you're trying to
20 make me confused; you're trying to upset me asking the
21 same question over and over again.

22 I can tell you I am very upset. I'm very
23 upset because I worked all my life for this company,
24 all my life. And this company fed me, my father, my
25 sister. Everything my sister has come from this

1 business, and she did not work a single minute of her
2 life. She got it all for nothing, okay? And then she
3 comes and she sues us this way, and we don't get even
4 a trial.

5 You know, I've been accused of being
6 oppressive to my sister and you know the results; the
7 judge ordered us to pay almost the same price that we
8 offered her in 2010, is less than 20% difference from
9 what the judge considered a fair price to what we
10 offered.

11 20% difference is far from oppressive, far
12 from oppressive. This is a complete travesty what
13 happened here, complete travesty. And I never had a
14 chance to sit in front of the judge and tell my truth.
15 My dad never had a chance to tell his story.

16 You know, my dad died really sad and
17 heartbroken from what my sister did, and she did that
18 because she joined my cousins in a bigger quest, and
19 your firm is part of that. So you want me to repeat
20 this again and you're sitting yourselves in the
21 position of strength and then extorted one of our
22 executives, one of the junior guys in IT to steal
23 information so my sister could give it to my cousins.

24 And that was done on your knowledge, your
25 firm's knowledge. And then your fees were paid with

1 money that was stolen from our company too. It was
2 done with your knowledge. Jeffrey Leon blessed it,
3 and he got really upset when I confronted him with it
4 during my first cross-examination back in, I forget,
5 2011 or '12 -- all that is true.

6 869. Q. What question do you think you're
7 answering?

8 A. I'm just telling you I have told you
9 the truth all the time, and you know all the answers.
10 And I'm not going to tell you anymore. I don't have
11 any source of income, I don't have any assets; you
12 took my cars, you took my house, you took everything
13 from me.

14 You destroyed my company -- not my company,
15 the company I ran -- my father's company, completely.
16 And now you're coming and telling me that I don't have
17 the right to live. I don't have the right to survive,
18 and you start questioning my wife and you don't even
19 know.

20 You don't know what she knows and what she
21 doesn't know, and she's not part of this judgment, and
22 I'm not going to tell you anything about her because
23 she's not part of this judgment. I don't have
24 anything. So you want to continue -- you want more
25 from me? You want me to name my organs so you can

1 sell them and Margarita can take the money?

2 That's the only thing I can give her now. I
3 have nothing else.

4 870. Q. My questions are much more specific
5 than that.

6 A. So you can keep asking the same
7 question over and over again, as I said I'm not going
8 to answer again, so you take it as refusals, if you
9 like. I don't know what that means exactly, but do
10 it. I'm not going to fall in your traps, okay?

11 871. Q. Let me ask a series of questions and
12 you can either answer them or not answer them, but I'm
13 going to ask you if you're not going to answer them,
14 to just not answer them and not go off talking for 10
15 minutes.

16 A. I'm going to continue telling my story
17 because I've been forbidden from doing so since 2011.
18 I've been accused of things I've never done by your
19 firm, knowingly for God's sake. You know exactly what
20 you're doing.

21 And you destroyed me, and I was an honest
22 person. You know, I paid my sister's mortgage by
23 mortgaging my house. What kind of heartless people
24 are you? And then you come and question me and don't
25 allow me to even say anything.

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1 And you kept me from being able to talk to a
2 judge. Why don't we go in front of a judge and have
3 this decided? Why don't we go? I'm prepared to go
4 and tell the judge my story. I still hope that there
5 is justice in this country. I never took any benefit
6 from this company, as a matter of fact if you look at
7 the accounting of the withdrawals from the company, my
8 sister took much more money out of the company than I
9 ever did, and she contributed nothing.

10 She didn't work a second in the company.
11 And her husband yes, worked there, but he embezzled
12 money from the company by using the credit card
13 without authorization, and that's why my father fired
14 him.

15 And then your firm managed to take that off
16 the docket, because that was part of the original
17 lawsuit if you remember? And the lawsuit was this
18 size, like covered a bunch of issues, and it was
19 narrowed to the one little issue of the Tropic shares.

20 And then we are accused, we are considered
21 or whatever, found to be oppressors because we offered
22 her a price that the judge decided was low because his
23 calculation was 20% difference, or less than 20%
24 difference.

25 That's far from oppression; that's Banana

1 Republic type of justice, you know? So then you keep
2 asking me questions, I'll keep telling you the story,
3 because this is the only time in my life I had a
4 chance to say the things and that's why I really
5 demand to get this transcript as soon as it is
6 physically possible.

7 872. Q. Who was the private lender that your
8 wife used to finance the purchase of her bid in the
9 auction for 174 Amber Bay Road?

10 A. I already answered that question.

11 873. Q. No, you haven't; please answer the
12 question?

13 A. Go read the transcript; I already
14 answered that question. When you read the transcript
15 you'll find out I answered that question.

16 874. Q. I'll find out you gave me a 15-page
17 answer that had nothing to do with my question.
18 Please just tell me ---

19 A. I answered the question, sir.

20 875. Q. --- who is the private lender? Do you
21 know or are you refusing to answer?

22 A. I already answered that question
23 before. Read the transcript and you'll find out I
24 already answered the question.

25 876. Q. Have you told me who the private lender

1 is?

2 A. I told you the answer. I'm not going
3 to repeat my answers anymore. Read the transcript.
4 You're going to get a copy in due time. I answered
5 the question the first time you asked me, and then you
6 keep asking me the question, then I tell you my story.

7 877. Q. Exactly, you tell me your story and not
8 answering my question.

9 A. Because I answered the first time, and
10 then you keep with the same question and the same
11 question and I'm not going to play your game, okay?
12 I'm tired of games. I'm tired. You play like little
13 lawyer -- no, I'm not going to play your games
14 anymore. I'm fed up with it.

15 You guys destroyed me on purpose, just for
16 money. Your firm has made -- I don't know how much
17 money you made out of this -- money that was taken
18 from our company. The company that now is defunct
19 thanks for you. Thank you, I hope you enjoy it.

20 878. Q. I'm going to interpret your answer as
21 meaning that you don't know who the private lender is.

22 A. Read the transcript; I answered the
23 first time.

24 879. Q. Please stop interrupting me when I'm
25 asking questions and this will go so much faster.

1 A. Listen, listen, I'm not going to let
2 you bully me anymore. That's what you've done the
3 whole time. The whole time that means since 2011 your
4 firm has been bullying us all along and taking
5 advantage of us and destroyed us. I answered the
6 question the first time you asked it. And when you
7 get your transcript you're going to read it and you're
8 going to see I'm telling you the truth. I answered
9 that question.

10 880. Q. I request you to make inquiries of your
11 wife as to who the private lender was?

12 A. Do what?

13 881. Q. I request that you make inquiries with
14 your wife to identify who the private lender was; that
15 was the source the ---

16 A. You can request whatever you want.

17 882. Q. I am; what's your answer?

18 A. Okay, you've requested -- fine.

19 883. Q. What's your answer?

20 A. You have the right to request.

21 884. Q. Right and you have the right to refuse
22 or to say that you'll do it or to say that you'll
23 think about it.

24 A. I'm not going to get my wife involved
25 in this mess. She's suffered enough, okay? So, I am

1 not going to get her involved in this thing. I'm not
2 going to let you do that.

3 885. Q. So you're refusing. Fine.

4 --- REFUSAL

5 A. You already destroyed my family
6 emotionally, have caused immense harm to my wife and
7 my mother. You know my mother is scared of losing the
8 little things she has now, because she doesn't have
9 any income, she has debts. That's all she got.

10 And then -- listen, I'm not going to let you
11 do that anymore. So I'm not going to answer any
12 questions that are related to my wife or my mother.

13 886. Q. And all you have to say is I refuse to
14 answer that question and move on. Next question; will
15 you provide me with ---

16 A. I didn't answer ---

17 887. Q. Stop interrupting me.

18 A. No, because you are putting words on
19 me. You're saying, you should say -- you're not going
20 to tell me what to say -- understand? You're not
21 going to tell me what to say. I'm telling you the
22 truth and I'm telling you what I have to say. So,
23 stop trying to put answers on me.

24 I didn't say what you just said now.

25 888. Q. I didn't say you said anything. You

1 can refuse my questions, you can answer them or you
2 can say you'll think about it and answer me later.

3 A. Don't tell me what to do. You asked me
4 a question and I answered it -- move on. Don't start
5 trying to give me advice -- you're not my lawyer.

6 889. Q. My request was for you to inquire of
7 your wife who was the primary lender?

8 A. And my answer was I am not going to let
9 you draw my wife into this, so I'm not going to ask
10 her anything about this. She's not going to be drawn
11 into this, because she's already suffered enough.

12 890. Q. I request that you obtain a copy of the
13 mortgage agreement that was used to fund the \$780,000
14 bid for 184 ---

15 A. I'm not going to let you draw my wife
16 into this mess; I have nothing to do with it, period.
17 You already hurt her so much. You were there at the
18 two auctions, my friend, you were there. You know,
19 with your little smile, I presume.

20 So no, you're not going to hurt my wife
21 anymore, I'm not going to let you do that. You
22 destroyed me, fine. Destroyed the company, fine -- no
23 more. No more. You have inflicted huge damages on
24 this family, huge. Many of them are irreparable, by
25 the way. And all because you wanted to make money and

1 because you're playing these little games and this
2 conspiracy thing; you got money from Panama and lend
3 it through Guatemala so you could get your fees paid
4 enjoy being here.

5 And on top of that you want to pretend me
6 paying your fees for being here today -- I know that's
7 going to come next. Right? Or not? So just ask your
8 questions. I'm not going to tell you anything about
9 my wife, I already told you, so your questions about
10 that don't even ask them because I'm not answering.

11 --- REFUSAL

12 891. Q. Well, I need to ask the questions and I
13 need you to say you're refusing to answer.

14 A. She's not part of this deal. She's not
15 part of this deal. She's an individual, she's an
16 independent person, she has nothing to do with my
17 sister, has nothing to do with this case, is not part
18 of the judgment.

19 She's free to do whatever she pleases and
20 whatever she can do. I already told you I did not
21 help her get the mortgage. I did not give her
22 anything because I have nothing to give -- that's all
23 I can tell you, period.

24 892. Q. You described earlier that there were
25 some things that were seized and sold off like the

1 cars and your interest in the house. Apart from that
2 action that Margarita has taken to enforce her
3 judgment, you'll agree with me that you haven't paid
4 any money to her directly for the judgment?

5 A. I don't have any money. I don't have
6 any money; how could I give her any? The answer is
7 no, I didn't give her anything because I have nothing.
8 She took the only things I have and destroyed my only
9 source of income. What else do you want?

10 893. Q. I'm not looking for the explanation,
11 I'm just looking for the "yes" or "no" answer to
12 confirm that we're on the same page.

13 A. Well, I'm giving you the explanation
14 because I have the right to do so. Its free speech in
15 this country, if you didn't know.

16 894. Q. At your last examination you described
17 that you had given some money to your mother, Carmen,
18 and they were described to us as -- or described to
19 Mr. Woycheshyn at the last examination as not large
20 amounts.

21 Then we asked for an undertaking as to the
22 specific amounts and we were told it was a nominal
23 amount. And then we received an answer that you paid
24 Carmen's bills in the amount of \$100,000 to \$120,000
25 since July of 2016.

1 Is that amount of money correct? Have you
2 paid approximately 100, to \$120,000 for Carmen's bills
3 since July of 2016?

4 A. I don't know. I did pay power bills,
5 condo maintenance bills -- I don't know; I didn't
6 account for all that stuff. I just helped her out as
7 much as I could, until you froze my account and took
8 everything away from me.

9 So now I cannot even help her. So, whatever
10 I told you in July '17, whenever, last cross-
11 examination was what happened to them. And from there
12 on I have nothing because you froze me completely.
13 Nothing's changed since then, except that I have
14 nothing left because you took it all away from me.

15 895. Q. I take your evidence; you're confirming
16 that no money was given to Carmen after July 2017,
17 that's also the answer that you gave earlier in
18 writing. I want to focus then on the period between
19 July 2016 and July 2017 when 100,000 to \$120,000 was
20 given, and ask you to tell me as best you can what the
21 bills were that that money went towards?

22 A. I don't remember, it's too long ago all
23 the details. I already answered that in the last
24 cross-examination. Anything that happened before the
25 last cross-examination you have the answers already.

1 896. Q. These are the answers that we got from
2 the last cross-examination and we only got these a few
3 months' ago -- a little more than a few months' ago,
4 but in March; the answer that it was 100 to \$120,000
5 for bills?

6 A. So that's what it is. What else do you
7 want?

8 897. Q. And my follow-up question is what
9 bills? Bills for what?

10 A. I already told you, condo maintenance
11 fees, insurance for the condo and I don't know what
12 else expenditures she has; food, Hydro, telephone,
13 cable TV -- I don't know, whatever the fees she has,
14 the bills she has, the expenditures she has. Like
15 everybody else, you know she has to eat; she has to
16 have electricity in her house. She has to pay the
17 condo fees; otherwise she gets in trouble there.

18 898. Q. How much are the condo fees?

19 A. I don't know, I don't pay them
20 directly, I just gave her money. I have no idea.
21 It's her apartment, not mine.

22 899. Q. Where would that money have come from;
23 a bank account? A TD account?

24 A. Whatever I gave her before you froze my
25 bank accounts came from me. After that I didn't give

1 her anything.

2 900. Q. I understand it came from you, but it
3 came from the TD bank account?

4 A. How many times do I have to answer that
5 question? I have one bank account at the TD Bank. I
6 opened it in 1984 and I never had another bank
7 account.

8 901. Q. I have that evidence. My question ---

9 A. Do you need me to tell it again? Okay,
10 so ---

11 902. Q. --- was slightly different.

12 A. So you don't have to ask again the
13 question; I'm going to say it again. I have one bank
14 account at the TD Bank, opened it in 1984. It's a
15 joint account with my wife, and it's the only bank
16 account I've ever had here in Canada since I came.

17 And I never have -- since I moved to Canada
18 in '84 I have never had a bank account anywhere else
19 in the world except for that one.

20 903. Q. And you're answering again a question I
21 asked earlier, but my question now is slightly
22 different. Its where did the money come from to pay
23 Carmen's bills from July 2016 to July 2017.

24 A. If I gave her any money it was coming
25 from that account, obviously it's the only account I

1 have.

2 904. Q. Thank you. That's all I was asking.

3 A. Next you're going to ask where the
4 money came to that account; from whatever drawings,
5 payments I got from Xela until I stopped getting money
6 from them, from the company. After that I didn't give
7 her anymore because I had none and the bank account is
8 frozen.

9 905. Q. The number that we were given in your
10 answers to undertakings of 100 to \$120,000 do you know
11 how that number was estimated?

12 A. I don't remember that. Obviously it
13 was looking at whatever the monies that were given to
14 her.

15 906. Q. Can I ask you -- I'm going to ask you
16 to please tell me what the basis of the calculation of
17 100 to 120,000 is, and to the extent that you looked
18 at any documents that you used to make that
19 calculation, to provide me with copies of those
20 documents, please?

21 A. I don't remember that. It must've been
22 from my bank account and her receipt, asking her --
23 no, I don't remember. How can I remember that from
24 almost 2 years ago?

25 907. Q. This was an answer that you gave in

1 March of this year.

2 A. I gave a lot of these answers to Mr.
3 Mendelzon and he passed them over to you. I don't
4 know when, I don't control that.

5 908. Q. And I'll tell you if you don't know; it
6 was in March of this year. So, you're saying that the
7 number came from you, and I'm asking you to advise --
8 you don't have to do it today, you can go look back at
9 whatever you want, but I'm asking you to advise me
10 what that number was calculated based on, and to the
11 extent there are any documents that you haven't given
12 us already to provide us with copies of those
13 documents. That's what I'm asking.

14 A. If it's a number I provided to Mr.
15 Mendelzon was simply looking at the bank accounts and
16 whatever bills I paid on her behalf or the money I
17 gave her. Or it could've come from my wife's savings
18 too, I don't know.

19 909. Q. Well, you must have known when you gave
20 the estimate of 100 to \$120,000 what you were looking
21 at to base that number on, so you knew at some point.

22 A. It's probably an estimation also based
23 on -- I don't know the answer, so I'm not going to say
24 more about it because you're trying to trick me again.

25 910. Q. I'm not trying to trick you ---

1 A. So I already told you I don't know the
2 answer. I don't know how Mr. Mendelzon put those
3 numbers together.

4 911. Q. Well you told me you gave them to him.

5 A. I don't even know what the document
6 you're talking about.

7 912. Q. Sure, that's fine; I can take you to
8 it. It's the answer to question number 175, on the
9 top row of this page that I'm giving you.

10 A. It cannot be clearer than that. It's
11 an estimation, and I was estimating on the different
12 things that she's paying or she needed money for. I
13 don't know more than that; I already answered the
14 question. It's just an estimation. Just read the
15 answer; it's in there very clear.

16 913. Q. Right and my question wasn't whether it
17 was an estimation. My question is what was the
18 estimation based on?

19 A. On whatever she required and whatever
20 she spent -- I don't know. I don't remember exactly
21 how that estimation was done.

22 914. Q. But you agree with me it was your
23 estimation?

24 A. Yeah, it's likely -- the numbers sound
25 like reasonable of whatever she's been needing for --

1 I don't know what time period that covers either, but
2 since my dad passed away I've been supporting my
3 mother until I couldn't do it anymore because you
4 froze me and took my assets away.

5 Before that I was supporting my mother. So
6 that's for the period of time since my dad died.

7 915. Q. And you described to me that this
8 number sounds reasonable sitting here today. I'm just
9 going to suggest to you that it sounds like a lot of
10 money for what you described those four things, like
11 hydro bills and food and condo fees. But, your
12 evidence is that it's reasonable?

13 A. Let me see it again, because I want to
14 -- before I say anything I want to make it -- yeah, I
15 cannot tell you anything different than I already
16 said.

17 916. Q. And, just to be clear these are ---

18 A. It's just an estimation, that's what it
19 is.

20 917. Q. Right and you've told me that many
21 times.

22 A. I don't have any means to verify the
23 numbers.

24 918. Q. And so, as far as you know there are no
25 documents you looked at as the basis for making that

1 estimate?

2 A. I don't remember that -- I don't think
3 so. Maybe there are some, but I gave you the best
4 estimation I could do. What else you want me to do?

5 919. Q. I just want you to tell me what the
6 estimate was based on -- that's been my question.

7 A. Well, I already told you I don't
8 remember exactly, but it's based on whatever she
9 needed since my dad passed away.

10 920. Q. And this is money that was given to her
11 without -- it wasn't a loan; there's no expectation of
12 being repaid?

13 A. No. How would I collect from my
14 mother? You know, I'm not my sister; I'm not that
15 type of person, you know? My mother supported me when
16 I was a baby, took care of me all my life and she's
17 81. So, am I going to give her money and say, pay me
18 back? Come on? I'm not like my sister that took
19 money from dad. All her life she never earned a
20 penny, and then she bit him, right? She stabbed him
21 in the back, big time.

22 921. Q. This is the Consolidated Undertakings
23 and Refusals Chart dated March 20, 2018, because we're
24 referring to it I'm just going to mark it as an
25 exhibit, number 3. And I'm going to take you to

1 another row of it.

2 --- EXHIBIT NO. 3: Consolidated List of Undertakings and
3 Refusals from previous cross-examination of Mr. Gutierrez,
4 dated March 20, 2018.

5 BY MR. BORTOLIN:

6 922. Q. This is labelled in the far left column
7 as question number J-421 and the question was to
8 provide any transfers of funds from you to your
9 children from October 2015 to present. And you can
10 see there what your answer was. So my question is
11 about the \$75,000; what form did that assistance come
12 in?

13 A. I don't exactly recollect, but her
14 husband was diagnosed with cancer. They had a small
15 business running; they were trying to make their life
16 through a pizzeria that they opened on Bloor, the name
17 of the crossing street. And they were struggling in
18 the business when the husband got sick. My daughter
19 was working two shifts a day, trying to keep the
20 business running and taking care of a very ill
21 husband.

22 They needed help to buy medicine, and
23 sometimes they needed some money to keep the pizzeria
24 running, so I took from whatever I had, any resources,
25 to help her out. That's what you do for your children

1 when they are in trouble, when they are suffering.

2 923. Q. So, some money went to the pizzeria?
3 What's the name of the pizzeria?

4 A. I don't know if money went straight
5 into the pizzeria. I helped my daughter, sorry, to
6 make ends meet. And that has nothing to do with my
7 sister's issue at all. And that happened only until
8 last year. It was in 2015 and '16, I believe.

9 924. Q. And the question that was asked was
10 October 2015 to present, and the answer was since 2015
11 -- can you be more specific then as to the time range
12 that this money was given?

13 A. It was mostly at the beginning of that
14 period of time. I don't know when the last help she
15 received, but I couldn't do anything since you froze
16 my bank accounts last year. You froze my only bank
17 account, so how could I help anybody from there on?
18 So then, anything that is there is before that. I
19 don't remember the date you did that, but you have it
20 on the records.

21 925. Q. I just want to make sure I have your
22 best evidence about what the money went towards; it
23 was the pizzeria and day-to-day living expenses?

24 A. I think it was mostly for medicine and
25 medical treatment for my son-in-law who almost died of

1 cancer.

2 926. Q. Then, I expect ---

3 A. I would assume that if you had a son-
4 in-law that has cancer you would do whatever you could
5 to help your daughter. If you have any decency that's
6 what the father does; right?

7 927. Q. I expect I know your answer, but you
8 received nothing in exchange for the money that was
9 given to them? No promissory note or anything like
10 that?

11 A. Nothing. And I wouldn't expect that,
12 you know? My daughter needed help because of her
13 husband's illness.

14 928. Q. So, my next set of questions is along a
15 similar line. At your last examination you advised
16 that there was money drawn down -- we looked at it
17 earlier; it was marked as Exhibit 1, the DS Financial
18 Loan Application. And you advised at your examination
19 last July that some of that money was applied towards
20 paying Xela expenses. Do you remember that?

21 A. Yeah. It was -- some of that went for
22 that, and some others were to support the family since
23 I wasn't getting any income anymore.

24 929. Q. And then we asked for more specifics of
25 how much money was applied to Xela expenses. And the

1 answer that you gave was \$261,593.50. Is that -- do
2 you remember providing your counsel with sort of ---

3 A. I don't remember the exact number, but
4 if that's what I answered at that occasion, that
5 number is, most be very much firm, since it's in the
6 accounting of the company whatever I gave it.

7 930. Q. And you told us already last July that
8 it was used to pay employee salaries and office rent.
9 Is that still your evidence of what that money was
10 used to pay?

11 A. Xela was in real distress, financially.
12 So I was forced to take that loan and use some of that
13 money to contribute to the company's paying expenses.
14 Exactly how it was disbursed I don't remember, but
15 certainly it must be some payroll. It could be rental
16 fees, some legal fees -- I don't know. I don't know
17 for sure exactly on the detail; I would have to go and
18 look in the accounting records. But, it was for the
19 purpose of keeping the company alive.

20 931. Q. And the number you gave, \$261,593.50
21 sounds very specific like someone was looking at an
22 accounting record. Do you remember how you calculated
23 that number?

24 A. I already told you it has -- must have
25 come from the accounting in the company, because I

1 don't keep accounting of that detail myself. The
2 company accounts for every penny that goes in and out,
3 so that must have been the source, to determine
4 exactly how much money I put in.

5 932. Q. So there was someone at the company who
6 calculated this number on your behalf. Who would that
7 have been?

8 A. I don't know the date, because
9 everybody's left the company now.

10 933. Q. But we received this answer to
11 undertaking recently.

12 A. So, it must have been done by the
13 accountant, I presume. I don't remember.

14 934. Q. Who is the accountant you're referring
15 to?

16 A. I don't remember -- I don't know when
17 the date when that information was obtained.

18 935. Q. As mentioned, this is what we marked
19 earlier as Exhibit 3. We marked earlier as Exhibit 3
20 the Consolidated Undertakings and Refusals Chart,
21 dated March 20, 2018. That is where this number comes
22 from. And, I'm pressing on this because it doesn't
23 make a lot of sense to me. You don't know who
24 provided that number or who could have provided that
25 number?

1 A. It depends on the date that the number
2 was calculated. Because, Mr. Mendelzon gave you that
3 on whatever date he gave it to you. I don't know what
4 date he gave it to you. That doesn't necessarily mean
5 an exact date when we calculated. And our employees
6 in the company were leaving, you know, so I don't know
7 who was doing the accounting at that exact moment. If
8 you give me the exact date I can tell you who might
9 have done the numbers.

10 936. Q. And you gave me back your copy of the
11 chart, but it's ---

12 A. I don't have a copy of the chart.

13 937. Q. Its J-232 is where the answer is
14 provided, on page 9 of what we marked as Exhibit
15 number 3. And where we're getting to is, is I want a
16 breakdown of what's included in that number. But I'm
17 trying to identify where I would get that information
18 from. I take it that sitting here today you don't
19 know what the breakdown of that number is?

20 A. I don't remember it. I don't remember
21 what the exact breakdown it is. The number is very
22 precise because it was taken from the company's
23 accounting. Now, you're asking who calculated that
24 from the accounting, I can tell you it could be two or
25 three people that could have done it, but it depends

1 on what date because all of them were leaving the
2 company at different dates. So, I don't know who was
3 doing it on the date that it was calculated, and I
4 don't even know when this calculation was done.

5 938. Q. And I can't tell you that because it's
6 an answer that -- I can tell you that it's an answer
7 we received in March of this year. I cannot tell you
8 when the calculation was done. But I'm going to ask,
9 and to the extent you need to make inquiries for who
10 calculated this number; I'm going to ask you to do
11 that. But my question is will you provide me with the
12 breakdown of that number; \$261,593.50?

13 A. You want a breakdown?

14 939. Q. Yes.

15 A. I will try to get it, but I can't
16 assure you I will be able to because as you know
17 there's nobody in the company and I'm not an
18 accountant, so I don't know how to access the records.

19 940. Q. Fair enough and it does seem that
20 someone had the ability to do that recently, because
21 we received the answer recently. It's all to say if
22 it helps you figure out ---

23 A. As I said, whenever Mr. Mendelzon gave
24 you the answers doesn't necessarily mean that was the
25 day when he got them from us, because we were working

1 diligently trying to answer all your questions. And
2 as we got answers -- managed to get the appropriate
3 answers we provided them to him. So this could have
4 been on several different dates.

5 941. Q. Fair enough. This is another answer
6 that you gave, but we don't need to turn to it if you
7 remember this. We asked how many days you were out of
8 the country in 2015 and 2016, and you advised about
9 one out of every six weeks, or 200 days approximately
10 over that period. Is that, sitting here today,
11 consistent with your recollection?

12 A. Yeah, because in 2015 I spent a lot of
13 time away. 2016 very little time, and 2017 I pretty
14 much didn't go away at all, or this year.

15 942. Q. And so, I take it and we have other
16 evidence on this, though I don't know how much we need
17 to go through in detail, but there is a lot of
18 spending in 2015 and 2016, and then I think we have
19 less records going into 2017. But will you agree with
20 me that you spent more money in 2015 and 2016 than
21 you're describing you're spending to me now?

22 A. I don't understand your question. Are
23 you talking about me personally?

24 943. Q. Yes, you, personally.

25 A. Obviously.

1 944. Q. And I'm talking about it in the context
2 of travel.

3 A. Obviously I'm spending nothing now; I
4 don't have any money, so I'm not doing -- just paying
5 for survival.

6 945. Q. And we can go through some specifics
7 and we have credit card statements and things, but you
8 were spending more than just the necessities of life,
9 you'll agree with me, between, let's say, October 2015
10 and November 2016?

11 A. I don't know exactly what you mean with
12 that question. It's a very tricky question, because
13 it could mean several different things; you know?

14 946. Q. Sure, fair enough. We'll go through --
15 -

16 A. What is for you the necessities; you
17 know?

18 947. Q. Sure, so travel; and we've acknowledged
19 you were traveling one out of every six weeks?

20 A. For business purposes.

21 948. Q. For business purposes, okay. And what
22 were the business purposes?

23 A. At that time we still had a viable
24 business. Most of my travelling was related to the
25 litigation down south, which is the biggest business

1 we've had in reality.

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

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

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

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

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

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

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

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

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

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

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

1 card?

2 A. Every executive that travelled had one,
3 including my brother-in-law had one. And that was
4 used for the purposes of covering the expenses when
5 you travel. We also used the corporate card to pay
6 some supplies, because that had the benefit of
7 generating points that could be used for travelling,
8 and travel points were used to reduce travelling costs
9 of executives, or anybody who was travelling for
10 business purposes and that was on the corporate card.

11 954. Q. And so, is the corporate card still in
12 existence?

13 A. No.

14 955. Q. When was that account closed?

15 A. I don't know -- long time ago.

16 956. Q. That's the corporate card. Now I'll
17 ask you about your personal card. Was there ever an
18 instance when Xela paid off a balance or some of a
19 balance on your personal credit card?

20 A. Xela was never used to pay any of my
21 personal money.

22 957. Q. So, anytime that there was a balance on
23 your credit card, the source of money to pay down that
24 would have been your TD bank account?

25 A. It would have been, yes. It may have

1 been -- I don't remember it -- but could have happened
2 that if something would happen while I'm away, that
3 part of my compensation would have been used to pay
4 directly, but that would be taken off my monthly
5 payment anyway.

6 958. Q. Sorry describe that again?

7 A. I don't remember this being, but it's a
8 possibility, since I travel so much for business,
9 especially back before 2015. So, it may be a
10 possibility that at one point I was away and something
11 had to be paid because of timing, that may have been
12 paid -- and I'm saying maybe; I'm not saying it
13 happened.

14 But I just want to be clear, it could happen
15 but if it ever happened it was deducted from my
16 compensation package. I never used corporate money to
17 pay any of my personal bills -- never.

18 959. Q. Let's talk about the sale of 2 Gordon
19 Road. We covered earlier that the sale closed on
20 August 20, 2018. I understand it was posted for
21 listing in August 2017. Is that right?

22 A. Yes.

23 960. Q. And it was posted with Sotheby's?

24 A. Yes.

25 961. Q. And that was, just to confirm again;

1 that was a house in which you had a joint interest
2 with your wife?

3 A. Yes.

4 962. Q. And did you make your best efforts to
5 obtain the best possible purchase price for that
6 house?

7 A. Absolutely. It's the only house I
8 have, you know? We did our absolute best to sell it.
9 And every time we had a possible sale people used to
10 back away because they found out about this
11 litigation, about this judgment thing, and people
12 don't want to get involved with that.

13 Also the market, as you know, since the new
14 rules that were in place last year on the taxes for
15 investors and things like that, the market deflated
16 for that sector of the market. So, we did our
17 absolute best. We even had to reduce the price
18 several times in order to try to lure more people in.
19 We did everything that was possible.

20 963. Q. I'm going to show you a document, and
21 I'll tell you where we got it from. We got it from
22 Reginald McLean who was involved ---

23 A. That was provided by the realtor to the
24 lawyer.

25 964. Q. Okay, so I'll show you what it is.

1 It's entitled Listing Analysis prepared for 2 Gordon
2 Road, January 20, 2018. And you recognize what this
3 is?

4 A. Yeah, I've seen it.

5 965. Q. This was -- well, who was this prepared
6 by?

7 A. By Sotheby's -- that's something they
8 do.

9 MR. BORTOLIN: We'll just mark this as an
10 exhibit quickly, number 4.

11 --- EXHIBIT NO. 4: Listing Analysis for 2 Gordon Road,
12 dated January 20, 2018.

13 BY MR. BORTOLIN:

14 966. Q. And what I want to go through is the
15 registered offers that start five pages in. And I'll
16 just ask generally before we go through these; you
17 were involved in the process of trying to sell the
18 house and listing it for sale and finding buyers?

19 A. Both my wife and I were involved.

20 967. Q. And the first ---

21 A. We own 50% each.

22 968. Q. The first offer here is from August 23,
23 2017, which is like -- if I go back to when it says it
24 was listed on the second page of this exhibit, it was
25 listed on August 17th, so within less than a week from

1 when it's posted for listing it looks like there was a
2 purchase offer for 3.988 million.

3 A. M'hmm.

4 969. Q. And I take it that this sale did not
5 complete?

6 A. No, because the buyer was a foreigner
7 and backed off from the deal at the last minute
8 because of the new tax that went into effect around
9 that time, I believe. We had signed it back but he
10 didn't come back to us.

11 970. Q. The next offer is a few weeks later,
12 September 14, 2017 and it's for 4.2 million. And do
13 you recall what the reason was that this offer did not
14 go through?

15 A. Which is the buyer on that one?

16 971. Q. The second page; the offer of September
17 14, 2017? Go to the second page of the first two
18 offers.

19 A. 14th, September 2017, you say?

20 972. Q. Yes.

21 A. M'hmm. What about that?

22 973. Q. My question was, what was the reason
23 that this -- from your understanding that this sale
24 did not go through?

25 A. I'm trying to remember who these people

1 are -- I don't recall, but the excuse that we always
2 got was either we can't get the finance, they didn't
3 sign it back, or in two cases it was they had the
4 building inspector -- in one case was the building
5 inspector came in, walked through the house and then
6 they said house has problems; we're backing off. That
7 was the second last one.

8 974. Q. Second last one. I don't think we're
9 quite there yet, so it doesn't sound like this one.
10 So, I take it you don't remember sitting here today
11 why this particular deal fell through?

12 A. I don't remember, but it could have
13 been because they couldn't get the financing or, they
14 simply didn't come back.

15 975. Q. And when they execute an agreement like
16 that, they pay a deposit; don't they?

17 A. I never got any of those deposits, and
18 in any of these cases and you can check that with
19 Sotheby's, none of these deposits when they backed off
20 the deal, or the deal never went to the point that it
21 was confirmed, they backed off before confirming but
22 we never got any deposits.

23 And the only time that I really expected to
24 get the deposit back was the second last one. And in
25 that case I learned that the buyer backed off before

1 paying the deposit, so we never got a penny out of the
2 deposits -- never.

3 976. Q. I'm just going through these
4 sequentially. The next one is an offer of January 28,
5 2018, and it's for \$4 million. Do you recall why this
6 offer did not go through?

7 A. Now that I see the order I think the
8 prior one that we were talking about, the one in
9 September, I think that was a couple from Montreal
10 that were doctors or something, they were coming. And
11 then, they were really interested; they came many
12 times.

13 We were almost -- we agreed on the price and
14 then they said that they couldn't afford it and then
15 they bought somewhere else. This other person here, I
16 remember it was a guy that was in the middle of a
17 divorce or something. So, we agreed to his terms and
18 he backed off.

19 977. Q. He didn't give a reason for backing
20 off?

21 A. No, not that I remember.

22 978. Q. The next one seems to be the same
23 buyer, but it's dated February 13, 2018.

24 A. Which one?

25 979. Q. So the one we just looked at was

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1 January 28, 2018 and it was Jason Burns in Trust. And
2 this one is also February 13, 2018, Jason Burns in
3 Trust. And I think you told me he backed off with the
4 prior offer because it was too much money?

5 A. Yeah.

6 980. Q. But he's offering you more money on
7 this one; 4.1 million.

8 A. No, he backed off because he had
9 problems; he was divorcing or something -- I don't
10 know the details. I didn't ask him, or I didn't
11 interrogate him; I never even met the guy. But he
12 first wanted to do it through a trust -- a very
13 complicated deal, and then he backed off and said he
14 couldn't do it. And then he came back again, and then
15 he backed off again. And the realtor told me that the
16 guy was in the middle of a very complicated divorce --
17 I don't know more, so he never actually completed any
18 offers.

19 981. Q. And there was nothing that he was
20 asking you to do that you wouldn't do that was
21 blocking the ---

22 A. No, we accepted everything he wanted.
23 In none of these cases the thing didn't happen because
24 we said no to something. We attempted to negotiate
25 the best price possible; we signed back their last

1 offers -- they never came back to us in some cases,
2 others backed off like this guy.

3 This other person here the 14th of May is
4 the one that sent a building inspector and we had a
5 deal. We were happy we made a deal. They sent a
6 building inspector and then they backed off from it.

7 982. Q. I'm going to suggest to you, and it may
8 refresh your memory or you may just say this is
9 totally wrong, but the way that this person offers 4
10 million on January 28th, and then comes back and
11 offers 4.1 million on February 13th; it looks like
12 he's being told the 4 million offer's not good enough
13 and asking to make a better offer?

14 A. What are you talking about?

15 983. Q. The two we just looked at; the ones
16 where Jason Burns is the person who had divorce
17 problems.

18 A. I already told you Jason, whatever his
19 name is, I never met the guy, he was in the middle of
20 a divorce -- that's what the realtors told me. We
21 signed back his offer but he didn't come back for it.
22 Like he backed off because of the legal or whatever
23 reasons. I don't know; I don't know his details. But
24 the one thing I can tell you is we did our best. We
25 signed these offers back.

1 Our house was worth much more but there was
2 no market, and I talked to our realtors many, many
3 times and they told me listen, all his clients they
4 are trying to -- thinking they can buy this as a
5 bargain. That's why a lot of people didn't come
6 through because we have all these convoluted things,
7 and this judgment and all these things. And the bank
8 was pressing also to liquidate -- that's why the price
9 at the end of the day; we had to give it up for the
10 only price we could actually get.

11 And if we wouldn't accept the last offer the
12 bank would have taken the house away, so we were left
13 with no options. And then, to make it even nicer, you
14 know once we get the deal and we inform your firm
15 about it, then using the power -- the position of
16 strength that you guys had, press my wife to give up a
17 big chunk of her 50% equity, even though she has
18 nothing to do with this, because otherwise you guys
19 wouldn't allow us to make the sale.

20 So we had to agree, and at first it was
21 supposed to be 350,000 and then it was increased to
22 425,000 or we won't approve the sale. Okay? And that
23 was Jason Woycheshyn who says that. And then we had
24 to agree on that, otherwise the bank would have end up
25 taking the house and we would all lose more.

1 984. Q. I will come to the difference between
2 what you described, the 350 and the 425, but for now I
3 just want to go through these agreements that we're
4 looking at, and I promise we'll come back to that.

5 A. My wife lost a lot of money because she
6 was paid only 250 out of that house, you know, and we
7 did our absolute best. Because, we are not stupid
8 people, okay? I'm not going to sell my house for
9 nothing if I can get something. It would be very
10 stupid, and I'm not stupid.

11 We lost tremendously. And the only reason
12 we had to do this was because we had a mortgage with
13 Scotiabank first, and we got that Scotiabank mortgage
14 because why? Because my dad asked me to get a
15 mortgage so he could pay my sister's mortgage, so she
16 would go without debts. That's a fact, okay?

17 And then, I can't pay the mortgage anymore.
18 The bank was not willing to renew the mortgage, and
19 then we had all this pressure -- when a house goes on
20 power of sale, the buyers just play these games, until
21 somebody gets it, because they're not really willing
22 to pay the price.

23 They know they're going to get it cheaper in
24 an auction or something, and that's a fact too. Okay?
25 And then, I asked my sister last summer to allow me to

1 re-finance the house so we can put it up for sale and
2 sell it without all these judgments on top of it, so
3 the house would sell for more money, she would get
4 more money and we would get more money. And the
5 answer was no. We don't trust you, is the answer.
6 You're probably the ones who drafted the answer. So,
7 we couldn't do that. Then we were under the power of
8 sale of the bank all this long, and we were
9 desperately trying to find a buyer.

10 985. Q. And that's what I'm asking questions
11 about, so just let me ---

12 A. So, I'm telling you exactly what
13 transpired ---

14 986. Q. --- please let me ask the questions and
15 we'll get through it ---

16 A. --- and then my sister through your
17 firm forced my wife to give up a big chunk of her 50%
18 at her damage, at her prejudice, when she's not part
19 of this case. She's not a debtor of hers, nothing.
20 My wife never did anything to my sister at all --
21 nothing.

22 There's no reason why my wife had to lose
23 money on that sale -- and she did. She got \$250,000
24 when my sister got \$475,000 on a house that was worth
25 much more. So, when you act the way you guys managed

1 this case, everybody loses.

2 987. Q. My questions are pretty specific. I'm
3 asking right now about the registered offers you
4 received. You told me in one of your answers that you
5 signed all of these. Is that right?

6 A. In all cases we were prepared to make
7 the deal; we signed back -- when you're negotiating
8 you obviously sign back. In one case we signed it
9 back with a difference of about \$50,000 and the guy
10 backed off.

11 In another case we accepted the offer and
12 the guy never confirmed the sale because that was this
13 guy Jason, whatever his name is, who was in the middle
14 of some legal issues, divorce or something. I don't
15 know the buyers, because under the real estate rules
16 here you don't negotiate with the buyers; you
17 negotiate through third parties.

18 So, we are at the mercy of the real estate
19 agents, and there's all these rules that impedes you
20 from actually making the best deal. But that's how it
21 works.

22 988. Q. Right, but my question was narrower
23 than that. I'm asking about what you described as
24 signing the offers. And the answer you just gave me
25 told me something slightly different, which is that

1 you signed back a counter-offer?

2 A. We signed counter-offers and we signed
3 back offers. We accepted the terms, okay? That's
4 what I'm telling you. In one occasion -- I don't
5 remember which of these cases, we were -- we came down
6 tremendously from the asking price to the guy's price.
7 And then the real estate agent said well, you can get
8 50,000 extra; it's easy. So, we signed it back with a
9 \$50,000 difference.

10 And we expected him to say 25 or say no, and
11 if he would have said no we would have agreed anyway.
12 We tried to get an extra 50 grand -- that guy backed
13 off. I can't control the buyers.

14 989. Q. Right, and I'm not asking whether you
15 can control the buyers. I'm trying to get from you
16 whether you accepted any of these offers.

17 A. We did.

18 990. Q. And what I just want to draw your
19 attention to is that, at least in these copies that I
20 have, part of the report I received that we marked
21 Exhibit 4, you'll notice at the end of every one of
22 these -- I'll call it I guess an offer sheet -- it
23 says at the top Agreement of Purchase and Sale --
24 there's room for initials of buyers and initials of
25 sellers. And in all of these the initials of the

1 buyer are present, but the initials of the sellers are
2 not. So, if I'm understanding your evidence it's
3 that, in at least some of these cases there is a
4 version of this Agreement of Purchase and Sale
5 somewhere that you did sign back?

6 A. I assume so, because we did accept all
7 of the offers. Now I don't know -- I didn't put this
8 together, it was done by some -- not even by our
9 agent; it's done by somebody in their office. So I
10 don't know exactly how they put together these things,
11 so I can't tell you about that.

12 991. Q. Right.

13 A. But what I can tell you is that we did
14 our absolute best -- it was for our best interest. We
15 were going to lose our house; we wanted to get every
16 penny we could get out of it. We're not suicidal
17 individuals; I'll sell it for nothing so we hurt
18 somebody else -- no.

19 We sell it for what we could sell it. There
20 was not possibility to sell it any other way. We
21 tried our absolute best. For a year we were trying to
22 sell this house. And the market has been weak on that
23 range of pricing, by the way, because of this tax that
24 was imposed.

25 The first buyer we accepted the offer -- the

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1 offer was the best offer and were very happy with it
2 and it was really good for us. We accepted it but the
3 buyer said no, I'm not going to go for it and the
4 reason is because of the tax. So then he backed off.
5 He was a guy from China, I believe.

6 992. Q. I hear you saying that you accepted the
7 offers. What I'm just looking to get to the bottom of
8 is that the copies of the offers that I have, it seems
9 like the buyer's making the offer and you're not
10 accepting the offer, so what I'm going to ask is for
11 you to check if you have copies of any of these
12 Agreements of Purchase and Sale that are included in
13 Exhibit 4, that you did sign back, and to provide me
14 with copies of the ones that you did sign back?

15 A. I'll check if I have any, but I don't
16 think I kept them.

17 --- UNDERTAKING

18 993. Q. And, as a follow-up to that you've
19 described to me that you never got any deposits?

20 A. No.

21 994. Q. And just if I look at what some of
22 these agreements say -- not all of them, but some of
23 them say the deposit is upon acceptance. And so, I
24 would expect that if you had accepted them that you
25 would have gotten deposits?

1 A. Except that the buyers backed off at
2 the last minute.

3 995. Q. Right, but they were -- and I'm not
4 trying to get into a legal argument with you, but my
5 understanding would be -- and I'll ask if it's your
6 understanding -- that once they've signed or once
7 they've already made the offer -- once you sign to
8 accept they owed the money; they couldn't back out.
9 Did you understand something different?

10 A. No, I understand that, but I never got
11 a penny. I was told by Sotheby's that the deposits
12 were not paid. That the offers were never confirmed,
13 whatever is called, from the other side. When you
14 sign an offer back, if you're agreeing on the terms
15 the other person has to sign the confirmation.

16 We never got those confirmations, except on
17 the case of the May 14th, Mr. Sharma. They did sign
18 the confirmation and we were on, and then they backed
19 off because they argued that the building inspector
20 who was 7 hours in the house then they said there was
21 too many problems.

22 They would not give us reasons; they just
23 backed off. And Sotheby's told us that because it was
24 on a condition of the building inspection we didn't
25 get the deposit. I asked -- I wanted the deposit and

1 I never got it.

2 996. Q. And I'll explain why this is important,
3 because if any of these buyers were obligated to pay
4 you a deposit then that is money that is potentially
5 available to us to collect. That's why I'm asking
6 these questions.

7 A. So go and ask it for them, because I
8 couldn't get it. I asked and the lawyer who was
9 representing us was Mr. McLean, my wife's lawyer; he
10 was representing us on the deal. And I asked him and
11 he said, no, there's no deposit we can get. So we
12 never got a deposit.

13 997. Q. And so that we can assess, just to
14 explain why I'm asking this question to ask you for
15 more information about the offers that went back and
16 forth and whether they were accepted or not, can you
17 provide us with copies of -- and I think I've asked
18 for if you have copies of these agreements anywhere
19 that are signed, any confirmation, any documentation
20 that was signed by people who offered and then backed
21 out -- I'm going to ask you to provide that to us.

22 A. I already told you I will check if I
23 have anything. I don't remember keeping copies of
24 this -- I don't keep copies of everything.

25 998. Q. Can I ask you to make inquiries of the

1 lawyer who acted on the transaction; Reginald McLean
2 to provide copies of those documents, if you don't
3 have them personally?

4 A. I will ask the question. But he
5 doesn't represent me; he's not my lawyer -- he's my
6 wife's lawyer, by the way.

7 999. Q. And it may be that there are good
8 reasons that you did not go after these people for a
9 deposit they were obligated to pay you, but if they
10 are obligated to pay a deposit it would potentially be
11 something that your wife would be entitled to half of
12 it. So there may be a mutual interest to getting to
13 the bottom of it.

14 --- UNDERTAKING

15 A. So, you are welcome to go and get those
16 deposits, because I don't have the money to pay a
17 lawyer to do that.

18 1000. Q. Right. And just to tell you why I'm
19 asking for what I would need to do that, it would be
20 copies of the contracts to see whether they do in fact
21 owe you money that they haven't paid you. So that's
22 why I'm asking -- and you've said you'll look into it.
23 But just to explain why and maybe to motivate you to
24 help us with that. We were going through the offers,
25 and again, I do just want to make sure we get through

1 all these, to the extent you remember anything
2 specific about them and why they didn't go through;
3 there are quite a few. But we left off on the
4 February 13th one with Jason Burns in Trust. And I
5 believe you told me the reason that that didn't go
6 through just had something to do with him being in the
7 middle of a divorce?

8 A. That's what my understanding is. I
9 don't know the guy, so I don't know who he is; I don't
10 know what he does. That's what I was told.

11 1001. Q. And if you just want to open this
12 again, so that we're looking at the same thing,
13 please, Exhibit 4? I'm now looking at an offer, May
14 11, 2018? And it is for 3.5 million.

15 A. Yep.

16 1002. Q. And do you remember anything about why
17 this didn't go through?

18 A. She's a real estate agent herself, so I
19 think she was looking to buy it as an investment. And
20 we accepted their terms, and I don't remember what the
21 excuse was, but they also backed off at the last
22 minute.

23 1003. Q. I'm just looking at what's struck
24 through and done in handwriting on this one. It looks
25 like they offered a deposit of \$150,000, but then they

1 initialled and they scribbled and they made it up to
2 \$200,000. So, is that a case where -- obviously this
3 was the lowest offer you received. Was that a case
4 where do you recall pushing back saying, okay, make it
5 \$200,000 and we'll consider it?

6 A. No, we didn't push back on that.

7 1004. Q. So they voluntarily offered to pay a
8 bigger deposit?

9 A. I don't know. I don't even know --
10 this is not a copy I drafted. If you can see, it's
11 handwritten by them, so how would I know why they put
12 that there.

13 1005. Q. And, well, I'm asking if you may --
14 they would have put it there if you had insisted on
15 it; if you said something along the lines of ---

16 A. No, we didn't insist on that.

17 1006. Q. Okay, so they voluntarily offered to
18 pay a larger deposit?

19 A. I don't know. How would I know that?
20 I don't even know if this is the original first copy
21 they sent us. We did not ask them to increase the
22 deposit -- I can tell you that.

23 1007. Q. Okay, so, I don't know that anything
24 turns on it, but I find it confusing. Is there anyone
25 that you can ask who could explain why they would have

1 increased their deposit?

2 A. I can ask the real estate agent to see
3 if they know.

4 1008. Q. And the relevance of it from my view
5 would be that it seems to suggest that there's a
6 motivated buyer who wants to purchase the property.
7 But that's not your recollection; they backed out?

8 A. They backed out. Listen, they backed
9 out -- I don't remember the exact details, but as I
10 told you many of these people found out there was a
11 judgment against me from the bank, a judgment against
12 me from DX Finance, a judgment against me from my
13 sister, so then and she's an investor.

14 My recollection of discussing with our
15 realtor is that our realtors have the impression that
16 this person had decided to back out of the deal,
17 thinking that this was going to go on an auction and
18 they could probably pick it up cheaper there. They
19 didn't want to buy this to live in it; it was just an
20 investment. That's what I was told by our agent. As
21 I said, we never met these people; I don't know their
22 faces; I don't know who they are.

23 Because, the real estate system here is such
24 that you are at the mercy of the realtors, right? So,
25 I have no idea who these people are. All I can tell

1 you is what I was told by the realtors.

2 1009. Q. And the next one in here seems to be a
3 duplicate of one we've already looked at. The one
4 from Jason Burns; we'll skip over that. Also seems to
5 be a duplicate -- I didn't prepare this. So, we just
6 looked at one the 11th of May, and I won't say the
7 names of the buyers so as to avoid the trouble of
8 trying to spell them for the transcript, but the same
9 buyers again on the 14th of May, so three days later
10 come back with another offer. And whereas the first
11 offer was for 3.5 million with \$200,000 deposit, this
12 is for 3.7 million with \$175,000 deposit.

13 A. What are you looking at; 14 of May?

14 1010. Q. 14th of May -- it's the last one before
15 ---

16 A. And where do you have them again? It's
17 only one of them. They only made one.

18 1011. Q. Well no, aren't these the same people
19 that made the offer on the 11th?

20 A. No. The 11th is the ---

21 1012. Q. Oh, you're right -- sorry.

22 A. It's completely different people. This
23 was a family from India that simply liked the house;
24 they were very motivated to live in the house, et
25 cetera. And then they sent their inspector, who

1 stayed seven hours in the house, and after that they
2 backed off. This is the only deal that we thought
3 actually had closed.

4 1013. Q. And then we get to the purchase that
5 went through -- the first one here is an Agreement of
6 Purchase and Sale, and it's in a similar form to the
7 ones we've been looking at on the first page. It's
8 dated July 9th, the buyer, Elliott Sud.

9 A. Yeah.

10 1014. Q. And so, you recognize this as the
11 person who ultimately bought the property?

12 A. Yeah. This is actually not the guy who
13 actually end up buying the property; he backed off at
14 the last minute.

15 1015. Q. Oh, I see, okay.

16 A. This was the -- this is the first time
17 you gave me one that is the last version of the thing,
18 and we agreed on his terms, and I don't remember
19 exactly, I think he used also the inspect -- I don't
20 remember exactly what was his excuse to walk out.
21 Couldn't get the finance, or the inspector, something,
22 I forgot. And then we didn't get totally discouraged,
23 because very close to this offer came the one that
24 actually bought the house.

25 1016. Q. And so, I take it you recognize this.

1 Is that your signature, or one of the signatures under
2 initials of sellers; is that yours?

3 A. Let me see if you have the same copy I
4 have?

5 1017. Q. Yeah, I have the same copy, yes, in the
6 bottom right.

7 A. I want to see it. Let me see it,
8 because I can't see it from here.

9 1018. Q. Well, you have the same document --
10 bottom right, where it says initials of seller?

11 A. Yeah, those are our initials.

12 MR. BORTOLIN: Just mark this as Exhibit
13 number 5.

14 --- EXHIBIT NO. 5: Agreement of Purchase and Sale for 2
15 Gordon Road for \$3 million by Elliott Sud, dated July 9,
16 2018.

17 BY MR. BORTOLIN:

18 1019. Q. So this is an offer for \$3 million, and
19 it gets signed by you. And so, certainly this offer
20 is significantly less than the other offers you
21 received. That's fair to say?

22 A. Yeah. We are -- at that point we're
23 getting to the point where the bank is going to
24 liquidate the house. We had to vacate, we got a
25 Vacate the House Order, right away. So, at that point

1 I presume this guy probably knew about it, and what
2 was our only option; accept the offer. We tried to
3 negotiate this as much as we could and it didn't work.

4 1020. Q. I want to take you to Schedule A, one
5 of the pages. In the upper right of the fax it's
6 number 12 of 13, and the bottom right it's page 7 of
7 8?

8 A. Yeah.

9 1021. Q. So, one of the terms of the transaction
10 was that the seller shall be permitted the right to
11 remain upon and continue the seller's use of the real
12 property, in accordance with the residential tenancy
13 agreement attached to this document at Schedule C for
14 a period of 24 months...and I could continue reading.
15 But this was a term that you negotiated into the
16 Agreement of Purchase and Sale that you would remain a
17 tenant at 2 Gordon Road for 24 months after the sale?

18 A. In this particular case he was refusing
19 to go up in price, and we had like a \$200,000
20 difference from our asking to where he was. And then
21 the realtor suggested we could accept his price and
22 then he would rent us the house for two years, and
23 then the rental of the house could be considered as
24 part of the price, so that would have improved the
25 price by that amount.

1 So that's why it was this solution; he
2 wanted to have it gone that way. So, instead of
3 paying rent we would get to stay there, and then that
4 would increase the value of our \$200,000, so then the
5 selling price would end up being about 3,200,000
6 instead of 3 million.

7 And that was the deal that was negotiated at
8 that point, but it didn't go through because the guy
9 backed off at the last minute. And this is the guy
10 that I said well, I want a deposit, and then I learned
11 that this guy -- actually it happened very quickly;
12 his sign-backs were quick. And the guy had not paid a
13 deposit and never did.

14 1022. Q. And this idea of a 24-month, or I
15 shouldn't say 24-month -- of a continued tenancy after
16 sale; had that come up in any of the discussions with
17 any of the other buyers, or people who offered -- made
18 purchase offers that we just looked at?

19 A. Not in this form. We don't have
20 anywhere else to go, so the first buyer, the Chinese
21 buyer he wanted to buy it as an investment. So there
22 was a discussion that after buying the house he was
23 willing to rent it back on yearly basis for a year and
24 renewals, but since the deal didn't close that's
25 irrelevant. None of the others were interested in

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1 that. And then the guys who actually bought the
2 house, they're not going to move in until December or
3 something, so they allowed us to stay until November,
4 which is just two extra months.

5 1023. Q. So, I take it that this was something
6 that you and your wife were asking for to be a term of
7 the agreement?

8 A. In this particular case, in this case
9 that we're talking about, the Mr. Sud? That's
10 something that we were interested in -- we don't want
11 to move if we don't have to, that's costly, and we
12 don't have anywhere else to go and we don't have any
13 money to buy a place, so it's irrele -- so, if we
14 can't increase the price and then rent back, so then
15 he doesn't have to put the cash in, the prepaid rent,
16 that would work really well for us because we don't
17 have any way to pay rent anyway, you know?

18 So then we could have lived there for a two-
19 year period. And at first he agreed on that, then he
20 backed off on the deal. So, if that deal would have
21 closed then you would have to consider the selling
22 price at 3.2 million, instead of 3.025, because that
23 was built in -- it was a way to increase the price,
24 okay? So, it's all arguments because the thing never
25 closed. So...

1 1024. Q. What I'm just trying to understand, and
2 this goes to whether you made, what you said were your
3 best efforts to obtain the best value for the house.
4 And, I don't think I'm being unfair to say it sounds
5 like you made compromises on the price that was being
6 paid for the house, in order to get some other type of
7 value at the back end that was beneficial to you
8 personally.

9 A. I know where you're going; if this deal

10 ---

11 1025. Q. I'm going exactly where I just said.

12 A. If this Elliott Sud deal would have
13 happened, then my sister would have get the 50% of the
14 equity at 3.2 million, not 3.025, because the prepaid
15 rent would have been part of the price. Do you
16 understand what I'm trying to say? I wasn't trying to
17 cheat my sister, because that's what you're
18 insinuating.

19 We were just trying to close a deal; the guy
20 didn't want to put more cash, we said okay, let's do
21 it this way. We discussed that with our realtors and
22 he seemed to agree at first, and then he backed off.
23 I don't know exactly the reasons and it didn't happen,
24 so this is just an argument.

25 We were just trying to find a way to close

1 the deal, and also we need to live somewhere. So
2 instead of going to rent somewhere else, we could have
3 rent the same house; that would be a very fair deal,
4 you know?

5 And if this deal would have closed that's
6 two years of rent would be added for the purpose of
7 liquidating my sister's thing, would have been added
8 to the price and she would have gotten the equity at
9 50% -- that's what it would have been. And in a way,
10 that's about the amount that the closing ended up
11 being, similar; right?

12 1026. Q. So the listing report that we looked
13 at, and we marked it as Exhibit 4, it was dated June
14 20th, so it would not include offers of purchase
15 received after June 20th, and I think I've already
16 asked you to check for signed copies of Agreements of
17 Purchase and Sale, they're titled that at the top of
18 the page. Can you also check for any -- I'm going to
19 call them an offer, because that's what they seem to
20 be, any offers that were received after June 20th that
21 are not included in the Listing Analysis, and provide
22 those to me?

23 A. There's no offers that are not here.

24 1027. Q. Well, that ties into my next question
25 which is whether this was the very first offer you

1 received, and I'm looking again, we marked as Exhibit
2 5, the July 9, 2018 offer from Elliott Sud.

3 A. That's not the very first offer.

4 1028. Q. Right. So ---

5 A. That's the second last offer.

6 1029. Q. From Elliott Sud?

7 A. Well, the only one from him.

8 1030. Q. Okay, so that's what I'm asking about,
9 is whether there was a prior offer from Elliott Sud
10 that did not include as one of its terms 24 months of
11 a tenancy after completion. Because from how you
12 describe it to me, this was a back-and-forth that was
13 added on later, and not something that should be in
14 the very first offer.

15 A. I don't recollect -- I don't remember
16 for sure when this agreement was. I presume it was in
17 the sign-back. But our realtors knew that we were
18 interested in staying, and they knew that we needed to
19 sell the house, and they were trying their best to get
20 buyers, so I don't know at what point Mr. Sud was
21 informed that that was an option that we would
22 consider, which is a rental of the house.

23 I don't know when he was informed of that,
24 so I don't remember it was in the first original offer
25 or if it was added afterwards -- I cannot tell you

1 that for sure. But the intention here was to make a
2 deal with him and try to get the highest value we
3 could for the house, and doing it this way would have
4 get extra value, in this case for my sister, because
5 my wife wouldn't get it; the benefit of that would
6 actually have to pay the other 50% of those -- let's
7 say \$200,000 rent for two years, half of that we would
8 have to give my sister in cash from the actual sale of
9 the house -- we understand that. Do you understand
10 what I'm trying to explain to you?

11 1031. Q. I do, I understand perfectly. I'm not
12 sure ---

13 A. We've been fair to my sister all the
14 time, even though she hasn't been fair to us at all.
15 But I've been fair to her and we did our best, and the
16 person that lost the most here was my wife because she
17 got \$250,000 for a home that is a really beautiful
18 home, that she really took care of for more than 20
19 years and it's her home, and she's out of it now, well
20 we still stay until November. But that's it; we're
21 gone after that.

22 1032. Q. The question I'm trying to get to the
23 bottom of, is to confirm that there was no prior offer
24 from Elliott Sud that did not include the 24 months
25 free rent?

1 A. Elliott Sud did one offer and we signed
2 back -- I don't know, I don't remember how many times
3 if it was more than once, and I don't remember exactly
4 if -- I already told you; I don't know if this clause
5 on, whatever it's page, on Schedule A, if that clause
6 was from the original Schedule A or it was added
7 after, I don't know. You know the real estate agents
8 talk to each other. Our agent knew that we wanted to
9 stay in the house if we could, because we don't have
10 anywhere else to go.

11 So we would pay rent as part of the -- that
12 was something I suggested, because it was a way to get
13 the buyer to not have to put more cash forward on the
14 deal, and we would get to be there. And as I said
15 before, if that would have happened, I would have give
16 my sister the 50% of that, because that would be part
17 of the equity, right? But in this case it didn't
18 happen, so you can argue about -- and that's all the
19 questions you want; it didn't happen. The guy backed
20 off from the deal anyway, so it's a moot thing.

21 1033. Q. Well, I'm not here to argue. I'm
22 asking if there were prior offers, and I take it from
23 your answer that you think there probably were. And
24 what I would like is to have copies of the prior
25 offers and counter-backs that preceded this one that's

1 on the first page of Exhibit number 5.

2 A. I'll try to see if I can get that.

3 --- UNDERTAKING

4 1034. Q. Thank you.

5 MR. BORTOLIN: Maybe we'll go off the record
6 for just a second.

7 --- OFF THE RECORD (1:10 P.M.) ---

8 --- UPON RESUMING (1:11 P.M.) ---

9 1035. Q. I am showing you now another Agreement
10 of Purchase and Sale dated July 27, 2018 with the
11 buyer Larry Mowens. Do you recognize this?

12 A. Yeah, I believe this is the one that we
13 signed -- this is the actual buyer. This is the deal
14 that closed.

15 1036. Q. And that's your signature beside
16 initials of seller on the bottom of the page?

17 A. Yeah, provided that you have the same
18 document as I do.

19 1037. Q. I do -- it's a copy.

20 MR. BORTOLIN: I'll mark this as Exhibit 6.

21 --- EXHIBIT NO. 6: Agreement of Purchase and Sale for 2
22 Gordon Road dated July 27, 2018 by Larry Mowens.

23 BY MR. BORTOLIN:

24 1038. Q. So, I just want to make sure the
25 sequencing of how this ties together with the first

1 buyer. It was actually not our impression that it was
2 a different buyer. I was under the misapprehension
3 that it was the same buyer that had just come back
4 with a slightly different offer.

5 A. This Larry Mowens only came once.

6 1039. Q. So, at some point the purchase from
7 Elliott Sud, the agreement we have at Exhibit 5; it
8 became clear that that wasn't going to work?

9 A. He backed off from the deal.

10 1040. Q. And then you've got another offer that
11 came in -- the Agreement of Purchase and Sale was
12 dated July 27th. Do you recall if there was anything
13 prior to that with this buyer?

14 A. No.

15 1041. Q. And again, I have a similar question to
16 the one I just asked in terms of, this is the final
17 version of this that you both parties have signed. Do
18 you recall if there were any prior offers or counters
19 back and forth with this buyer?

20 A. I don't remember. I suppose there
21 probably was, but I don't remember.

22 1042. Q. I will ask you to check, please, and
23 provide me with copies of any prior offers or counter-
24 offers that were exchanged back and forth? Will you
25 do that?

1 A. On this one I think is the only one,
2 not for sure, but most likely will have access because
3 this is the one that closed, so I should be able to
4 have this.

5 1043. Q. And the ones that you don't personally
6 have access to, would they be things that you could
7 ask the real estate agent who worked for you to
8 provide to you?

9 A. I will attempt to do that.

10 --- UNDERTAKING

11 1044. Q. Thank you. And so this offer is for
12 more than the last one. The last one was for 3.025
13 million, this one's for 3.174 million. And if I go to
14 Schedule C, I believe it is, to this agreement, which
15 is the second to last page?

16 A. M'hmm.

17 1045. Q. There's a tenancy arrangement similar
18 to the one we just looked at. And we talked about
19 this earlier, where you stay in the property until the
20 end of November, in consideration for reducing the
21 purchase price. You recall negotiating for that?

22 A. Well, this is the deal we agreed on.

23 1046. Q. And in the second paragraph of this it
24 says that the licensee requested it. And the licensee
25 is, it's at the top of the page, is you and your wife?

1 A. We requested the buyer if we vacate the
2 house after November. And the reason for that is
3 because our son is getting married in October. One of
4 our sons is getting married in October and then it
5 will be very hectic to move before October, and we
6 don't have a place to go; we need time to find
7 somewhere to live.

8 And it's not easy, particularly this time of
9 year to find houses for lease -- it's not easy.
10 There's a few but either too overpriced or in really
11 bad shape. So, we had to have a little bit of time to
12 accommodate and the buyer was, he say yeah; he's not
13 going to move before that anyway.

14 1047. Q. So what strikes me is that you have a
15 lot of offers for more money that don't go through,
16 but then the two offers that include you being able to
17 stay in the house as a tenant do get signed. And so,
18 my pointed question to you is whether you insisting on
19 a right to tenancy caused those earlier transactions
20 to fail?

21 A. The answer is absolutely not. We
22 didn't ask for that -- that was indicated -- I told
23 you the first buyer, the Chinese person, he was an
24 investor that was looking for buying the house for
25 investment purpose. And he was willing to sign a

1 lease agreement for the house.

2 Unfortunately he backed off because of the
3 new rules, and he decided he wasn't going to go
4 forward with the investment so that deal didn't close.
5 And then, none of the others was renting the house
6 back until the last, Mr. Sud said he would for a year
7 or two years -- but he also backed off.

8 And this other buyer he agreed on doing it
9 until November 20, in order for us to have time to
10 find somewhere to move and not have to be rushing and
11 moving out during my son's wedding. I think it's a
12 very reasonable thing.

13 So, if you're insinuating that we were
14 blocking sales or anything, I just want to tell you
15 again we did not do that. We did our absolute best to
16 sell this house. We tried really hard, and the
17 circumstances were such that these deals didn't go
18 through, partly because the market at this particular
19 level of house is difficult right now.

20 Prices have come down a lot. Just look
21 around; there were many houses in my block that took
22 much longer to sell than usual. But we had these
23 judgments on top of it, and anybody who does a little
24 due diligence will quickly find out that this is a big
25 family issue. People don't want to get involved in

1 it, or they're trying to take advantage of it and
2 that's what we saw in some of the buyers.

3 That's all I can tell you. We did our
4 absolute best, our real estate agents did the best
5 they could; they brought as many people as they could
6 bring, and we accommodated to the offers; we tried to
7 close these deals within reason.

8 Of course we were not just going to buy --
9 if somebody would offer me 20 bucks I wouldn't accept
10 that either. But we did our absolute best to sell the
11 house, and you're smiling again like making fun of me.

12 1048. Q. I don't know what you think a smile
13 looks like, but it's not this.

14 A. But I'm telling you the truth. I'm
15 telling you the truth. And do you think -- just think
16 logically; do you think that we would try not to sell
17 the house when we have the bank executing on us? We
18 were going to have to sell the house, like it or not,
19 because the bank was already evicting us anyway.

20 And I couldn't pay the bank because my
21 sister didn't allow me to re-finance and allow us to
22 sell this without all the judgments on top. So I had
23 two mortgagers -- how do you call it -- pressing for
24 foreclosure and selling it for sale, the house. I
25 have my sister pressing for it for sale. Anybody who

1 wants to buy a house knows this is going to be cheap
2 on the market. Simple as that.

3 We did the best we could to get this done.
4 And it was to our own interest. Do you think I'm very
5 thrilled that my wife only got \$250,000 for her house?
6 Do you think that she's celebrating and going on
7 parties because she got that? Of course not. We
8 wanted to sell this house for what it was worth. And
9 we couldn't because of the circumstances.

10 1049. Q. So you're going to tell me ---

11 A. We did an absolute best to do it, and
12 you can smile and you can look away and you can say
13 whatever you want to say, but we did what we could.
14 It was to our own interest.

15 1050. Q. Was it not in your interest to stay in
16 your house longer?

17 A. How could we? We have the bank
18 liquidating the house. We had the house for sale.
19 The only reason we didn't get evicted a year earlier
20 is because the house was for sale and the bank
21 realized that it was going to be a better deal of
22 selling the house in the market, than by a forced
23 sale.

24 The bank is not necessarily interested in
25 doing that; the house was for sale. And we had this

1 effort going as much as we could. Now, I don't have a
2 miracle thing that I say, (clicking fingers) like that
3 and people will come in and buy my house and pay me
4 whatever I want. It doesn't work that way.

5 The reality is different than what you would
6 like it to be. So we got what we could get. We got
7 what we could get. And you use your position of
8 strength, you know, to pressure my wife. She had to
9 accept the offer no matter what, and you pressured her
10 to give away a big chunk of her 50% equity. And she's
11 not a debtor of my sister.

12 But she had to accept that because otherwise
13 this deal would not close and we would not have a
14 house anymore. So we did what we had to do; we
15 couldn't do nothing else. So you can make all the
16 faces you want, but that's it; that's the truth.

17 1051. Q. I have a problem with the fact that you
18 told me earlier you're here to give evidence on your
19 wife's behalf, you don't know evidence on your wife's
20 behalf, but now when it's convenient to you to assert
21 that she's been aggrieved, suddenly you're giving
22 evidence on your wife's behalf?

23 A. I'm not giving evidence on my wife's
24 behalf; I was part of the seller. I'm just telling
25 you I'm very upset that my wife was forced by you guys

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1 to give up a big chunk of her share of the deal. But
2 we had no choice; we had to sell the house.

3 So, we had to say to Mr. Woycheshyn okay,
4 just like Willie Aguilera, our former IT guy had to
5 say okay to Ricardo; I'll steal the information for
6 you so you don't sue me. We had no choice; we're
7 against the wall. And you think I'm very happy about
8 selling my house so cheap?

9 You think that's the case? Use -- be
10 reasonable and use your brain and think about it. I
11 was in a situation where I needed to get as much as I
12 could from the house, and that's all we could get.

13 1052. Q. We'll come back to math of what you got
14 for the house after we take a fifteen-minute break for
15 me to collect my notes -- off the record?

16 --- A BRIEF RECESS (1:23 P.M.) ---

17 --- UPON RESUMING (1:34 P.M.) ---

18 CONTINUED EXAMINATION BY MR. BORTOLIN:

19 1053. Q. So I'm going to describe to you what I
20 understand to be where the proceeds of the sale of 2
21 Gordon Road went. If you want to bring out a
22 calculator or write this down on a piece of paper, and
23 I'm going to ask you to let me know which of these
24 numbers you disagree with.

25 The price paid by the buyer was \$3,174,596.

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1 Of that \$1,739,598.42 was to discharge the mortgage of
2 the Bank of Nova Scotia; another \$525,089.23 was to
3 discharge a second mortgage, possibly the DX Financial
4 mortgage. And then there was the commission, part of
5 which was paid as a deposit, but the balance that was
6 not the deposit was \$52,459.98.

7 If I -- and again, we can take a break if
8 you want to do it, but if I take that top line number,
9 the 3.174 million, and subtract the mortgage discharge
10 numbers and the commission number that I just
11 described, and divide by two, the number that I get is
12 429,224.19.

13 So, I can tell you that that is the basis on
14 which we sought \$425,000 on the sale of 2 Gordon Road,
15 and you've told me several times today that that was
16 more than half, so I'd ask you if you're sitting here
17 today you can tell me, but just tell me otherwise,
18 I've asked you to go figure out on what basis are you
19 saying that the proceeds of the sale were not evenly
20 split?

21 A. Well, I didn't do the numbers, so I
22 have to ask the lawyer who did the closing because
23 he's the guy who did the liquidation. So, I don't
24 even know if these numbers you're giving me here are
25 the correct numbers; I have no idea. So I have to ask

1 the lawyer who handled the closing, because he's the
2 guy who did the math; I didn't do the math.

3 1054. Q. But you were very, very confident
4 earlier -- you repeated it to me at least half a dozen
5 times today, that you paid Margarita more than half of
6 the house sales and that it came out of your wife's
7 pocket. So, on what basis were you so confident of
8 that?

9 A. On my understanding from what the
10 closing was. The information we got from the closing;
11 my wife got \$250,000, that's what she got.

12 1055. Q. So, if you want to rely on that for any
13 purpose, or if you want to make a big deal out of it
14 then I'd ask you to substantiate on what basis you say
15 that she got less than was paid out to Margarita, the
16 judgment creditor, on the sale?

17 A. I'm not trying to make a big deal of
18 anything, except I'm telling you -- you're trying to
19 tell me that we sold the house or did not do the best
20 to sell the house. You're trying to invent all these
21 situations and I'm telling you that's not all true;
22 it's all lies what you're telling me.

23 We did our very best effort to sell the
24 house. A lawyer handled the closing; I don't know the
25 numbers. I don't know if these numbers you're telling

1 me here are accurate or not. I don't know what else
2 it could have been or not.

3 I was told that when you add the numbers my
4 wife was getting less. And if she got less then I
5 didn't do the math, so I might have done the math
6 wrong in this case because I didn't have the numbers;
7 I didn't do the numbers.

8 But the one thing I can tell you very
9 clearly is we did our absolute best to get the best
10 price of this house, and we got very little out of it.
11 And all these things have been a sham, and I've been
12 saying -- that's why I repeated it, because I never
13 had my chance to be in front of the judge.

14 And again you're doing the little faces.
15 You can do all the faces you want; I'm going to keep
16 saying the truth here. I did my very best, my very
17 best to sell this house. We've done our best to pay
18 this, again your little face and looking at the table
19 ---

20 1056. Q. This is the face of someone who's
21 exasperated because you're not answering my questions.

22 A. If you're going to be disrespecting me
23 -- are you going to continue disrespecting me? I'd
24 like to know why are you so disrespectful. I'm
25 answering your questions. You guys fabricated a case,

1 manipulated big time; we never got our fair trial.
2 You got paid with money that was stolen from us,
3 concocted in a deal in your office.

4 I never had the chance to be in front of a
5 judge to say all that -- you keep doing your face.

6 1057. Q. This is my resting face; I'm sorry if
7 you don't like it.

8 A. No, it's not your normal face because
9 I've seen you the whole day and I've seen you before,
10 okay? So, I'm telling you the things the way they
11 are. And I have been -- I'm the actual victim here,
12 you know, big time, because I lost everything I had.
13 I've been accused of money laundering in false. The
14 allegations were dismissed after five years'
15 investigations; destroyed my banking relationships, my
16 business relationships, my reputation.

17 My sister printed a letter that is full of
18 lies in the newspapers on paid ads, full page size, in
19 every single newspaper in Guatemala where we had our
20 main businesses. Destroyed the reputation of our
21 firm, our company, the reputation of our family.

22 And then you're making a big mess out of
23 everything. You took everything away from me; I have
24 no car, I have no house, no nothing. I have no bank
25 accounts, I have nothing.

1 And you keep asking me the same damn
2 questions over and over again. Just looking for when,
3 because I'm upset, I will say something that you can
4 turn, twist and spin, like you're trying to do here
5 now.

6 I was telling you what my honest
7 understanding is. We sold this house for very little
8 value, very little, because we couldn't sell it. And
9 the main reason why we couldn't sell it for a better
10 price was because of all these judgments that were on
11 top. I'm the big time loser here.

12 1058. Q. What question do you think you're
13 answering?

14 A. Huh?

15 1059. Q. What question do you think you're
16 answering?

17 A. I am telling you that I don't know --
18 it's helpless, to talk to you is helpless, you know?
19 You are trying to make me accept things that are not
20 true. And I'm not going to play this game. Ask me
21 direct questions and I'll give you the answer, but
22 stop doing those faces, please, because it's really
23 insulting. It's really insulting.

24 1060. Q. There's no face -- let's move on.

25 A. Yeah, you're making these disrespectful

1 faces to me.

2 1061. Q. The last thing I want to do today is
3 you've provided us with answers to undertakings with a
4 couple of hundred pages of credit card statements.
5 And I put it to you earlier that your spending was not
6 as frugal, at least in 2016 and early 2017, as you
7 described it to me and you resisted that.

8 So, we'll do this as long as it takes to go
9 through your credit card statements and I'll ask you
10 about some of these things that were spent money on.
11 And if you'll accept that you spent money somewhat
12 liberally in 2016, we can just leave it at that and
13 move on; otherwise I'll take you through some
14 examples?

15 A. I don't understand what you're saying.

16 1062. Q. All right, well let's get started then.
17 I'm starting with the year-end summary statement for
18 an American Express Platinum card in your name for the
19 period from January 1st through December 31, 2016.
20 Are you familiar with that credit card?

21 A. Yeah.

22 1063. Q. Are you the only person who uses that
23 credit card?

24 A. My wife has a secondary card.

25 1064. Q. And I see that actually does come up in

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1 some of these, that there's a different card number
2 who's attributed to the transactions. So I'm going to
3 mark all this as an exhibit, but I put a star beside
4 transactions in August 2016 that reference a hotel
5 that your wife stayed at.

6 Do you recall making a trip in August 2016?

7 A. August 2016 -- it's very long ago, but
8 I don't think I did that trip. Where is this? If my
9 wife paid it means I wasn't with her. So, this
10 might've been when my wife went to visit my daughter
11 who lived in London at the time.

12 1065. Q. Well, in the row above that there's a
13 transaction on August 22, 2016 where you're staying at
14 the Shangri-La.

15 A. Which are you talking about?

16 1066. Q. The same page we were just looking at
17 where there were transactions on your wife's card,
18 right above that on August 22, 2016 is a Shangri-La
19 charge for \$315?

20 A. \$315 -- yeah, but that was in April,
21 that wasn't in August -- September. You were asking
22 me about her staying in a hotel in August. So, if you
23 want to ask me now about the Shangri-La thing I can
24 answer to you.

25 I did a business trip to China -- never been

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

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

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

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

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

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

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

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

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

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

6 A. Going forward?

7 1071. Q. Yes?

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

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

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

22 A. Yeah.

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

1 Avicola?

2 A. That's correct -- not shares only, past
3 dividends that have been illegally retained. And that
4 we were -- by the way, that's a very important
5 question you asked, because Avicola shares that you
6 just asked about are the ones that we were
7 expropriated from by the boys, or the cousins sorry,
8 we call them boys, the cousins; using the information
9 your office facilitated my sister to steal from our IT
10 department.

11 All that has now been overturned and it's
12 almost told, but not there yet. So it's been a
13 nightmare that we had to raise for all these years
14 since 2011 to date, and everything because of what
15 your firm helped my sister do.

16 1074. Q. So do I understand that you're counting
17 on -- you have no other source of income that you
18 anticipate receiving, other than resolving the
19 problems with the cousins?

20 A. At this point, yeah, that's it.

21 1075. Q. And what do you anticipate are the odds
22 of resolving those difficulties and when would you
23 expect to resolve those?

24 A. Very good, and soon. I'm not going to
25 tell you what because you're part of the other team

1 and if I disclose -- I talk about that, it's going to
2 end up in my cousin's knowledge and we'll go back into
3 the same thing all over again.

4 And I know that's what a lot of your
5 questions are guiding is to find where we can get
6 attacked by my cousins, so...

7 1076. Q. That's very imaginative of you ---

8 A. It's not imaginative, you did it in
9 2011, you did for five years. You were taking
10 information about our company that had nothing to do
11 with my sister's lawsuit. You're trying to do the
12 valuation of the Tropic shares; you hired this big
13 named evaluator, Mr. Cohen, who started demanding
14 information that he didn't even use.

15 We said, this information you're demanding
16 has nothing to do with the Tropic shares, nothing.
17 And you insisted and we got -- we had to deliver all
18 that stuff. Where all that stuff ended? Did Mr.
19 Cohen use any of that for the valuation?

20 The answer is no. Did the evaluation of Mr.
21 Cohen end up him being the numbers my sister was
22 claiming? No, it was very close to the offer price we
23 made. The judge ruled that we had to pay her less
24 than 20% more than we had offered in 2011, so then
25 where was all this magnificent information you were

1 getting from? Where was it used to? It was all sent
2 down south, and that's how I've been hurt so much.

3 1077. Q. My question ---

4 A. So, I'm not imaginative, I'm just
5 telling you what's already happened.

6 1078. Q. My question -- you may not recall --
7 was with respect to the likelihood that you expected
8 to receive these funds, and you said soon, so my
9 question would be how soon?

10 A. I don't know how soon, but it's soon.
11 I don't have a crystal ball; I can't read the future,
12 but I know we are getting very close to it. And
13 besides, I'm not going to tell you any more about it,
14 because that's why I just gave you the explanation and
15 there you go again trying to -- trick me into give you
16 information about the case; I'm not going to tell you.

17 1079. Q. It's not a trick. One of the primary
18 focuses of this type of examination is to understand
19 your capacity to pay the judgment and determine how we
20 can collect on the judgment. And what you're
21 describing to me is the only possible source of money
22 that you could receive is this settlement, or I should
23 say not settlement, I'm guessing settlement, but some
24 sort of resolution of issues between you and the
25 cousins.

1 And I'm just asking for more detail on why
2 you're expecting to receive money; how much you're
3 expecting to receive; when or how? And I'm entitled
4 to ask those questions. You're entitled to not answer
5 them, well, you're not entitled, but you can refuse to
6 answer them and decide later in front of a judge
7 whether you're entitled not to. But, let me just ask
8 those questions and you can answer them or not answer
9 them.

10 A. I forget the exact date, but I think it
11 was February or March of this year we had a meeting in
12 your office.

13 1080. Q. And again, I don't want to interrupt
14 you when you're giving answers, but you're describing
15 a conversation that's subject to settlement privilege,
16 and I'm not asking you about that.

17 A. Well, it was a conversation between
18 your side and my side, so to me that's the only
19 privilege that counts. I was in that meeting, you
20 were in that meeting, Mr. Leon was in that meeting,
21 Woycheshyn was in that meeting, my sister was in that
22 meeting.

23 In that meeting I presented a proposal to
24 settle my sister's judgment in full, and then we
25 provided you all of the information on money that's

1 going to be collected in a matter of months. So, and
2 you already know about that.

3 I'm not going to tell you more, because
4 anything else I would be disclosing things of the case
5 to people who have been helping our counterparts, so I
6 hope you can understand that I cannot tell you that.

7 1081. Q. Well, I'm not sure I do understand, but
8 I don't need to. But let me just make sure I have the
9 hope you have of collecting money with respect to the
10 issues with the cousins is the same issues that you've
11 communicated previously to Margarita, or the same
12 grounds that you've communicated previously to
13 Margarita.

14 A. Yeah, it's part of it -- there's more.

15 1082. Q. There's more, okay?

16 A. But I'm not going to say more about it.

17 1083. Q. So, you're refusing to tell me more
18 about ---

19 A. Because you're going to pass over to my
20 cousins, like you did it already before. Since 2011,
21 so you want me to repeat how you got the information
22 that you gave to my cousins?

23 1084. Q. That was absolutely not my question.

24 A. Well, so then don't ask me more things
25 about the case.

1 1085. Q. I'll go back to the credit card
2 statement and eventually we'll mark this as an
3 exhibit, but for now I'll just hand you some pages
4 from it. This is page 9 of 10 of the year end summary
5 of 2016 for the American Express card, and I'm
6 directing your attention to the bottom of the page
7 where there's a charge, again in April 2016, which
8 would likely have been when you said you went to
9 China.

10 It says Sunrise Duty-Free, Shanghai, 997.00.
11 Can you take a look at that, please?

12 A. Yeah, I can see that. That was the
13 same trip that we did to China that I already
14 mentioned before.

15 1086. Q. And do you recall what you bought at
16 the duty-free shop for almost \$1000?

17 A. I do not remember exactly what it was,
18 but I believe -- if I remember I bought a brief case,
19 or not a brief case but a travelling bag, and I might
20 have bought a few other things for my wife and maybe
21 some souvenirs -- I don't really remember what it was.

22 1087. Q. So it's possible that you bought some
23 expensive luggage?

24 A. Not expensive, I just bought a little
25 carry-on bag. \$900 seems like a lot of money, but

1 it's not a lot of money either when there's three
2 people travelling. I don't remember what we bought.
3 And, as far as I know, spending \$900 was not something
4 that I was not allowed to do.

5 You know, I had a reasonable income at the
6 time. I don't have it anymore, but I had a reasonable
7 income at the time, so...

8 1088. Q. And so, when would you say you stopped
9 having a reasonable income?

10 A. At the end of August last year.

11 1089. Q. So the next I'll show you, this is from
12 a different set of documents, a year end summary 2017
13 for the same American Express credit card. And I've
14 starred a couple of rows here, one is a transaction in
15 April 2017 and another is a transaction on your wife's
16 card, but in September 2017, so you take a look at it.

17 A. Yeah. The one in April is a computer,
18 obviously. I don't remember exactly what computer it
19 was, but I had an iPad that was damaged by accident.
20 So, I'm assuming that's the one that was replaced.

21 1090. Q. So this is in August 2017?

22 A. No, that was in April.

23 1091. Q. Sorry you're right, I misspoke. What I
24 just want to get to is this notion that you didn't
25 spend money even on clothing; that you were just

1 spending money on food and ---

2 A. I didn't say we didn't spend money on
3 clothing. I said we didn't spend money like crazy on
4 a lot of expensive, luxury things -- of course people
5 need to buy clothing from time to time. My mother was
6 used to have a lot of stuff and buying whatever she
7 wanted, because my dad gave her that pleasure and she
8 deserved it.

9 Now we're not supposed to buy new clothes
10 when we need one? Are we just supposed to dress in
11 rags and we're not supposed to go to a restaurant and
12 we cannot buy a couple things in the one and only time
13 we've been in China? You know, this is not like we're
14 buying jewelry, throwing money around like crazy, you
15 know?

16 You can try to portray this any way you
17 want, but we are not people that throw money like
18 crazy. We could have spent much more money when we
19 had money and we didn't necessarily live like crazy.
20 As I said before, I didn't take my family to expensive
21 World Cup trips paid by the company, like my brother-
22 in-law did.

23 And that's what triggered all this problem;
24 when my father found out that he was embezzling money
25 from the company fired him and that angered them. I

1 had nothing to do with it, nothing to do with it, and
2 I'm the one paying now.

3 So you took everything I have now and you're
4 going to go back a year, or two years' ago on \$315 we
5 spent probably at a dinner or something, entertaining
6 the guy who had invited us to do this trip in Tibet,
7 or buying something on our one and only trip to China
8 in a duty-free.

9 You can try to portray anything you want,
10 but we haven't been spending my sister's money, if
11 that's what you're concerned about.

12 1092. Q. At your last exam I'll show you -- you
13 still have a copy of the transcript, or I still have
14 both of them to show it to you -- so, I'm looking at
15 question 604 on page 113. The question was, "What
16 about clothing? Do you go shopping for clothing?"
17 Answer: "I don't shop for clothing at all. From time
18 to time my wife buys me something when she thinks I'm
19 looking too used -- I hate clothes"?

20 A. Yeah, that's been true since we got
21 married.

22 1093. Q. And I'm just trying to understand your
23 evidence, because you said before and I recall you
24 saying it again today, although I may have mis-
25 remembered and we'll find out later, that you didn't

1 buy clothes, or things you didn't need; that you were
2 very minimalist in your spending. And the answer that
3 you just gave now was not entirely the same; it was,
4 well I've got to live my life. What if I want to go
5 on vacation, what if I want to buy something,
6 occasionally get something nice?

7 And I'm just trying to understand which of
8 those two is your evidence as to how you've been
9 spending money since the judgment was issued against
10 you?

11 A. There you go again with the little
12 games, and that's why you don't ask me the question
13 without looking at me -- you look at the table over
14 there and you look at the floor and you look at the
15 wall, but you don't look at me when you ask the
16 question.

17 And the question is very simple; we're not
18 buyers of clothing -- I'm not going like my sister and
19 my brother-in-law used to go shopping at malls; we
20 don't do that. Of course from time to time we need to
21 buy a shirt or something, that's normal for people;
22 don't you think? I don't go to the shopping for
23 clothing; my wife does most of the clothing shopping
24 and very very seldom.

25 We're not in the mall all the time buying

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

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

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

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

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

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

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

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

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

10 A. This?

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

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

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

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

1 are. I'm just telling you I probably picked up the
2 car for them -- I don't know. I don't remember. This
3 is a year ago. I don't remember exactly what I do
4 every day. But you have a car in service. If it's
5 winter you need winter tires, it's simple as that.

6 So we're not supposed to change the tires if
7 they're needed? If the car needs service we're not
8 supposed to service our cars?

9 1099. Q. I didn't ask you what you were or
10 weren't supposed to do; I just asked you what these
11 charges were for.

12 A. If we are family we're not supposed to
13 be able to do a favour to somebody in the family? I
14 can assure you probably my son has paid things for me
15 too. So, if you want to make a big deal out of it,
16 make a big deal out of it.

17 So, what you want me to do? Give \$500 to my
18 sister because I paid something at the Mini for my
19 son's car?

20 1100. Q. All I want you to do is answer my
21 question.

22 A. Just be serious. Try to be serious,
23 you know? So, find something in there that is really
24 a substantial thing that you can make a big fuss out
25 of it, because otherwise you're just wasting our time

1 -- and keep doing little faces and rubbing your eyes -
2 - come on? Be professional, please and respect me.

3 Talk to me seriously without doing all these
4 faces. You know? I'm not doing faces to you.

5 1101. Q. Do you recall what these charges were
6 for?

7 A. Not off the top of my head, but
8 obviously they are car-related service or something.

9 1102. Q. But you have no specific recollection?

10 A. No.

11 1103. Q. I take that as your answer. The
12 charges related to the Mini and the Audi; you
13 recognize those as being cars of your kids?

14 A. Yes.

15 1104. Q. So, the only explanation you can think
16 of for paying those would've been for your kids?

17 A. Yeah, it could -- so, is that a sin?

18 1105. Q. Well, it's just a yes or no question.
19 You don't have to worry about what it means.

20 A. I know what you're trying to do; you're
21 trying to make me fall into traps here. If I pay the
22 bill for my son and then I'm giving money to my son
23 and then you're going to say at one point I said I'm
24 not giving money to my son -- no, I'm not giving
25 money, my kids money to live every day, every week.

1 Once somebody needs a little help, you help.
2 The same way as when I need help they help. If that's
3 a sin, then I'm a sinner, you know? And you're going
4 to try to twist this, and that's why I'm telling you;
5 you ask these little questions and then make these
6 little faces and don't look at me, because you're
7 trying to set me up into something that you're going
8 to try to create. This is just normal family life --
9 that's what it is.

10 1106. Q. I'm at a different period of time and a
11 different credit card. This is a TD Gold Elite credit
12 card. Do you remember that one?

13 A. Yeah.

14 1107. Q. Do you still have that credit card?

15 A. Yeah.

16 1108. Q. And this is a statement from, dated
17 February 17, 2016. I'm showing you page 4 of 5 of it.
18 But I'm going to put a star beside a transaction on
19 February 3rd from Brown's Appliances, Port Carling.
20 Do you recall this?

21 A. I don't remember what that might be.
22 Obviously it's something at the cottage that needed
23 replacement. I don't know what it is. That was
24 actually on my wife's card, if you can see it.

25 1109. Q. The account is in your name, but I

1 guess this is another one that has two cards that can
2 be charged to the same account; is that what's going
3 on?

4 A. Yeah.

5 1110. Q. And paying these credit cards off; it
6 always came from the same place? It came from the
7 joint account. Right?

8 A. Up until you froze the account. Then,
9 since then I'm not paying the account; my wife takes
10 care of it.

11 1111. Q. Still with the TD Gold Elite and I'll
12 move to November 17, 2016 statement. And again, at
13 page 5 of 6 there's a reference here to Guarantee Co.
14 of Northam, Woodstock and an amount payable of over
15 \$1,000?

16 A. Insurance company.

17 1112. Q. What was being insured?

18 A. The house, the cottage, the car. You
19 have to add those insurances for the mortgage purposes
20 and to get a license for the car. Right?

21 1113. Q. Another statement that I'll show you,
22 still on the TD Gold Elite, now February 2017, a star
23 beside it on the copy I gave you. It says a cash
24 advance of \$2000?

25 A. I don't know what that is.

1 1114. Q. You can't recall why someone would take
2 out a cash advance of \$2,000 in February 2017?

3 A. No, I don't know what it is. I don't
4 have a clue. It could've been, I don't know for sure,
5 but my wife's mother is a 94-year-old woman and she
6 doesn't have any income either, so from time to time
7 my wife sends money to her, so that might've been.
8 It's the only reason we would take cash out.

9 1115. Q. And I think in fairness you've told me
10 that you were giving money to your mother up until
11 July 2017. Right?

12 A. Yeah.

13 1116. Q. I'll show you a similar one. This is a
14 statement dated April 17, 2017, page 3 of 5 of it.
15 The transaction posted April 3rd for a \$6000 cash
16 advance. Do you recall what that was for?

17 A. I have no idea.

18 1117. Q. Are you surprised that that's on the
19 statement?

20 A. I am surprised at that one -- I didn't
21 see that. I don't know what that is. I have no idea.

22 1118. Q. And if you didn't know would your wife
23 likely know what that money was for?

24 A. I don't know.

25 1119. Q. Can I ask you to inquire with her what

1 that \$6,000 was for?

2 A. I can ask her if she remembers. I
3 don't know if she does.

4 --- UNDERTAKING

5 1120. Q. And I'll have the same question; I'm
6 looking now at the May 17, 2017, still for the TD Gold
7 Elite, page 3 of 5. The transaction's posted on May
8 1st and May 2nd. There are again cash advances of
9 \$3000 and \$5000. Do you remember those?

10 A. No, I don't know what this is. I will
11 have to find out.

12 1121. Q. And I'll make the same request that you
13 inquire?

14 A. This is strange. I've never seen this.

15 --- UNDERTAKING

16 BY MR. BORTOLIN:

17 1122. Q. Is it a practice for you to review
18 credit card statements before paying the bill?

19 A. I don't pay the bills; my wife pays the
20 bills. I used to, but all this is after you froze me
21 out of my own life.

22 1123. Q. And so, just to follow up on that
23 point, so when is it that you say you stopped having
24 access to the TD joint account?

25 A. When you froze my account. I don't

1 remember the date, but you know the date; you did it.

2 1124. Q. Well, but you seem to remember it
3 vividly. I'm just asking you to tell me what the date
4 is.

5 A. I know it was last year, I don't
6 remember the exact date. It was sometime last year
7 before these dates, for sure.

8 1125. Q. And so, from that point forward, where
9 did the money come from to pay the credit cards then?

10 A. My wife.

11 1126. Q. So this question seems like it might be
12 a different card, unless it got rebranded. It's still
13 TD, but it's called a Visa Infinite card.

14 A. The card we had -- this elite card came
15 from '84. They've changed the -- whatever.

16 1127. Q. And I'm going to draw your attention,
17 so this is an August 4, 2017 statement, page 3 of 7,
18 and a transaction on July 9th at Gordon Bay Marine
19 Ltd., MacTier?

20 A. Yeah, that was servicing the boat.

21 1128. Q. And maybe I'll just ask this question
22 generally without referring you to it, or I can if you
23 like. But, if I see a charge in 2016 that goes to
24 places like Mini Downtown or Audi, Midtown or
25 Mercedes-Benz Canada, or downtown Porsche Toronto, can

1 I assume that those relate to vehicles owned by you,
2 your wife or your kids?

3 A. Or my mother.

4 1129. Q. And so, the ones that are charged on
5 credit cards, and again if it helps I can show you
6 what I'm looking at, but it may be easier just to
7 answer the question generally since it does recur.
8 Are these lease payments, maintenance payments; what
9 are they?

10 A. Maintenance payments, repairs, new
11 tires that sort of stuff.

12 1130. Q. And you would do that at the
13 dealership?

14 A. Yes. If you don't service them at the
15 dealership your warranty is voided.

16 1131. Q. Another transaction I'll ask you about
17 is for your Canadian Tire MasterCard. Do you remember
18 that card?

19 A. Yeah.

20 1132. Q. Is that a card that's still issued?

21 A. Yeah. You have all the statements for
22 that card too.

23 1133. Q. And this is a statement that I'm
24 looking at dated February 12, 2017, and the
25 transaction I'm going to ask you about with the star

1 beside it is dated January 23rd at Nordstrom's for
2 \$847.50?

3 A. That will probably be some winter
4 clothing or something, I don't know for who. You
5 can't get a decent coat for 10 bucks, right? So I
6 don't know what that is. I didn't buy that. That
7 must have been my wife probably.

8 1134. Q. So is that like a winter coat; is your
9 guess?

10 A. Or could have been for my mother also.

11 1135. Q. Do you recognize the name Express
12 Router?

13 A. No.

14 1136. Q. I'm just looking at these statements;
15 the cardholder name looks like it says Juan C.
16 Gutierrez?

17 A. It's misspelled.

18 1137. Q. They misspelled it? And then I have
19 another credit card -- how many credit cards do you
20 have?

21 A. I only have the Visa and the
22 MasterCard. I no longer have the AMEX.

23 1138. Q. This seems to be for a different card,
24 an older one. The statement I'm looking at is dated
25 February 11, 2011 for TD First Class Travel Card. Do

1 you recognize that card?

2 A. Can I see the statement, because I
3 don't have a travel card?

4 1139. Q. And I'll put a star next to the
5 transaction I'm going to ask you about on January 15?

6 A. That's my father's credit card.

7 1140. Q. Oh, it's your father's credit card,
8 okay. I think it was provided to us in a package of
9 statements identified as yours.

10 A. No. That's from February 2015. That
11 was my father.

12 1141. Q. Fair enough; I won't ask you about that
13 one. It just got lumped together into the file, I
14 think.

15 A. If you look at it carefully it says
16 here, MD through Point Zero Interpreter, Infinity, I'm
17 pretty sure that's one of his many medical bills that
18 he used to have to pay when he was in winter season.

19 1142. Q. Just a few follow-up items and then
20 we'll be done. When we last examined you we asked if
21 there were any judgments against you other than
22 Margarita's and you advised there were not. And my
23 question will be whether that remains true; that only
24 Margarita's judgment against you, and if it helps I
25 thought you referred earlier to mortgage judgments

1 against you?

2 A. I have the mortgage judgment, that's
3 more recent.

4 1143. Q. And so, that is the Scotia Bank
5 judgment?

6 A. Yes.

7 1144. Q. Did DX Financial, which had the second
8 mortgage also obtain a judgment?

9 A. No, they didn't obtain a judgment.

10 1145. Q. So the judgments against you are
11 Margarita's and the Nova Scotia judgment, which I'm
12 guessing will be discharged now that the house is
13 sold. Is that right?

14 A. Yes.

15 1146. Q. There's nothing else?

16 A. No.

17 1147. Q. In your answers to undertakings you
18 provided some T4 and T5 slips and some other tax
19 documents and I have a couple of follow-up questions
20 about those. So, I'm going to show you a T5, it's
21 from 2015 and it's for \$127,836.79.

22 And it says its investment income. Can you
23 describe what investment this is?

24 A. I'm not a hundred percent sure whether
25 it, it must be related to my RRSP, because it's with a

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1 -- oh, it's London Life Insurance, yeah that's related
2 to that I think. I cannot tell you -- or it may have
3 been when I sold my life insurance is because I needed
4 money.

5 1148. Q. Sorry, I'm not sure I ---

6 A. I had some life insurance way back in
7 '14, '15, I don't remember. All that stuff we already
8 provided to you anyway, so whatever it happened you
9 already have the papers because I don't have a
10 recollection about that. I do not know exactly what
11 this is about.

12 1149. Q. These are the papers, so it's all I
13 have to go on.

14 A. But you have the information anyway; it
15 was provided to you already.

16 1150. Q. But this is the information that's
17 provided, and it's just not clear to me what this
18 refers to, so that's why I asked you. I think your
19 recollection is that this relates to an RRSP?

20 A. I don't know what it is. I just
21 suspect -- that came as a possibility, but I don't
22 know exactly -- what year is this?

23 1151. Q. 2015.

24 A. '15? That might've been probably when
25 I was -- I may have cashed one of my life insurance

1 that I used to have. Could be, but I can't actually -
2 - I don't know for sure. I'm speculating on that, I
3 shouldn't be, but I'm trying to help you out with the
4 answer.

5 1152. Q. We referred to this document, so I'm
6 going to mark it as an Exhibit number 7.

7 A. This one?

8 1153. Q. Yes, the T5; it's a Statement of
9 Investment Income 2015?

10 A. 7, you said, number 7?

11 1154. Q. Yes.

12 --- EXHIBIT NO. 7: T5 for 2015; Statement of Investment
13 Income for Mr. Gutierrez.

14 BY MR. BORTOLIN:

15 1155. Q. When you were last here you brought
16 with you to your last examination your income tax
17 return for 2016. If you may recall, the tax that you
18 reported was 45,000 from Xela. Do you remember that?

19 A. That's what year?

20 1156. Q. 2016?

21 A. Yeah.

22 1157. Q. You've provided us subsequently with a
23 reassessment that adjusts your income to \$96,825. Do
24 you remember receiving that reassessment?

25 A. These tax things are so complicated; I

1 don't understand them. So I always rely on the tax
2 advisor to go through that. So, I don't remember that
3 stuff. I don't understand exactly what it is.

4 1158. Q. And there is an explanation; it's not
5 very detailed, but I should give you a copy of this
6 and I'll mark it as an exhibit. And I'm looking at --
7 the first several pages are the original filing. And
8 then, starting at -- it's the middle page on the back
9 there's a Notice of Reassessment.

10 And at the bottom of the page where it says,
11 "Tax Reassessment" at the top on page 2 in the upper
12 right-hand corner, at the bottom of that page there's
13 a heading called "Explanation of Changes and Other
14 Important Information".

15 It says, "We included income from London
16 Life Insurance Company, T4 RRSP". Does that refresh
17 your memory at all?

18 A. I cannot tell you for certain because,
19 as I said I'm not understanding the tax issues very
20 clearly, it's so complicated material. But, from what
21 it says here is that was the year when I sold the life
22 insurance thing and I'm being reassessed on that, I
23 presume. I presume that's what it is.

24 1159. Q. Well there are a couple of different
25 things. The tax that we just looked at was for the

JUAN GUILLERMO GUTIERREZ - 311

1 year prior, 2015, and that was for over \$100,000.
2 This seems -- this is from 2016 and it's for a
3 significant -- well, it seems, I'm inferring because I
4 can't actually tell -- it seems to be for about
5 \$45,000 based on how much it increases the total
6 income, or \$50,000?

7 A. I cannot tell you what it is because I
8 don't understand this. I can inquire.

9 1160. Q. Thank you.

10 --- UNDERTAKING

11 BY MR. BORTOLIN:

12 1161. Q. There's also a reference on the back of
13 this page, page 3 in the upper right-hand corner, it
14 says "We changed your federal spouse or common-law
15 partner amount to take into account your spouse or
16 common-law partner's correct net income".

17 And do you have an understanding of what the
18 spouse or common-law partner deduction is?

19 A. Can I see what you're looking at,
20 because I have no idea what you're talking about?

21 1162. Q. It's the same document we were just
22 looking at; it's just the next page over. I haven't
23 marked this as an exhibit yet, so let me do it before
24 I forget. This would be Exhibit 8, the Income Tax
25 Return and Notice of Reassessment for 2016 for Juan

1 Guillermo Gutierrez.

2 --- EXHIBIT NO. 8: Income Tax Return and Notice of
3 Reassessment for 2016 for Juan Guillermo Gutierrez.

4 A. I don't understand what that -- this is
5 something Revenue Canada did, I have no idea. I don't
6 know anything they do. All I know is whatever they
7 tell me to pay, I pay because I don't know what the
8 rules, exactly.

9 1163. Q. So there's someone who prepares your
10 taxes for you, I take it?

11 A. I use an advice for that because I
12 can't do that.

13 1164. Q. And when you say you use advice; does
14 that mean that you give your papers to someone else
15 and they file your taxes, or does that mean that you
16 ask someone for advice and then you file your taxes
17 based on their advice?

18 A. I provide all the information and they
19 prepare the thing and then we go through it and then I
20 sign it and send it.

21 1165. Q. So you're involved in the process of
22 preparing your tax return?

23 A. At the end of the process I sign the
24 things, but as I said I'm not a tax expert and these
25 rules are so complicated; I rely on the experts to do

1 that.

2 1166. Q. Well, I'll show you something and you
3 may not recognize it and you may have never seen it
4 before, it's from the Government of Canada website.
5 It refers to the spouse or common-law amount; it seems
6 to correspond to what's described in the Notice of
7 Reassessment. And what it describes is a deduction
8 that can be claimed if your spouse or common-law
9 partner has a net income of less than a certain
10 amount. And does that refresh your memory at all as
11 to what the issue was with spousal amount?

12 A. I already told you my wife doesn't have
13 a steady job. In those years she wasn't receiving any
14 money, so I already answered all those questions
15 before when you asked me about source of income.

16 1167. Q. And if we come back to that point, you
17 explained where the money for the house came from.
18 But, as we were talking about earlier with the credit
19 cards there comes a point at which she's also paying
20 for the credit cards.

21 And as we saw, through there, there's a not
22 insignificant number of charges over time that add up,
23 whether or not they're reasonable or not; there's a
24 significant amount of money that gets put on the
25 credit cards over time.

1 And that's all coming from your wife?

2 A. Yeah and my mother also got a mortgage
3 on her apartment also which we've been helping --
4 she's been helping us also. It's been a double --
5 listen, we are family in a serious crisis and so we do
6 what we can to help each other. So, then that's how
7 it is.

8 1168. Q. But there's no dispute between us
9 anyways that your wife's income, current income over
10 the past two, three years is not a significant amount
11 of money?

12 A. In the last two years it wasn't.

13 1169. Q. And your explanation for why she had
14 money, at least at some point in time, is through
15 savings from a long time ago. Is that right?

16 A. Yeah.

17 1170. Q. And that understanding is based on what
18 she's told you?

19 A. She's not on trial here. I'm just
20 telling you what I understand, what I know. I cannot
21 tell you what she says or doesn't say. She's not a
22 party in this thing, you know?

23 Actually, she's the biggest victim of all
24 these things; she's lost her home, so what else you
25 want?

1 1171. Q. I just wanted to know the basis for
2 your understanding.

3 A. You're going to go after her now? Come
4 on.

5 1172. Q. It makes it hard for the transcript if
6 you talk over me. I was just asking what the basis
7 for your understanding was about where her money came
8 from and what she had told you.

9 A. I already answered that question since
10 we started today, and before. You know all these
11 things -- you already know them, so...

12 1173. Q. So you're not going to answer my
13 question now?

14 A. I already answered your question. And
15 again, you're with these little games. You asked me
16 these questions at the beginning of this cross-
17 examination, now you're going to ask me, and then of
18 course I'm not going to use the exact same words and
19 then you're going to find one little thing where you
20 can accuse me of contradicting myself, and I don't
21 have the benefit of a lawyer to assist me here.

22 So, I'm not going to tell you anything
23 different. I already know the answer.

24 MR. BORTOLIN: Subject to answers to
25 undertakings, refusals, those are my questions.

1

2

--- WHEREUPON THE EXAMINATION WAS ADJOURNED AT 2:33 P.M.

3

4

I hereby certify that this is the

5

Examination in Aid of Execution of

6

JUAN GUILLERMO GUTIERREZ, taken

7

before me to the best of my skill

8

and ability on the 30th day of

9

August, 2018.

10

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12

LAILA A. STEPHEN - Certified Court Reporter

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Reproductions of this transcript are in direct

23

violation of O.R. 587/91 Administration of Justice Act

24

January 1, 1990, and are not certified without the

25

original signature of the Court Reporter

This is Exhibit "D" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

COUNSEL SLIP

COURT FILE

NO.: CV-11-00009062-00CL

DATE: October 29 2019

NO. ON LIST

6

TITLE OF PROCEEDING

Castillo, M v. Xela Enterprises Ltd et al

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19 Oct 2019

order shall go as per Schedule A
attached. Counsel with email me a typed
version for signature.

McL...

SCHEDULE "A"**In the Matter of the Receivership of Xela Enterprises Ltd.**

The following terms were determined at the Case Conference returnable October 29, 2019:

1. Xela Enterprises Ltd. agrees to provide the Receiver with timely disclosure of any negotiations and offers of settlement related to the Avicola Litigation;
2. The Receiver shall be consulted and advised with respect to settlement negotiations relating to the Avicola Litigation; provided that the Receiver shall not have any veto right with respect to any offer of settlement; and
3. Any settlement accepted by the parties involved in the Avicola Litigation shall be subject to the approval of this Court.

*All capitalized terms used herein shall have the meaning ascribed to them in the Receiver's First Report to Court dated October 17, 2019.

*Such terms shall be read in conjunction with the Appointment Order and be effective until December 31, 2019 unless otherwise extended by the Court.



October 29, 2019

This is Exhibit "E" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

RESPONDING RECORD

March 22, 2020

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Table of Contents

Tab	Date	Document
1.	March 22, 2020	Affidavit of Juan Guillermo Gutierrez
Exhibit		
A.	September 5, 2008	Leamington Judgment
B.	2009/2010	Villamorey's audited financial statements for 2009/2010
C.		Opening statement for G&T Bank account No. 900051264
D.		Certificate of Deposit #010152676
E.	April 17, 2012	Excerpt from Margarita's cross-examination
F.	September 9, 2011	Affidavit of Margarita Castillo
2.	March 22, 2020	Affidavit of Harald Johannessen Hals
Exhibit		
A.	December 2012	BDT Judgment
B.	October 18, 2019	Magistrate Judge's Report and Recommendation
C.	December 5, 2018	Payment Order

TAB 1

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

(Sworn March 22, 2020)

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

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

2. The Second Report is erroneous and/or inaccurate in various material respects. Further, it omits relevant information that should properly be taken into consideration as the Court evaluates and guides the ongoing activities of the Receiver.
3. Significant questions remain concerning Xela's counterclaims against Applicant Margarita Castillo ("**Margarita**") – which are pending in the Court in Toronto – that have not yet been adjudicated. These pending claims, if sustained, would more than offset Margarita's judgment against Xela (the "**Castillo Judgment**"). Xela has emphasized these claims to the Receiver and their likely offset of the Castillo Judgment, but the Receiver has taken no discernible steps to pursue them.
4. Specifically, Xela has alleged that Margarita received an illegal US\$4.35 million loan in 2010 from G&T Continental Bank ("**G&T**") in Guatemala (the "**Loan**"), funded by dividends improperly diverted from LISA, S.A. ("**LISA**"), an indirect subsidiary of Xela. The Loan was illegal because it was secured – without Xela's knowledge or consent – by a Certificate of Deposit in the sum of US\$4,166,250, purchased with some of the improperly withheld dividends owed to one of Xela's subsidiaries. Xela asserts that Margarita was never required to repay the Loan, and that mere weeks after the Loan funded, the bank foreclosed the collateral, making itself whole and effectively laundering the misappropriated dividends by transferring them to Margarita. Xela further maintains that Margarita used some of the tainted Loan proceeds to fund the oppression action against Xela that eventually led to the Castillo Judgment.
5. Those allegations, which are supported below by specific references to evidence, have been asserted in separate counterclaims in a civil conspiracy lawsuit against Margarita that predate entry of the Castillo Judgment. If proved to be true, Xela would be entitled to a judgment of its own against Margarita that could more than offset the Castillo Judgment and the expenses of the receivership. Xela's claims against Margarita are both substantial and viable, and fairness suggests that any unresolved claims that might offset the Castillo Judgment should be resolved judiciously as part of the receivership process.

The Avicola Group

6. Arturo Gutierrez (“**Arturo**”) laid the corporate foundation in 1965 for what is now a lucrative poultry conglomerate of 29 companies in Guatemala (collectively the “**Avicola Group**”). He gave a one-third ownership to each of his two siblings, keeping a 1/3 stake for himself. In 1974, his brother and brother-in-law were tragically killed in a small aircraft accident, and their interests passed to their respective heirs (referred to collectively here as the “**Nephews.**”) Arturo remained President of the company and the single largest shareholder.
7. Beginning in 1982, Arturo began a transition to relocate his immediate family to Toronto. He resigned as President of the Avicola Group, leaving operations in the hands of the Nephews. He also formed LISA, S.A. (“**LISA**”), a Panama company, to which he transferred all of his shares in the Avicola Group. (LISA is wholly owned by Gabinvest, S.A., a Panama company (“**Gabinvest**”), which is in turn wholly owned by Xela.) By 1984, the transition was complete.

Initial Fraud by the Nephews

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

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

Ongoing Theft of Dividends and Laundering of Illicit Proceeds

10. In 1999, the buy-out discussions having failed, Arturo began efforts to recover his unpaid dividends by commencing legal action in Florida and Bermuda, followed by a lawsuit in Panama against a company in which he held a 1/3 stake, Villamorey, S.A. (“**Villamorey**”) – which owns 25% of the Avicola Group shares – and multiple lawsuits in Guatemala. In response, the Nephews suspended all Avicola Group dividend payments to LISA, while continuing to declare and pay dividends to themselves. Although the full amount has never been documented owing to the Nephews’ failure to share financial reporting or data with LISA, LISA estimates the total sum of unpaid dividends from 1999 to the present to approach \$400 million with interest (the “**Unpaid Dividends**”).
11. Although the Nephews have successfully stalled legal proceedings and evaded judgment in most jurisdictions, the fraudulent scheme documented on videotape eventually became the subject of a three-week trial in Bermuda in 2008. There, the Court found that the Nephews had misappropriated LISA’s dividends and converted them to their own use, laundering illicit cash receipts through the sale of bogus insurance policies at an inflated premium by a Bermuda-based reinsurance company that they owned. Judgment was entered in favor of LISA on September 5, 2008 (the “**Leamington Judgment**”), from

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

- a. That LISA was a victim of a conspiracy to defraud by the Nephews;¹
- b. That the Avicola Group used accounting records that recorded only a portion of its true income;²
- c. That a substantial portion of the income generated by the Avicola Group was kept off the books and used to fund distributions to the Nephews but not to LISA;³
- d. That the re-insurance policies at issue were not genuine;⁴
- e. That some of the “black” money was being “whitened” by paying the insurance premiums that were then distributed as purportedly legitimate corporate profits, and that the Nephews intended to deprive LISA of its rightful share of the profits generated by the Avicola Group;⁵
- f. That the Nephews used cash-only operations to conceal the Avicola Group’s true earning from the Guatemalan tax authorities;⁶
- g. That the Nephews intended to injure LISA through a fraudulent conspiracy;⁷
- h. That LISA had been excluded from participating in the distributions made to the Nephews;⁸and
- i. That the members, officers and directors of the various Avicola Group companies

¹ Leamington Judgment, at ¶91.

² Leamington Judgment, at ¶55.

³ Leamington Judgment, at ¶57.

⁴ Leamington Judgment, at ¶63.

⁵ Leamington Judgment, at ¶82.

⁶ Leamington Judgment, at ¶62.

⁷ Leamington Judgment, at ¶106.

⁸ Leamington Judgment, at ¶109.

had “actual knowledge of all of the facts which made the conspiracy unlawful.”⁹

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

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

13. After the Leamington case was decided, beginning in February 2009, the parties met through representatives more than a dozen times to discuss potential settlement of the dispute. The negotiations were tense and complex, owing to the extreme animosity and distrust that had developed between the branches of the family. It was during this extended period of negotiations that Margarita secretly joined forces with the Nephews, and conspired with them and others to attack Xela and its subsidiaries, in breach of her fiduciary duties as a Director of Xela.
14. Although Margarita’s ensuing misconduct had multiple facets, perhaps her single most egregious act – and the transaction that is particularly relevant to this receivership – was her acceptance of what appears to be a tainted bank loan for US\$4.35 million, funded by the Nephews through G&T Continental Bank in Guatemala (“**G&T Bank**”) using LISA’s unpaid 2010 Villamorey dividends as collateral (the “**Castillo Loan**”). As detailed below, the Castillo Loan appears to have been transacted through Margarita’s nephew, Roberto Barillas (“**Roberto**”) – who acted as her legal representative – and repaid through foreclosure of the collateral.
15. Specifically, G&T Bank and other records indicate the following:
 - a. Villamorey declared in LISA’s favor (but did not pay) dividends of US\$4,166,250 in 2010. A true and correct copy of Villamorey’s audited financial statements for 2009/2010 is attached hereto as Exhibit B.

⁹ Leamington Judgment, at ¶115.

- b. On May 6, 2010, Juan Luis Bosch, one of the Nephews, used those dividends, without LISA's knowledge or consent, to open an account in Villamorey's name with G&T Bank. A true and correct copy of the opening statement for G&T Bank account No. 900051264, showing the initial deposit of US\$4,166,250, is attached hereto as Exhibit C; and
 - c. On May 25, 2010, the initial deposit to Account No. 900051264 (*i.e.* LISA's dividends) was used to purchase Certificate of Deposit #010152676 in the amount of \$4,166,250 (the "CD"). A true and correct copy of the CD is attached hereto as Exhibit D; see also Exhibit B, referencing CD #010152676.
16. Further, during meetings in September 2012 and November 2012, Mr. Jorge Porras – at the time an attorney for one of Xela's subsidiaries – provided information to Xela, of which he had personal knowledge, regarding an ongoing conspiracy between the Nephews and Margarita to injure Xela. During those meetings, Mr. Porras told Xela, among other things, that:
- a. Roberto had executed the Castillo Loan documents on Margarita's behalf, under a power of attorney signed and delivered to Roberto by Margarita in Miami in March 2010;
 - b. The Castillo Loan was for a total of \$4.35 million;
 - c. A portion of the Castillo Loan was to finance Margarita's oppression application in Toronto against Xela, our father and me; and
 - d. He (Mr. Porras) had attended meetings in Toronto with Margarita and her lawyers, Jeffery Leon and Jason Woycheshyn (Bennet Jones). Katherine Kay (Stikeman Elliot), who represents the Nephews in various legal matters, was also present during at least one of those meetings. The subject of the meetings was Margarita's oppression action against Xela, during which Margarita disclosed to her lawyers that the action would be financed through the Nephews.

17. Under cross-examination on April 17, 2012 in Toronto, Margarita admitted receiving the Castillo Loan and testified that G&T Bank had given her the Castillo Loan solely on the basis of her “net worth,” as she had no assets in Guatemala and had not lived there in decades. A true and correct copy of an excerpt from Margarita’s cross-examination is attached hereto as Exhibit E. However, in an affidavit dated September 9, 2011, Margarita testified that she had been struggling financially, and that she had asked the Nephews for “help” securing the Castillo Loan. A true and correct copy of that Affidavit is attached hereto as Exhibit F. In any case, Margarita confirmed in cross-examination that she used at least some of the Castillo Loan proceeds to pursue her oppression claims in Toronto against Xela, Arturo and Juan. (See Exhibit E hereto.)
18. In 2016, I participated in at least four meetings in Guatemala with high-level representatives of G&T Bank about the Castillo Loan. Initially, I spoke with Mr. Estuardo Cuestas, a member of the Board of Directors of G&T Bank and a close advisor to the President. I told him that I believed G&T Bank had given a loan to Margarita that was collateralized with LISA’s Villamorey 2010 dividends, which she had used to fund litigation against me in Canada. Mr. Cuestas promised to look into the situation. During our second meeting, Mr. Cuestas confirmed that the Castillo Loan had indeed been collateralized with CD #010152676, and he seemed to recognize the seriousness of the situation. He arranged a meeting for me with Mr. Mario Granai, the President of G&T Bank. I shared my concerns with Mr. Granai, who provided no substantive commitment, although he seemed genuinely concerned about the bank’s exposure.
19. Some weeks passed, after which Mr. Cuestas contacted me by telephone and informed me that G&T Bank would not be able to assist me, and that the Castillo Loan was “no longer an issue” for the Bank, as it had been “collapsed.” I understood Mr. Cuestas’ comments to signify that G&T Bank had satisfied the Castillo Loan by foreclosing the collateral (*i.e.*, using the CD purchased with LISA’s 2010 Villamorey dividends), without Margarita being required to repay any part of the Castillo Loan.

20. At the time of the Loan, Margarita was sitting on the Board of Directors of Xela. Further, Margarita's oppression case was only one facet of a broader attack strategy, which included false criminal complaints against me in Guatemala. Those have all been dismissed with prejudice, but only at great expense and after significant damage to my reputation as well as to Xela's banking relationships.
21. This coordinated attack has benefitted the Nephews by depleting LISA's resources to pursue Unpaid Dividends. Further, I understand that lawyers for the Nephews have attended recent hearings in this receivership, obviously looking for an opportunity to close the loop on the conspiracy by purchasing LISA's claims for Unpaid Dividends at fire sale prices in exchange for satisfying the Castillo Judgment.
22. Although these facts should yield a judgment in Xela's favor that would likely more than offset the Castillo Judgment, they have yet to be adjudicated. I believe that in these circumstances, it would be unfair and inequitable to bar Xela from pursuing these outstanding questions to resolution. Indeed, the issue of Margarita's alleged wrongdoing should be addressed in a fair and equitable manner, under the Court's supervision, and within the confines of this receivership.

BDT Investments Ltd.

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

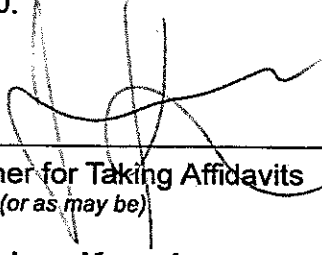
24. In April 2016, as part of his estate planning, Arturo formed The ArtCarm Trust, a Barbados Trust (the “Trust”), to which he irrevocably transferred various assets, including BDT, for the benefit of certain family members, but excluding me. Meanwhile, BDT continued to fund LISA’s claims to recover Unpaid Dividends, and LISA’s debt to BDT grew to approximately US\$50 million (the “BDT Claim”). Thus, at the time the Receiver was appointed, BDT was LISA’s single largest creditor, with a claim approximately ten times the size of Margarita’s Judgment. Still, BDT has consistently said that if LISA were to collect Unpaid Dividends, BDT would consider subordinating its rights under the BDT Judgment to the reasonable requirements of the receivership.
25. After the Receiver was appointed, I understand that LISA began to inquire into potential third-party loans sufficient to satisfy, among other things, the Judgment and the expenses of the Receivership. In December 2019, I was told that LISA had received a verbal commitment for such a third-party loan on terms acceptable to LISA (the “Loan”). All of the Loan details were managed and approved by LISA without my instigation, involvement or approval. I was told only the basic terms of the Loan, including that it was sufficient to satisfy the Castillo Judgment and the expenses of the receivership.
26. Upon learning of the lender’s commitment to make the Loan, I understand that LISA informed the Receiver, stating specifically that the Loan was adequate to satisfy the Castillo Judgment and all reasonable expenses of the Receivership. The Receiver asked me for more details about the Loan, but I was unable to provide more information because I had not been told.
27. I understand that the Receiver has taken action in Panama to try to alter the composition of LISA’s board of directors. I also understand that the Receiver’s lawyers in Panama did not follow the required steps to make those changes, nor did they notify me of their plans. I also understand that when LISA’s counsel in Panama observed that an unidentified person was trying to alter LISA’s corporate structure, LISA quickly contested the

- changes, which were officially rejected by the Corporate Registrar for failure to comply with applicable procedures.
28. I have offered multiple times to meet face-to-face with the Receiver to discuss the focus of his collection efforts as well as Xela's own counterclaims against Margarita. Most recently, those offers have been conveyed to the Receiver through LISA's lawyers in Panama. The Receiver initially implied that he would attend a meeting in Panama, but he later placed a precondition on any meeting with me, namely that LISA consent to the changes requested by the Receiver to LISA's Board of Directors.
 29. Meanwhile, the Loan has not funded, for reasons that are unclear to me. What I understand, however, is that the failure to fund is related to the Receiver's attempts to intervene in the transaction.
 30. I further understand that BDT has extinguished its debt to LISA in exchange for LISA's full 1/3 stake in the Avicola Group, including its claims for Unpaid Dividends. That proposal was not given to Xela or to me in advance, and neither Xela nor I consented to or approved of it. As I understand it, the decision to assign its remaining assets to BDT in exchange for cancellation of the debt was made solely and entirely by LISA.
 31. Contrary to what the Second Report suggests, Xela has not withheld any information from the Receiver. Indeed, the only documents the Receiver claims Xela has not provided are records evidencing BDT's funding of LISA's litigation efforts. Although I believe that Xela's counsel has supplied records of this type to the Receiver, the request is moot in light of the U.S. District Court's finding that the BDT Judgment does not represent a fraud. Otherwise, to the best of Xela's knowledge, it has supplied all information in its possession requested by the Receiver.
 32. From the outset of the receivership, I have repeatedly asked for face-to-face meetings with the Receiver to discuss how best to collect Unpaid Dividends from Villamorey and/or the Avicola Group companies, and to discuss the validity of Xela's own civil

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

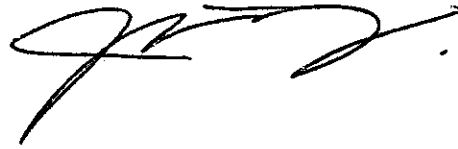
Panama lawyer that a meeting might be possible, but only on the condition that LISA first voluntarily consent to the Receiver's proposed changes to its Board of Directors.

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



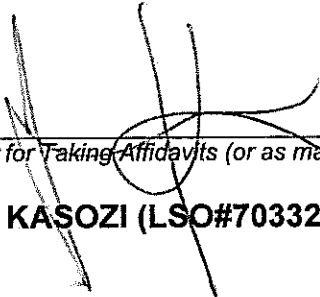
Commissioner for Taking Affidavits
(or as may be)

N. Joan Kasozi
(LSO# 70332Q)



JUAN GUILLERMO GUTIERREZ

This is Exhibit "A" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.

A handwritten signature in black ink, consisting of several loops and a long vertical stroke, positioned above a horizontal line.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)



In The Supreme Court of Bermuda

CIVIL JURISDICTION COMMERCIAL COURT

1999: No. 108/ 2001 No. 79

B E T W E E N:

LISA S.A.

Plaintiff

- and -

LEAMINGTON REINSURANCE COMPANY LTD.

First Defendant

- and -

AVICOLA VILLALOBOS S.A.

Second Defendant

JUDGMENT

Dates of Trial: June 23-July 4, July 8-July 10, 2008

Date of Judgment: September 5, 2008

Mr. Narinder Hargun and Mr. Paul Smith,
Conyers Dill & Pearman, for the Plaintiff
Mr. John Riihiluoma, Appleby, for the First Defendant
Mr. Jan Woloniecki and Ms. Shade Subair,
Attride-Stirling & Woloniecki, for the Second Defendant

Introductory

1. *“Strong parents have strong children and strong children have strong opinions, and that usually leads to conflicts that they have difficulty in reconciling”*, Atlanta Mayor Andrew Young recently observed in relation to a litigious dispute between

members of his city's most famous family. This observation might well explain the emotional underpinning of the present dispute. The trial of the present action, which commenced almost a decade ago, arises out of a commercial family falling-out amongst members of a prominent Guatemalan family, a dispute which has also spawned litigation in at least three other forums.

2. In my Ruling of February 10, 2006¹, I described the history of the present actions as follows:

"1. On March 26, 1999, the Plaintiff issued a Generally Indorsed Writ of Summons in Civil Jurisdiction 1999: 108 against the Defendants herein. The claim was a derivative proprietary claim against the First Defendant on behalf of the Second Defendant, who was joined to meet the procedural requirements under Bermuda law in relation to derivative claims brought by a shareholder on behalf of the company whose shares the Plaintiff holds.

2. On the day the Writ was issued, Mitchell J granted a Mareva injunction. The First Defendant ("Leamington") provided discovery on April 28, 1999. The Plaintiff ("Lisa") applied ex parte for leave to serve the Second Defendant ("Avicola") out of the jurisdiction on May 14, 1999, but did not obtain such leave until Simmons J's Order was granted on December 23, 1999. In the meantime, Leamington had both applied to set aside the Mareva injunction on October 15, 1999, and obtained directions in relation to its application from Wade-Miller J on November 4, 1999.

¹ On the trial of a preliminary issue and the Plaintiff's application for leave to re-amend its Statement of Claim.

3. On January 26, 2000, Leamington applied to strike-out the action, with directions being ordered by Storr AJ on February 10, 2000. On March 22, 2000, Lisa filed its Statement of Claim, and on July 31, 2000 applied *ex parte* to renew its Writ. The renewal order was granted that day by Simmons J, but Avicola applied to set aside that Order on July 31, 2001. Directions were given by Meerabux J on February 1, 2001. Lisa sought to sidestep a potentially fatal attack on action 1999: 108 by issuing a similar Generally Indorsed Writ in Civil Jurisdiction 2001: 79 on March 2, 2001, in which fresh action both Defendants in due course entered appearances. On March 26, 2001, Lisa applied for leave to serve Avicola outside the jurisdiction, which application was granted by Mitchell J on April 5, 2001. On April 9, 2001, Lisa applied to consolidate both actions.

4. This fancy legal footwork bore fruit when on June 7, 2001, Mitchell J set aside the *ex parte* writ renewal order on Leamington's application, but also granted Lisa's consolidation application. On November 8, 2001, Ward CJ granted Lisa's June 25, 2001 application for leave to amend its Statement of Claim. On February 15, 2002, Leamington filed its Amended Defence and Avicola its Defence. One year and nine months later, after filing a Notice of Intention to Proceed on October 3, 2003, Lisa applied on November 20, 2003 for Further and Better Particulars of Leamington's Amended Defence. I granted this application on December 4, 2003, and the relevant particulars were given on January 2, 2004. It was only after these numerous initial interlocutory skirmishes, that battle was joined on the issues which presently fall for determination.

5. On September 3, 2004, the Defendants applied for the trial of two preliminary issues, and after ordering directions on September 23, 2004, Ground CJ granted the application on December 2, 2004. On February 17, 2005, Lisa applied for leave to re-amend its Statement of Claim, again with a view to fending off a potentially lethal attack on its claim by the Defendants. And on April 6, 2005, Wade-Miller J ordered, *inter alia*, that both applications should be heard together.

6. The three parties, musketeer-like, have moved their legal sword-play from one battleground to the next, with various interlocutory applications being heard over nearly seven years by eight different first instance judges. None of the interlocutory applications to date appear to have given rise to either a considered judgment or any appeal. The above summary does not include related proceedings which have taken place in the British Virgin Islands, Florida and (it seems²) Guatemala as well. The Defendants assert that they have been more proactive than the Plaintiff in this litigation, and invite the Court, in addition to other arguments, to have regard to the law of limitation and the doctrine of laches, or delay.”

3. On March 10, 2006, I resolved a preliminary issue in favour of the Defendants, but granted leave to amend to the Plaintiff in the following terms :

“137. The Plaintiff is granted leave to re-amend to assert those claims which I have found to be arguable, but not in the form of the draft RASC presently before the Court. The theory of direct liability on which the Plaintiff now relies should be

² The Defendants’ Counsel suggested that Lisa had filed over 100 suits against Avicola and related entities in Guatemala; proceedings in the other two jurisdictions were directly referred to in evidence.

incorporated into a further draft RASC to meet the concerns which I have sought to clearly identify above..."

4. The Defendants appealed against this Ruling, and the Plaintiff cross-appealed against my decision that it had no standing to pursue a personal claim against the First Defendant, having heard extensive evidence on Guatemalan law. On November 22, 2006, the Court of Appeal dismissed the Defendants' appeal against my decision to permit the Plaintiff to amend its Statement of Claim, and allowed the Plaintiff's cross-appeal against my resolution of the preliminary issue in favour of the 1st Defendant based on the Amended Statement of Claim. The Court of Appeal apparently took the view that since various claims against the 2nd Defendant were going to be tried, it was undesirable to decide the overlapping issue of the 1st Defendant's liability in isolation from the totality of the evidence to be adduced at trial against the 2nd Defendant, although they expressed doubt as to whether the preliminary issue had any further relevance. To my mind my February 10, 2006 Ruling on the standing of Lisa to advance a personal claim against Leamington based on the pleadings as they were prior to the RASC has no present significance whatsoever. The merits of the claims against Leamington fall to be determined on their merits based on the case advanced in the RASC.

5. The 2nd Defendant did not contend before me in March 2006, nor (seemingly) the Court of Appeal in November, 2006, that the amendments should be refused because the averments were liable to be struck-out on the grounds asserted in the strike-out applications it filed on June 14, 2007. The attempt to strike-out the Re-Amended Statement of Claim altogether was, save for one pleading complaint which could not have been previously raised, difficult to comprehend. The Re-Amended Statement of Claim ("RASC") was filed on March 15, 2006, so the 2nd Defendant had an adequate opportunity to contend before the Court of Appeal last November, that the amendments ought to have been refused because the proposed re-amended pleading was itself liable to be struck-out on abuse of process or other grounds. These points were not taken. It may have been reasonable for the 2nd

Defendant to simply focus on dismissing the subsequently abandoned derivative claim, but these strike-out points, if serious, could have been advanced by the 1st Defendant at an early stage of the action. And if these issues only became relevant to Avicola when the personal claim was first asserted, it was first asserted in February 2005, when the application to re-amend was filed.

6. The second limb of the total strike-out application was, however, based on an averment only made in the Plaintiff's Reply to the Re-Amended Defence of the 1st Defence filed on February 22, 2007. But the Plaintiff voluntarily gave further and better particulars of this aspect of its case, with a view to meeting the 1st Defendant's complaints.
7. The partial strike-out application was, delaying tactics apart, no easier to comprehend. The complaint that three "background" frauds were not relevant to the Plaintiff's claim sought to strike-out portions of the RASC which had been pleaded from the outset in 1999. This point was not taken before me or the Court of Appeal in 2006, let alone in the previous six years of the litigation. The paragraphs of the RASC attacked, 8-11 and 15(i),(iii), were pleaded in the original Statement of Claim served in 2000. At the very latest, this point ought to have been taken, assuming it to be serious, as part of the 2nd Defendant's opposition to the Plaintiff's application for leave to re-amend.
8. Although the 2nd Defendant consented to pre-trial directions on March 13, 2007, it was less surprising that its new separate attorneys, who came on the record on April 26, 2007, should raise a point which had not previously been taken by the Defendants' joint attorneys, less than two months after the point could first have been taken. The original case, from 1999 until February 2007, was that the operating companies in the Avicola group were subsidiaries of the 1st Defendant, and that the Plaintiff was defrauded because they diverted funds which ought to have been "up-streamed" to the Plaintiff as dividends through the 2nd Defendant. The Plaintiff belatedly conceded that the operating companies, which are said to

have obtained fraudulent policies from the 1st Defendant, are not in fact subsidiaries of the 2nd Defendant. The 2nd Defendant was clearly entitled to know how the Plaintiff now put its case, on these materially different facts.

9. The third issue I was required to decide was whether the Plaintiff was entitled to obtain full disclosure in relation to the business operations of various companies in support of its case on the three "background" frauds. The 2nd Defendant complained, by way of alternative to its partial strike-out application, that the discovery requested was oppressive. The Plaintiff eventually agreed to adjourn its application in this regard, conceding that the request as formulated was oppressive.
10. The fourth issue I was required to decide was the 1st Defendant's application for further and better particulars of its case that the reinsurance policies issued by the 1st Defendant to operating affiliates of the 2nd Defendant. It was essentially agreed that the Plaintiff had not yet received and/or considered full discovery from the Defendants, and the Plaintiff undertook to advise the 2nd Defendant of whether it can supply the requested particulars without the need for a formal order, within 28 days.
11. On June 26, 2007, I resolved these issues as follows: (a) I dismissed the 2nd Defendant's total strike-out application, (b) I dismissed the 2nd Defendant's partial strike-out application, (c) I granted the Plaintiff's application for discovery in part, and reserved the position on the need to give effect to a narrower version of the oppressive discovery request, and (d) I reserved the issue of whether the Plaintiff should be ordered to give further particulars in relation to the reinsurance policies, because the scope of any potential order was presently unclear. I handed down Reasons on July 3, 2007. I refused leave to appeal against the strike-out rulings, and the Court of Appeal likewise refused leave.

12. At the pre-trial review, the scope of the trial fell to be considered. On June 9, 2008, I agreed with the 1st Defendant (“Leamington”) that the Plaintiff’s (“Lisa’s”) damages fell to be determined by reference to its pleaded claim to loss suffered by it as a shareholder of the 2nd Defendant (“AVSA”) (i.e. the Avicola Group of Companies). Lisa had previously abandoned any independent claim as an indirect shareholder of Leamington through Villamorey. I also indicated that it was improbable that I would make positive findings that any criminal offences had been committed under Guatemalan law. However, I left open the possibility of deciding whether Lisa’s indirect interest in Leamington had been sold to the extent that the parties had prepared to argue this point and had addressed it in their evidence.
13. In the event, the trial required the Court to consider whether Lisa was able to prove one or more causes of action under Bermuda and/or Guatemala law, having regard to not only ordinary factual evidence, but also considering expert evidence accounting evidence, expert evidence as to insurance practice and expert evidence as to foreign law.

Pleadings: Lisa’s case

14. Lisa’s case is essentially pleaded in the Re-amended Statement of Claim (“RASC”) as read with the Further and Better Particulars of the Plaintiff’s Re-Amended Statement of Claim and Replies (“FBPs”). Lisa’s original RASC claim was based on the premise that AVSA was the parent of a group of 19 companies, including AVSA (“the Avicola Group”). Its ultimate claim was that AVSA is the *de facto* parent of a group which has always been regarded as a single economic unit. As a result, the RASC may for all economic or compensatory purposes be read as if references to “Avicola” are references to the Avicola Group.
15. Paragraph 5 of the RASC provides in material part as follows:

“...From inception, Avicola has been owned by the Gutierrez family comprised of Lisa representing the 25% shareholder interests of Don Arturo and his family. Trucha, S.A., a company incorporated in Panama, represents the 25% interest of Jean Luis Bosch Gutierrez (“Jean Luis”) and his family. San Cristobal, S.A., a company incorporated in Panama, represents the 25% interest of Dionisio Gutierrez Mayorga (“Dionisio”) and his family. Villamorey owns the remaining 25% shares in Avicola and Villamorey itself is owned equally by Lisa, Trucha, S.A. with the result that Lisa is a 1/3 owner of Avicola...”

16. Paragraph 7 of the RASC avers that in 1982 Don Arturo (who established the Avicola Group) and his family emigrated from Guatemala to Canada. Day to day control was assumed by Dionisio, Juan Jose Gutierrez, Juan Luis, Konrad Losen (“Losen”), Fernando Rojas (“Rojas”), Mauricio Bonifasi (“Bonifasi”) and Roderico Rossell (“Rossell”) who are described as the “Controllers”. All of the foregoing individuals, Rossell apart, are also defined as the “administrators” of Avicola. Paragraph 8 alleges that soon after they assumed control of various family businesses, *“the Controllers embarked on a systematic scheme to defraud the Plaintiff of its share of the corporate profits of Avicola...”*
17. Various “background” or “feeder” frauds are then alleged by way of setting the scene for the substantive claims. The Pollos Vivos (Live Chickens) Fraud is said to have been admitted in a videotaped meeting by Rojas and Rossell in August 1998 (RASC paragraph 9). It involved not reporting live chicken sales and distributing the resultant Avicola profits to all shareholders save Lisa. The Los Cedros Fraud operated in a similar manner in relation to the sale proceeds of chicken manure and oranges (RASC paragraph 10). The Ancona Fraud is alleged to have involved the laundering of the proceeds of the two other background frauds and to have been admitted in the same manner (RASC paragraph 11).

18. It is then alleged, uncontroversially, that Leamington was incorporated in Bermuda on July 23, 1997 and that Rossell was at all material times its director and secretary³. The averment that Leamington is 100% owned by Villamorey is disputed, however (RASC paragraph 12). Leamington is a captive insurance company only reinsuring the risks of the Avicola and Multi Inversiones group of companies which were issued policies by fronting companies including El Roble Seguros Y Fianza (“El Roble”), a Guatemalan insurance company (RASC paragraphs 13-14). Paragraph 15 (excluding the Particulars of Fraud) provides as follows:

“15. The Plaintiff accepts that part of the risks reinsured by Leamington represent bona fide risks in respect of which Leamington has levied premiums at commercial rates. However, the Plaintiff contends that a substantial part of the reinsurance risks underwritten by Leamington are in respect of (i) non-existent risks; or (ii) risks which bear no relationship to the reinsurance premiums charges by Leamington. The Plaintiff contends that the primary object of Leamington has been used in this fraudulent scheme was to use Leamington as a vehicle to make distributions to the shareholders of Avicola so as to (i) launder the proceeds of the illegal sales of live chickens; (ii) reduce the profits of Avicola; and (iii) reduce the dividends which would otherwise be payable to the Plaintiff. The fraudulent payments made to Leamington were intended by the Controllers and Avicola to be distributions of profits to the shareholders of Avicola. However, in making these distributions to the shareholders, the Controllers and Avicola have deliberately and unlawfully excluded Lisa from receiving its appropriate share of these profits of Avicola. Leamington received the fraudulent payments from Avicola with the knowledge that they

³ Rossell himself admitted to being Treasurer and Secretary, and this was not apparently challenged by Lisa.

were intended by Avicola to be distributions to Avicola's shareholders. Further, the The Controllers have ensured that any dividends paid by Leamington to Villamorey are not further distributed to Lisa as a shareholder of Villamorey by increasing the expenses of Villamorey which bear no relationship to the activities of Villamorey. During 1992 to 1998, Avicola used the fraudulent payments to Leamington as a means of making distributions to the shareholders of Avicola in the amount of US\$1,964,691.92 in 1993, US \$2,713,888.32 in 1994 US\$6,184,486.88 in 1995, US\$6,075,000.90 in 1996, US\$6,324,431.00 in 1997 and US\$6,594,894.00 in 1998. The controllers and Leamington have deprived Lisa of its share of these distributions made by Avicola to its shareholders. ”

19. The dollar amounts were, Mr. Hargun clarified in his closing submissions, intended to be read in Quetzales. The consequences of the fraud alleged in paragraph 15 are pleaded in paragraph 16 as follows:

“16. As a matter of Guatemalan law, Avicola is obliged to declare, by way of dividends, all its profits on an annual basis. Further or in the alternative, as a matter of Guatemalan law, Avicola is obliged by Article 134 of the Guatemalan Commercial Code to hold an annual general meeting each year, at which true and accurate financial information about the condition of the company (including its profit/loss statement and balance sheet) is provided to the shareholders and at which (in the light of such financial information) the shareholders take appropriate decisions about the distribution of profits. Avicola has held no annual general meeting since 1982 and true and accurate financial information has not been provided to the shareholders. The shareholders have thereby been prevented from exercising their rights under Guatemalan law to take appropriate decisions to distribute the profits of the company to themselves. The Controller and/or Avicola failed to hold annual general

meetings as required by Guatemalan law in order to cover up the frauds set out above and/ or as part of their fraudulent scheme and conspiracy to defraud Lisa of its true entitlement as a share holders of share of the distributions made by Avicola. The effect of the fraudulent activities set out in ¶15 above is that profits which would have been distributed to Lisa SA were retained in Avicola and partly transferred to Leamington in Bermuda Lisa was deprived of its share of the distributions made by Avicola though the device of Leamington. Leamington knowingly participated in this fraudulent scheme. As a matter of Bermuda and/or Guatemalan law, Lisa has a personal and proprietary claim to the funds which Avicola Lisa should have declared by way of dividends received as its share of the distributions made by Avicola to its shareholders but has failed to do so. Lisa is entitled to maintain those personal and proprietary claims against Leamington.”

20. The following additional and alternative causes of action are pleaded in paragraphs 17-19 of the RASC:

“17. Further, and in the alternative, the matters complained of in paragraph 15 and 16 hereof were committed by Leamington pursuant to a conspiracy between the Controllors (and in particular Rossell) and Leamington and (by reason of the matters set out in paragraph 17C and 17F below) Avicola to defraud Lisa of its true entitlement as a shareholder of Avicola of the distributions made by Avicola. The parties to the conspiracy included Losen, Rojas, Bonifasi, Rossell, Avicola and Leamington. Leamington joined the conspiracy after its incorporation on 23 July 1997.

17A. Further, and in the alternative, the Controllors and/or Leamington and/or Avicola are obliged under Guatemalan law to compensate or infemnify Lisa for the damage causes to Lisa by the said frauds and

conspiracy, which amount to intentional wrongdoing within the meaning of Articles 1646 and/or 1653 of the Guatemalan Civil Code.

17B. Further, and in the alternative, the Controllors and/or Leamington have been wrongly enriched, without legitimate reason, by reason of the said frauds and/or conspiracy and are obliged under Article 1616 of the Guatemalan Civil Code and/ or Bermuda law to indemnify Lisa in respect of that wrongful enrichment.

17C. Further, and in the alternative, Leamington and/or Avicola are liable for the acts of the Controllors in committing the said frauds and/or conspiracy, under Article 1664 of the Guatemalan Civil Code and/or by reason of the Guatemalan doctrine of simulation and Article 1284 of the Guatemalan Civil Code.

17D. Further, and in the alternative, the said frauds and/or conspiracy amount to wrongful abuse of corporate personality by Leamington and/or Avicola and/or the Controllors, which under Guatemalan law are tortious acts and for which Leamington and/or Avicola are liable to Lisa in damages.

17E. Further and in the alternative, Leamington and/or Avicola and/or the Controllors are in liable to Lisa for the said frauds and/ or conspricy under Articles 171, 172 and/or 176 of the Guatemalan Civil Code.

17F. Further and in the alternative, Leamington and/ or Avicola are liable for the said frauds and conspiracy as the alter ego of the Controllors.

18. Lisa SA asserts that the knowledge of Rossell, as president, director and secretary of Leamington, is to be attributable to Leamington

and/or Rossell has been at all material times the controlling mind of Leamington.

19. *In the premises, all monies received by the fronting companies as premiums and transferred to Leamington as reinsurance premiums on account of non-existent risks or on account of grossly inflated premiums were and are held, up to the amount of Lisa's share of the distributions made by Avicola, by ~~the First Defendant~~ Leamington as a trustee for Lisa Avicola and as a consequence of ~~the fraud committed by the Controllers, Avicola has suffered loss and damages. The Plaintiff is unable to give full particulars of loss and damage until the completion of discovery.~~*"

21. In Lisa's Closing Submissions, the causes of action relied upon were summarised as follows:

"81.1 Against both Leamington and Avicola, conspiracy by unlawful means, with the intention of injuring Lisa (Bermuda common law and/or Article 1645 of the Guatemalan Civil Code);

81.2 Against both Leamington and Avicola for simulation (Article 1284 of the Guatemalan Civil Code (¶17C of RASC));

81.3 Against Leamington only for equitable fraud in that Leamington has participated in a fraudulent scheme to defraud Lisa of its share of the corporate profits of, inter alia, Avicola (¶s 8 & 15 of RASC);

81.4 Against Leamington only as a constructive trustee as a result of its dishonest assistance in Avicola's breach of trust or fiduciary duty to Lisa (¶s 16 & 19 of RASC). Furthermore, Leamington is liable as a constructive trustee as a result of its knowing receipt of monies from the Avicola group of companies, which should properly have been paid to Lisa (¶s 16 & 19 of RASC);

81.5 Against Avicola only under Article 176 of the Commercial Code (¶17E of RASC)".

Pleadings: Leamington's Defence/AVSA's Defence

22. Leamington, in its Re-Amended Defence ("RAD"), denies each of Lisa's claims against the reinsurer, denies liability for the acts of the Controllers and in any event does not admit that Leamington is liable by virtue of the doctrine of simulation.
23. AVSA in its Amended Defence ("AD") also denies liability for each cause of action asserted against it and does not admit that it is liable by virtue of the doctrine of simulation.

Factual Evidence: Overview

24. Lisa's live factual witnesses were its principal, Mr. Juan Guillermo Gutierrez Strauss ("Juan Guillermo"), an accountant Mr. Lawrence Rosen and a translator, Esther Cecilia Crespo. A hearsay notice was served in respect of the now deceased Mr. Mario del Aguila Cancinos ("del Aguila") and in respect of the transcript of the August 20, 1998 Toronto meeting ("the Toronto Transcript").
25. Leamington called no live factual (i.e. non-expert) witnesses save, belatedly, Hector Rene Lopez Sandoval, who also gave expert evidence as to Guatemalan notarial practice. It served hearsay notices in respect of five witnesses who were

“*beyond the seas*”, Lionel E. Asencio (“Asencio”), Hector Rene Tercero Soto (“Tercero”), Roderico Rossell Anzueto (“Rossell”), Jesus Briz Barillas (“Briz”), and Luis Fernando Villaverde (“Fernando”).

26. AVSA called no live fact witnesses at all, serving hearsay notices prior to trial in respect of the following five persons who were also “*beyond the seas*”: Silvia Maria Rossbasch Rheinbolt (“Rossbasch”), Luis Arturo Gutierrez Strauss (“Luis Arturo”), Jose Fernando Ramon Rojas Camacho (“Rojas”), Rene H. Perez Ordonez (“Perez”) and Alberto Antonio Morales Velasco (“Morales”). At the trial, further affidavits by Mario Rene Archila Cruz (“Archila”) and Ana Lucrecia Palomo (“Lucrecia”) were served to deal with an issue which arose in the course of the trial.
27. Juan Guillermo as the partisan *de facto* representative of Lisa’s side of this family dispute was obviously a witness whose evidence needed to be treated with considerable care. In general terms, he was a credible witness whose evidence provided background to Lisa’s central case rather than supporting it directly. Despite skilful and vigorous cross-examination by Mr. Woloniecki, I found his contention that he had not personally seen the “dividend” cheques before trial (and merely knew of their existence) to be credible. The Toronto Transcript supported his contention that this was the position when the August meeting took place. Although he initially is recorded as having said that he “saw” cheques were being made payable to the bearer, later in the Transcript he clarified what he meant by this stating: “*Fine, but I don’t see the checks...That is, I see Carlos Vasquez’...report.*”⁴ On the other hand, under withering cross-examination by Mr. Riihiluoma, Juan Guillermo was simply not credible when he testified that at the recorded Toronto meeting, he did not admit having seen minutes related to a Villamorey sale of shares and made reference to this transaction by way of fishing for information:

“24 Q Can we now start from the premise that at

⁴ Vol. E, page 369.

25 this point in time in the meeting you were having a
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1 discussion with Mr. Rossell and Mr. Rojas about
2 minute books?

3 A We were discussing the minute books, yes.

4 Q And I will pick it up MVI in the middle of
5 the page. "So on what date is the stockholder
6 meeting held?"

7 It has to be held, by law it has to be
8 prior to October. But those, um, they're going to
9 be available, right, um. Unless once again, you
10 want to ask for as many photocopies as there may
11 be."

12 The next voice, MVI, is you. "In any
13 event, we expected to receive at least the minutes
14 of the stockholders meetings, because we have never
15 seen the minutes for the stockholders meeting for, I
16 don't know, 15 years." Do you accept that that is
17 what you said?

18 A Yes. We haven't seen any minutes for --
19 in those days probably 15 years. Now it will be 20
20 years.

21 Q And you accept that MVI is you; you are
22 the speaker?

23 A Yes.

24 Q "I don't know, 15 years, well, um, I saw a
25 couple there, that were related to, um, transaction
541

1 of what was done in February on Villamorey. I think
2 when the shares were transferred, when the sale in
3 '95 was made, right." You saw the minutes of

4 Villamorey.

5 A I didn't see the minutes of Villamorey.

6 If you read a little later in the next -- after that

7 paragraph you just read -- I believe it is MV3,

8 Mr. Rossell, probably he says, "no, I don't know.

9 Juan Guillermo, but if you want they can be made for

10 you."

11 Q Sir --

12 A That means the minutes were not made.

13 Q Sir, you said -- "I saw a couple there

14 that were related to the transaction that was done

15 in February, Villamorey, I think when the shares

16 were transferred, when the sale -- when the sale in

17 '95 was made." That is what you said.

18 A Remember that I was questioning them, and

19 I asked -- I made that comment to see what the

20 reaction was. In the next paragraph they say that

21 the minutes didn't exist. So I actually didn't see

22 my minutes. I was simply fishing for information.

23 Q Sir, that is a shameful answer, if I may

24 so say so. That is exactly what you said. You saw

25 the minutes of Villamorey, when, in February 1995

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I when the transfer was made.

2 A You can call my answer shameful, but that

3 is the truth. I was just fishing for information,

4 sir."⁵

28. Mr Rosen's evidence must also be treated with some caution, for the straightforward reason that having been employed as a forensic accountant by Lisa,

⁵ Day 4, pages 539-542.

he has the entirely understandable emotional interest in Lisa's success that any professional person in his position might be expected to have. That said, he was a generally credible witness. One narrow aspect of his evidence, under cross-examination by Mr. Woloniecki, was unsatisfactory, however. This was the detailed description of a conversation Rosen said he had with del Aguila in Guatemala in late 1998 about banking arrangements for the proceeds of live chicken sales contained in his witness statement prepared almost ten years later but not recorded in any of his contemporaneous notes:

"25 Q So you say that that sentence "he told me

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1 that these cash sales were never reported to Lisa

2 S.A, that Lisa didn't receive any shares of the

3 sales proceeds, "was written by you?

4 A Yes. Was signed by me.

5 Q Signed by you. Are you saying that you

6 put that in of your own initiative without any

7 discussion with anyone else?

8 A I certainly don't recall being pressured

9 to put it in, if that is what you are asking.

10 Q I am not asking you whether you were

11 pressured. I am asking whether you had a discussion

12 with anyone about that sentence.

13 A I would say, like I have signed hundreds

14 of affidavits, there is all back and forth between

15 lawyers and myself. And do I have perfect

16 recollection of those? The answer is no.

17 Q And, yet, you say you have perfect

18 recollection of Mr. del Aguila telling you this at

19 some meeting ten years ago, and it does not appear

20 in any of your notes?

21 A If you look at the notes, there are all

22 sorts of things that could have been there that were
23 not, because you're not doing a fraud investigation
24 at this point. I am trying to do a business
25 valuation.”

29. Ms. Crespo the interpreter was cross-examined about some very narrow aspects of her translation of the Transcript. Her astonishing attempt to tell Mr. Woloniecki how to conduct his cross-examination appeared to me to be consistent with the fact that she was an experienced and extremely fastidious translator who was unaccustomed to having her work questioned or challenged and was genuinely offended by the suggestion that she might have made a mistake. I found her to be entirely credible and reject any suggestion that she was influenced in her work by having been employed from time to time by Lisa.
30. As far as those witnesses who could have been called by the Defendants but were not, the fact that their written evidence was not subjected to cross-examination obviously diminishes the weight to be attached to their evidence, on matters which are not supported by any other evidence. However, I bear in mind that it is for the Plaintiff to prove its case. And while in certain circumstances the Court may be entitled to draw adverse inferences from the failure to call a witness, the Defendants are not obliged to assist Lisa to bolster its case through cross-examination.

Expert evidence: overview

31. The Plaintiff and the Defendants called expert evidence as to forensic accounting matters (Joseph Gardemal and Maria Yip, respectively), insurance matters (Daniel Spragg and William Bailie, respectively), Guatemala law (Professor Michael Wallace Gordon and Marcos Jose Alfredo Ibarquen Segovia, respectively) and Guatemala notarial practice (Ida Rebecca Permuth Ostrowiak and Hector Rene

Lopez Sandoval, respectively). Mr. Lopez also gave factual evidence about the 1995 Villamorey shareholders meeting which he notarized.

32. In general terms I found all of the experts credible and not unreasonably reluctant to depart from the crucial opinions set out in their respective reports.

Legal and factual findings: was Lisa's indirect interest in Leamington through Villamorey sold in 1995?

33. This issue was addressed in argument and by way of evidence and is a discrete issue which may conveniently be dealt with at the outset. The following points arise for consideration: (a) did the Villamorey shareholders resolve on February 14, 1995 to sell that company's shares in Leamington to La Brana; (b) was an agreement for the sale of Lisa's Leamington stake consummated in or about 1995; and assuming the answers to both (a) and (b) are affirmative, (c) are there any Bermuda law impediments to this Court affirming such conclusions?

34. I find that Mr. Lopez did notarize a Villamorey shareholders meeting which approved the sale of the Leamington shares to La Brana in 1995, doubts about the precise accuracy of the recorded length of this related meeting notwithstanding. Bearing in mind that Villamorey is a Panamanian company and no expert evidence was adduced as to Panamanian law, I decline to hold that that resolution had no legal effect under Panamanian law. Applying Bermudian/English conflict of law rules, whether or not a company has validly passed a resolution is an internal corporate management question which falls to be governed by the law of the place of incorporation of the relevant company: Lawrence Collins (ed.), Dicey & Morris, *The Conflict of Laws*, Rule 156⁶. No basis for departing from this principle was advanced in argument. I am bound to assume that Panamanian law is the same as Bermudian law and Bermuda law would not nullify the Villamorey resolution in question because of notarial irregularities under Guatemala law. The fact that, as Ms. Permuth's evidence strongly suggests, the notarization of the

⁶ 12th edition (Sweet & Maxwell: London, 1993), Volume 2 page 1111.

Villamorey meeting may well be invalid under Guatemala law is not determinative in this regard. The same applies to her opinion that under Guatemala law foreign currency transactions were prohibited, especially since the Minutes only purport to approve the sale of shares in a Bermuda company, not to effectuate the sale itself.

35. Not only did I believe Mr. Lopez as a factual witness. Juan Guillermo's admission during the August 1998 Toronto Meeting that he may have seen Villamorey Minutes when the February 1995 sale occurred makes it impossible to believe that the Villamorey meeting did not take place at all. However, it is far from clear that the sale did take place for the nominal consideration of US\$1 stated in the Minutes. Other share sales notarized by Mr. Lopez on the same day were either "at the price and under the agreed conditions with the buyer" (Inversiones Nuevas SA, Hornbill Investment Limited), or were supported by sale agreements dated February 15, 1995 for substantial sums (US\$12 million, Lomax Investment Corporation, and US\$13 million Crystal del Pacifico). The nominal consideration referred to in the Villamorey Minutes is not plausibly explained (in terms consistent with the sale having been consummated), although the letter of intent which contemplated the sale of various entities by Lisa provided for a total consideration of \$23 million. It is true that Juan Guillermo swore an affidavit on February 15, 1999 admitting that Lisa had sold various companies including its interest in Leamington, and that Lisa has seemingly commenced no proceedings to set aside this sale⁷.

36. The proper law of a contract for the sale of shares in Leamington, a Bermuda company, seems obviously to be the place of incorporation of the company: *Banco Atlantico SA-v- The British Bank of the Middle East* [1990] 2 Lloyd's Rep 504. In my judgment the public policy importance to Bermuda's international insurance regulatory regime of clarity as to who ultimately owns Bermuda insurance and reinsurance companies impacts on the way this issue ought to be

⁷ First Defendant's Skeleton Argument, paragraph 59.

addressed. Where, as is clearly the case here, Leamington has represented in its audited financial statements and its insurance returns that Lisa post-1995 was one of its ultimate beneficial owners, clear evidence is required to establish that these representations are incorrect. It also seems curious that lawyers in civil law jurisdictions such as Guatemala and Panama would be content to consummate a sale of shares without executing a written sale agreement. The suggestion that the failure to report the change in ultimate beneficial ownership of Leamington which purportedly occurred in 1995 cannot be explained by reference to extreme confidentiality concerns. The purported change merely involved Lisa's principals dropping out of the picture, with the "new" ultimate beneficial owners being otherwise the same as the "old" owners.

37. Bearing in mind how sensitive Lisa was about getting fair (or, according to the Defendants, unfair) value for all of its interests, it seems extraordinary to suggest that Lisa with full knowledge and consent agreed to finally dispose of its interest in Leamington for only nominal consideration. Bills of sale exist for the sale of other interests which total the \$23 million referred to in the earlier letter of intent, which leaves no consideration for the sale of Leamington at all. No obvious or straightforward explanation has been proffered as to why this should have happened. More significantly still, the recorded August 1998 Toronto meeting reveals discussions about Leamington which make no sense whatsoever if Lisa's indirect Leamington interest had already been sold three years previously. Rossell is recorded in the Transcript as saying at this juncture:

*"You are going to start to receive all the profits... because we had left Levington [phonetic] a little over time... in order to strengthen the company and we hadn't distributed dividends..."*⁸

38. In my judgment there is no sufficient evidence before this Court to displace the statutory presumption which arises under section 68 of the Companies Act that

⁸ Volume J1, page 154.

the registered shareholder, Villamorey, is the shareholder of Leamington. I find that Juan Guillermo was simply mistaken when he swore in 1999 that Lisa's Leamington interest had been sold by Villamorey. Such a mistake is consistent with the propensity Juan Guillermo has demonstrated in these proceedings for being wrong when he has testified on matters of detail outside of his own direct knowledge. And the evidence of Mr. Lopez, Leamington's own witness, supports the view that Juan Guillermo's father was the one who conducted the 1995 negotiations rather than Juan Guillermo himself:

*"17 Q. Yes. And was Mr. Juan Arturo Gutierrez
18 present at these meetings?
19 A. Look, he was in the negotiations, he was
20 present for most of the negotiations. He was there, 10:17
21 he did participate in the negotiations. We would all
22 see him come in with his bodyguard. All of the
23 employees were aware of the fact that he was arriving
24 and that he would be negotiating with his nephews."*⁹

39. On balance it appears that the sale of Lisa's indirect interest in Leamington was contemplated by way of an agreement in principle but was never consummated as Lisa contends. This view is further, and most cogently, supported by a December 7, 1995 letter from Asensio to Mr. Baker of the Managers indicating that "*Mr. Juan Arturo Gutierrez has decided to sell his equal part of Leamington's shares*" and indicating that La Brana has been formed to hold all of the shares on behalf of the other two family members. While the English words used by a Spanish speaker might carry less weight than the same words used by someone for whom English is their native tongue, the terms of the December 7, 1995 letter as a whole give the distinct impression of an incomplete transaction. The suggestion that Mr. Baker proceed to the BMA was seemingly never pursued¹⁰. Briz, the President of

⁹ Day 9, page 1445.

¹⁰ Volume K8, page 410.

Leamington from incorporation in 1987 until 2000, long after the purported 1995 sale, in his Witness Statement signed on October 24, 2007 and filed on behalf of Leamington, concludes by stating:

“11. During the time that I was president of Leamington.... Leamington paid dividends exclusively to Villamorey as the sole shareholder of Leamington.”

40. I find (to the extent that this may be relevant for the purposes of the present proceedings and Lisa’s claims for loss attributable to its shareholding in the Avicola companies) that Lisa’s indirect shareholding in Leamington was not sold in 1995.

Legal and factual findings: is AVSA the de facto parent of the Avicola Group (Lisa’s claim against Leamington)?

41. Another discrete issue which it is convenient to dispose of at the outset is whether AVSA has been proven to be the *de facto* parent of the Avicola Group. It is necessary to distinguish two questions in this regard. Firstly there is the pleading issue of whether Lisa’s pleaded case embraces a claim for loss suffered by Lisa solely as a shareholder of AVSA, which must be proven to be either an actual or *de facto* parent of the Group, on the one hand. Or, alternatively, does Lisa’s claim embrace loss suffered by the Plaintiff in respect of the Avicola Group as a whole irrespective of whether or not AVSA is shown to be the *de facto* Group parent. Secondly, there is the separate issue as to whether or not AVSA is jointly liable with the non-party Avicola operating companies who were in fact the primary insureds on the grounds that AVSA was at all material times the controlling *de facto* parent company. This narrower issue will be addressed separately below.
42. As far as the scope of loss claimed is concerned, the issue was argued on the basis that Lisa’s claim pivotally depended on proof of the averments set out in the FBPs served to avoid a strike-out application once it was appreciated that AVSA was

not in fact the parent company of the Avicola Group. By the end of the trial it seemed to me that this was ultimately a very technical argument as far as the quantum of loss was concerned, because Lisa's case from the outset was and remained that it was defrauded of its share of the profits of the Avicola Group being monies which were unlawfully paid to Leamington under bogus reinsurance policies in relation to which AVSA itself was not a primary insured. As between Lisa and Leamington, it seemed to me by the end of the trial, the status of AVSA in relation to the primary insureds was largely irrelevant it being common ground that Lisa's shareholding in the primary insured operating Avicola companies was the same percentage as its shareholding in AVSA (25%). The quantum and recoverability of Lisa's loss from Leamington did not appear to be affected by the *de facto* parent issue at all.

43. My Ruling at the pre-trial review to the effect that Lisa's claim was limited to loss suffered by it as a shareholder of AVSA was in substance merely confirming that Lisa's claim as pleaded had always been based on the premise that it had suffered losses attributable to profits generated by the Avicola Group, not profits generated by Leamington/Villamorey, claims which Lisa explicitly abandoned years ago. The position with respect to the status of AVSA within the Avicola Group is primarily of concern to Lisa's claim against AVSA even though both Leamington and AVSA averred (paragraph 6 of the RAD and AD, respectively) that AVSA was not the parent company of the Avicola Group. Lisa's Reply to the RAD of the First Defendant (and AD of the Second Defendant) was as follows:

"2. ...Lisa accepts that the operating companies are not strictly speaking subsidiaries of Avicola Villabos S.A. under Guatemalan law. However, for purposes of reporting and the payment of distribution to shareholders of Avicola, the income of all the operating companies is consolidated and is treated and distributed as group income. Furthermore, at the videotaped meeting on 20 August 1998 the controllers represented to Juan Guillermo that they would be

providing to him all the relevant financial information of all the operating companies.”

44. The Reply was dated February 22, 2007. By Summons dated May 16, 2007, Leamington applied for Further and Better Particulars but not in relation to paragraph 2 of Lisa’s Reply. On June 14, 2007, however, AVSA issued its partial and total strike-out applications. It sought to strike-out the entirety of Lisa’s claim on the grounds that the above-quoted plea could not be understood. When the *de facto* parent argument was set out in the FBPs, the particulars were for all practical purposes provided to explain Lisa’s case against AVSA, not Leamington at all¹¹. It is true that in formal terms the original plea as well as the particulars were advanced against both Defendants, but prior to the trial it was not obvious that any or any serious issues were joined between Lisa and Leamington on the *de facto* parent argument at all. The FBPs themselves contain three main paragraphs, all three of which explicitly refer to AVSA alone and not Leamington. Paragraph 1 opens by stating: “*Avicola Villabos S.A* (*‘Avicola’*) is the *de facto* parent company of and/or the *de facto* principal of and/or the *de facto* controller of a group of numerous operating companies.” These matters are in reality all advanced to explain the nature of the case against AVSA, not the loss recoverable from Leamington.

45. Mr. Riihiluoma was unable to advance a coherent case in closing as to why this issue was relevant to Leamington’s case. Leamington’s only proper concern was to know what quantum of loss formed the basis of Lisa’s claim. The profits generated by the relevant insured members of the Avicola Group remain the same irrespective of the corporate hierarchy of Group members. I find that Lisa’s pleaded case against Leamington, sensibly read, embraces the profits of the Avicola Group as a whole, and no need in this context to determine whether or not AVSA was the *de facto* parent arises.

¹¹ See paragraphs 22-25 of this Court’s Reasons for Decision dated July 3, 2007.

Legal and factual findings: is AVSA the de facto parent of the Avicola Group (Lisa's claim against AVSA)?

46. Mr. Woloniecki opened AVSA's closing submissions by asking the following rhetorical question: "*Why are we here?*" Lisa's Closing Submissions relied upon the following portions in Juan Guillermo's Witness Statement:

"20. Even though these companies are legally distinct entities, in practice they form separate divisions of a larger consolidated chicken production operation. Some of the operating companies run fattening farms, some slaughter houses and one provides the IT services to the entire Group..."

21. The operating companies are certainly not separate and distinct entities as a matter of fact. I believe that as a matter of fact and as a matter of practice, Avicola is the company that, by itself and Multi Inversiones SA, directs and controls the actions of all 19 companies, which are all treated as one single Avicola Group. All the financial reporting and accounting for the entire Group is consolidated. The information provided to shareholders has always been consolidated for the entire Group (emphasis added).

...

24(b) All 19 companies are managed by the same Group executives. This appears to be confirmed by the fact that Jose Fernando Ramon Rojas Camacho himself admits, at ¶3 of his own Affidavit of 18 June 2007, that he was, until 2002, 'the CFO of 19 Guatemalan companies... which, together, are known as the Avicola companies'.

24(g) I do not believe that the fraud could have operated without the companies in the Avicola Group operating as one enterprise. As I understand it, the fraud required records to be falsified throughout the production chain (emphasis added)."

47. This is some evidence supportive of the Plaintiff's case. I accept that, as a matter of Bermuda and/or Guatemala law, it is legally possible for a controlling corporate entity to be vicariously liable for the torts of the companies it controls¹². But this testimony as to AVSA's control is based in large part on Juan Guillermo's recollection of how AVSA operated prior to 1982. There is no cogent support for this proposition in the voluminous documentary record relating to the Leamington insurance programme. These assertions support Lisa's case in a largely abstract way, without any tangible support for them when one closely analyzes the relevant transactions. It is not enough for AVSA and the relevant Avicola operating companies to have common officers and/or accounting practices. It must be demonstrated that the relevant officers were acting on behalf of AVSA when they were directing the operating companies in making the allegedly fraudulent insurance and reinsurance arrangements. The estoppel case (i.e. the submission that AVSA is estopped by its conduct from denying that it is a de facto parent) is also not sufficiently proved.
48. Bearing in mind the high standard of proof required for allegations of fraud, I am not satisfied that AVSA was either the *de facto* parent or controller of the operating Avicola companies so as to render AVSA liable for any frauds which such companies and/or Leamington may have committed. Even if AVSA alone could declare dividends and the operating companies were just cost centres, it does not follow that AVSA was the controlling corporate entity. It seems more plausible that a company wholly owned by the other two branches of the Gutierrez family such as Multi Inversiones was in reality the controlling corporate

¹² The submissions set out at paragraphs 108-112 of Lisa's Closing Submissions are accepted.

entity, if there was one. For example, in notes recording negotiations between the parties in Toronto on February 21, 1998, Juan Guillermo himself described the two sides as “*Lisa’s side*” and “*Multi-Inversiones’ side*”. And paragraph 3 of these notes record Rossell indicating that “*Multi-Inversiones provides strategic planning, legal advise [sic], fiscal strategy and high level administration services to the Avicola Companies.*”¹³ This is admittedly far from conclusive in terms of ascertaining which corporate entity played a controlling role before Lisa sold its interest in Multi-Inversiones, however. This is because Juan Guillermo suggests that this sale happened as late as 1997.

49. The del Aguila Affidavit suggests that AVSA had some prominence in the Poultry Group, and he left AVSA in 1996 before Lisa’s interests in various companies (including Multi-Inversiones) were sold. He worked for AVSA for many years and was ideally placed to explain precisely what role AVSA played in relation to the Avicola Group of companies between 1978 and 1996 as Chief Internal Auditor of AVSA “*and its affiliates and subsidiaries*”¹⁴. Although he defined AVSA as “*a conglomerate of horizontally and vertically integrated corporations*”, del Aguila did not explicitly aver that AVSA itself was the dominant corporation. I accept that this may be inferred. His February 3, 1999 Affidavit is mainly concerned with how off-the-books sales occurred. In the penultimate paragraph of his Affidavit, del Aguila describes false invoices being presented to AVSA to divert money to the Panamanian Ancona Finance, SA as part of a general scheme of diverting AVSA monies to offshore entities. Del Aguila deposed: “*These invoices would be prepared by Multi-Inversiones, the holding company of the Bosch-Gutierrez and Gutierrez-Mayorga interests...*” This supports, in a very general way, the assertion made by Rossell to Juan Guillermo in 1998, that Multi-Inversiones played a high level consultative role in relation to the Avicola Group as a whole, including AVSA itself.

¹³ Vol. D1, page 136A.

¹⁴ Vol. D1, page 172.

50. I therefore find that AVSA may only properly be held to be liable for breach of any legal duties to Lisa to the extent that it is proved to have directly participated in the conduct complained of. Lisa's case based on the vicarious liability of AVSA for the acts of its officers and/or its corporate agents is dismissed. It follows that since AVSA was not itself an insured and there is no or no sufficient evidence tying AVSA to the Leamington programme, claims against AVSA and Leamington (conspiracy, simulation) in relation to the Leamington programme must be dismissed as against AVSA. These claims are clearly based on the unsubstantiated premise that AVSA is jointly liable with the operating poultry companies and/or vicariously liable for the acts of their common principals or for the acts of the poultry companies themselves.
51. A claim under Article 176 of the Guatemalan Commercial Code was asserted against AVSA alone. This was what Mr. Hargun's own Closing Submissions stated in this regard:
- "Article 176 is not an independent cause of action but allows other causes of actions to be asserted, for example, claim for simulation and for intentional wrongdoing (conspiracy). Given that claims for simulation and conspiracy to defraud are otherwise asserted, Article 176, in the context of these proceedings, adds little to causes of action already pleaded."*
52. It follows that this claim against AVSA stands or falls with substantive claims asserted against both Leamington and AVSA, namely the tort of conspiracy (Bermuda law) and simulation (Guatemala law). For the reasons set out above, these claims have not been proved as against AVSA and must accordingly be dismissed.

The “background” or “feeder” frauds

53. I indicated in my June 9, 2008 Ruling following the pre-trial review that I considered it improbable that any positive findings as to breaches of Guatemalan tax law would be made at trial. It remains to consider whether this Court should accept Lisa’s submission that the Leamington reinsurance fraud was motivated by a desire to launder monies which were the fruits of a large-scale tax fraud.
54. In the absence of expert evidence as to Guatemalan tax law it is not possible to properly make any findings that specific tax offences were committed by AVSA and/or the Avicola operating companies. It is possible, however, to determine whether Lisa has established by way of background a plausible motive for Leamington being used as an instrument of fraud. The most cogent evidence that those controlling Avicola and Leamington had a motive to funnel false premiums through an offshore reinsurance programme may be summarised as follows.
55. It seems clear beyond serious argument that the Avicola companies conducted business on a regular basis using official accounting records which recorded only a portion of the Group’s true income. Lisa’s Opening Submissions cite the following extracts from the Transcript in which Rojas made the following admissions:

"And live chickens was something that didn't get too... too much attention before Juan Guillermo [phonetic], but you can see that starting in '94-'95 and, in particular, this last '96-'97, you can see that it went...well it... it went up rather significantly."¹⁵

"Then, it started to... to... to... gain importance and there... we... we also ran into a problem, which... which also partially gave rise to what happened with... uhm... with Campero [phonetic] during the last two years, and it's that nobody works with... with... with... with invoices!"

¹⁵ Vol. E, pages 70-71.

*With invoices. That's why... that's something I was going to mention to you. That's why the black area you see [here] is sixty-three million quetzales in '97-'98 generated through the sales of live chickens is black. There's no way to invoice that. Those to whom you sell the live chickens don't give you any type of receipt or anything and...that's why, in fact, part of this... and that was part of the confusion we had the last time... we had to pass it on to Avicola [phonetic] as white money, in order to maintain the sales history and tax payments plan... because if you fail to pay taxes at any time...at the level you are in... the Treasury gets on your case and, we... we'd have found ourselves in trouble. We're going to address that later on."*¹⁶

56. The term "black money" has been defined to mean as follows: "Income, as from illegal activities, which is not reported to the government for tax purposes."¹⁷ It seems obvious that the terms "black" and "white" used extensively in their context in the Transcript in relation to money, accounts and/or transactions, were intended to refer to off-books and on-books money respectively. There was clearly a less than enthusiastic attitude towards paying taxes, as Rojas went on to explain: "We already had a ...a scare once....This thing with fiscal terrorism is ever present, right?"¹⁸ There was also a willingness to take extensive steps to minimize the tax exposure. As Rossell went on to explain:

"The idea for all this within our tax planning, which is something that we handle with Multi [phonetic], is to increase sales, turn this around, try to catch it right here instead of sales dropping here to...return this in order for sales to hold their trend and also for the tax level to stay on the same trend. Thus, avoiding having any unusual problems in the eyes of the

¹⁶ Idem.

¹⁷ <http://www.thefreedictionary.com/black+money>.

¹⁸ Vol. E, page 85.

Treasury which would subject us to an audit. That's why this whole thing is so complex."¹⁹

57. Rojas and Rossell clearly admitted in a meeting which was secretly recorded that a substantial portion of the income generated by the Avicola Group, in particular cash generated from the sale of live chickens, chicken manure and oranges was kept off the books and used to fund distributions to shareholders. It was effectively admitted at trial that after Lisa revealed the existence of the Transcript, revised tax filings were submitted and further taxes paid by the Avicola companies²⁰. They did not expressly admit defrauding Lisa of its share of these distributions however; and alleged admission of the Ancona fraud is far less clear. Lisa also relies on the following admission made in paragraph 9 of the Lozada expert accounting report filed on behalf of the Defendants in respect of the first two feeder frauds:

"The Xela Operation consisted of an "off-book accounting system to account for the cash flows from the sale of live chickens (Pollos Vivos), oranges and chicken manure (Los Cedros) and a subsequent net distribution of profits (Utilidades) to all shareholders including Lisa."

58. The reliance placed on the feeder frauds is explained in paragraph 24 of Lisa's Closing Submissions as follows:

"The existence of the Pollos Vivos fraud and the Los Cedros fraud is relevant and probative because when considered with the Leamington fraud, it renders it more likely that the Leamington fraud took place. If it assists in this regard, the evidence is admissible on the ground of similar fact evidence. See JP Morgan Chase Bank and others v Springwell Navigation Corporation [2005] EWCA Civ. 1602:-

¹⁹ *Ibid*, page 94.

²⁰ Volume D 2, pages 194-196.

'71. That puts the test for the relevance of any evidence, and conspicuously for the relevance of similar fact evidence, far too high. Cross & Tapper, Evidence (9th edition), p55, suggest that as a definition of relevance is it not possible to improve on article 1 of Stephen's Digest:

"any two facts to which [the term] is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other [emphasis supplied]"

72. A fact may therefore be probative either on its own or because it renders a conclusion more likely when taken in conjunction with other facts. The latter is essentially the role of similar fact evidence. The relationship of Chase with the other Greek families, taken on its own, clearly cannot prove anything about the relationship between Springwell and Chase. But it might explain, illuminate or put in context evidence about that latter relationship that would otherwise be ambiguous or difficult to understand.'"

59. I accept the evidence of Juan Guillermo and Mr. Rosen that the disclosures about the off-books profits were made by the Controllers in the context of attempts being made by Lisa to value the Avicola Group for the purpose of sale of Lisa's interest in it. I find that they were genuinely surprised by the disclosures initially made at the April Toronto meeting even if they had previously received copies of statements which in fact represented the so-called "Special Results". This prompted Juan Guillermo to arrange for a secret filmed recording of the meeting at which further disclosures about the off-books business were made. The extensive explanations which were made by Rojas and Rossell as to how Avicola operated are inconsistent with any rational suggestion that Juan Guillermo was fully aware of the "black money" all along. The Transcript suggests that the Controllers were explaining what the "real world" was like in the "old country" to

a naïve émigré who was living in a far more comfortable developed world. It seems highly improbable that Juan Guillermo wrote the following letter to them in December, 1998 referring to his father in disingenuous terms:

*"I'm not even going to start listing the series of activities and facts I've come to know about recently here, which have had a significant impact on me and dishonour my Dad's memory. I can't conceive that the companies that you presently manage can be involved in activities of this nature. The interests and net worth of Lisa, SA have been damaged by your inadequate conduct, as was admitted by your representatives."*²¹

60. Rossell in his first Witness Statement does not explicitly refute the admissions relied on in relation to the off-the books business. In his Second Witness Statement, he avers that Lisa was well aware of the live chicken business and that he personally travelled to Toronto in 1994 to discuss the various operations. At this stage Lisa expressed no objections to the operations. In essence, it is implied that Lisa was aware of the off-books aspects of the Avicola business. This is not made explicit by Rossell who (a) does not expressly admit that off-business occurred at all, though he admits a tax rectification was made in 1999, and (b) does not even explicitly assert that Lisa's principals were aware that the live chicken business was off-books at all (as opposed to simply being aware of the existence of the income stream). Rojas in his first Witness Statement does not deal with the "feeder frauds" at all. In his Second Witness Statement, Rojas does not deny the off-the books business at all, and essentially refutes any suggestion that Lisa had been defrauded and denies that he admitted Lisa was defrauded.

61. Luis Arturo Gutierrez Strauss's November 14, 2007 Witness Statement exhibits his June 2, 2000 Affidavit. He admits that he is estranged from his siblings as a result of a disagreement in particular with Juan Guillermo. He strongly supports the honesty and efficacy of the dealings of the Controllers as far as the

²¹ Volume J3, page 164.

commercial interests of all shareholders and profitability are concerned and denies that Lisa has been defrauded. He worked within the Group until 1994 and was Lisa's representative. He does not admit being aware of the off-the books nature of any part of the Group's business; nor does he contend that Juan Guillermo was aware of this either.

62. In my judgment there is no or no sufficient evidence that any admissions were made by either Defendant to the effect that the "feeder frauds" constituted a fraud on Lisa as opposed to being designed to conceal from the revenue authorities in Guatemala what the Poultry Group's true earnings were. The Transcript supports the untested evidence of the Defendants in this regard. I am not satisfied having regard to all of the evidence in any event that Lisa was defrauded as alleged in relation to the Pollos Vivos and Los Cedros frauds.

63. I reject Lisa's submission that these background "frauds" are admissible as similar fact evidence on the grounds that they make it more probable that the Leamington fraud occurred. They are, however, admissible as potentially making it more probable that the Transport Policies issued by Leamington were not genuine reinsurance, but for this limited purpose alone.

Factual and legal findings: were the Leamington reinsurance policies genuine reinsurance?

64. A commercial court sitting in the world's leading captive domicile is bound to approach a claim that a local captive insurer has issued non-existent policies with a degree of caution that might not be required elsewhere. Bermuda public policy clearly requires a delicate balance to be struck between avoiding unwarranted attacks on an important segment of the national economy and granting appropriate relief where captive arrangements are proven to have been used as an instrument of fraud. While Leamington is not entitled to any "home court" advantage, Lisa cannot expect a Bermudian Court to lightly conclude that captive insurance or

reinsurance contracts are of no legal effect based on generic criteria which could apply to countless existing contracts issued by other Bermudian captives.

65. While it is legally permissible for this Court to determine the validity of the Transport Policies based on expert opinion evidence, it is in my view preferable to use the expert opinions as a lens through which the factual evidence is viewed. In that way any formal conclusions reached will be fact specific and should not undermine the stability of contractual relationships beyond the scope of the present case. Moreover, the unique fact pattern of the present case is such that the crucial judgments turn not just on the formal structure of the reinsurance arrangements, but on the underlying intent of the Controllers and Leamington. As far as the evidence of Mr. Gardemal, whose expert financial evidence goes primarily to support Lisa's compensatory claim, is concerned, I have placed no reliance on his generic "*indicia of fraud*". He fairly conceded that he is not an insurance expert, and I found this aspect of his evidence too general to be of assistance in the specialist area of captive insurance arrangements.
66. The general weight of Lisa's expert's insurance evidence is obviously diminished by the fact that Mr. Spragg's captive insurance experience is substantially US-based. Most of the analysis in his main report was based on criteria used for US tax purposes for the purposes of determining whether premiums ceded to a captive may be deducted for tax purposes. Under cross-examination, Mr. Spragg creditably admitted that he had no real familiarity with the Latin American view of such matters generally, let alone Guatemala in particular. It is unclear whether Lisa was unable to retain a local captive manager expert because none was willing to proffer the desired opinions or because none was willing to break ranks with local professional colleagues. I draw no inferences one way or another in this regard and assess Mr. Spragg's evidence on its merits.
67. Mr. Bailie's extensive experience of Bermuda captive insurance for over 20 years made his evidence generally particularly cogent. But I accept Mr. Spragg's

observation that Bailie too had no reliable basis for expressing opinions as to Guatemalan premium rates for transport policies. And it seems obvious that greater weight should be attached to his opinions as to captive management practice generally than to his opinions as to the underlying facts. Of course in many cases the primary findings made by a court may be based substantially on expert opinion evidence. Where issues of fraud and deliberate breach of duty are alleged, the crucial findings will typically relate to the state of mind of the primary actors at the material time. I accept the following opinions expressed by Mr. Bailie: (a) the level of involvement of captive managers in their clients' underwriting programmes was lower in the 1980's and 1990's than it is today, (b) outside of US tax requirements, there is no general insurance requirement for captive/parent relations to be at arms length, (c) numerous factors influence premium levels for captives, making the process quite distinct from ordinary commercial insurance where the insurer determines the premium level, (c) it is normal for captives to maximise premium income and the tax benefit for their shareholders who may also be policyholders, (d) loss reserves are often kept by insurers instead of retained earnings because in some jurisdictions (but not Bermuda), the latter are taxable but the former are not. In the Bermudian context the tax-driven incentives for keeping loss reserves do not exist, (e) retroactive approval of dividends which have been previously paid is not good practice but nor is it an indication of fraud, (f) the absence of underwriting files is not unprecedented for the period of time in issue, (g) the direct payment of premiums to Leamington is not necessarily an indicator of fraud as Gardemal suggests as there is no evidence that the fronting companies did not receive their commissions, (h) lending to related parties is not uncommon for captives, (i) the use of fronting companies is a normal practice and not an indicator of fraud as Gardemal seems to suggest, (j) the fact that no claims were made on the Transport Policies over several years is unusual but not unprecedented, and, finally, I note (k) that Bailie's view that the reinsurance was genuine was necessarily based on a

detached review of the relevant transactions rather than based on direct knowledge of the underlying facts²².

68. Under cross-examination by Mr. Riihiluoma, Mr. Spragg fairly conceded that there was no specific basis for believing that the primary policies issued by El Roble did not transfer any risk in the sense that if claims had been submitted they would not have been paid. Juan Guillermo also agreed that if a valid claim had been submitted to El Roble it probably would have been paid. Nor is there any dispute as to whether or not the purportedly insured risks might potentially exist and warrant insurance cover. But this questioning was extremely hypothetical as it was common ground at trial that over a 13-year period, no claims were actually made or paid under the primary transportation policies. It is open to this Court to conclude, looking at the insurance and reinsurance arrangements as a whole in light of all the evidence, that the risks at both levels (although the reinsurance level is most directly relevant) were non-existent in the sense that the Avicola companies had a fixed intention from the outset which they never diverted from not to make any claims even if losses occurred. Mr. Spragg further opined that "*Leamington was a sham captive that happened to write some legitimate policies later in life*"²³. And under re-examination by Mr. Hargun he opined that no risk transfer occurred under the reinsurance Transport Policies²⁴.

69. I agree with Mr. Spragg's view that the Transport Policies were not genuine reinsurance but that the later Property Policies were genuine. I find that the reinsurance policies did not involve the transfer of any genuine risk. In reaching this finding, I do not rely on all of Mr. Spragg's supportive technical reasoning and instead concur with his conclusion primarily based on my own assessment of the underlying facts. And these findings are reached in circumstances where (a) the crucial question turns on the view the Court takes of the genuineness of contracts the formal validity of which has not been in question and (b)

²² Day 10, pages 1627-1628.

²³ Day 5, pages 751-754.

²⁴ Day 5, page 854.

Leamington, a Bermuda company, called no live factual witness to support the proposition that there was a transfer of risk under the Transport Policies.

70. In his closing oral argument, Mr. Riihiluoma forcefully argued that Lisa's pleaded case of "non-existent" risks was not proved because it was clear that genuine risks of chicken losses did factually "exist". The no transfer of risk argument was a wholly distinct and un-pleaded new allegation. In my judgment the term "non-existent risks" read in a commonsense manner in the light of the RASC as a whole encompasses both (a) risks which do not really exist because they are wholly fictitious, and (b) risks which do not really exist because no real or genuine risk was transferred under the impugned insurance and/or reinsurance contracts.

71. In the context of a secretly recorded meeting at which extensive admissions were made about elaborate attempts to conceal off-books income from the Guatemalan tax authorities (including moving documents to avoid detection in an anticipated audit), the following statements²⁵ cannot easily be explained away as describing legitimate reinsurance in colourful terms:

"*MV2 (Rojas) Rather, then, let's go on to what we expect to, uhm... what's it called? ... to distribute this year...*

*MV1 (Juan
Guillermo
("JGG")) Uh-huh*

MV2 (Rojas) Profits, dividends, Levington [phonetic], Ancona [phonetic]... Ancona [phonetic], Multi [phonetic] and Abejemol [phonetic], right?

MV1 (JGG) Okay. So, what you mean is that here's where... then, let's see... that is, what says 'profits'... comes from live chickens.

²⁵ Lisa's Outline Submissions, pages 13-14; Volume E page [].

- MV2 (Rojas) Uh-huh.
- MV3 (Rossell) Exactly. The dividends come from the fiscal portion.
- MV1 (JGG) This is fiscal.
- MV3 (Rossell) Levington [phonetic] comes from a... a... figure that perhaps we hadn't told you... they're insurance [policies] that... don't exist... see? They're just false premiums that are paid and then Levington returns them and they're distributed...
- (Interrupts. Voices overlap.)
- MV1 (JGG) Okay.
- MV3 (Rossell) That is... let's say...
- MV1 (JGG) Let's say Levington [phonetic] distributes...
- MV3 (Rossell) We insure everything nobody else in the world insures... but it's not an actual policy, right?
- MV1 (JGG) Oh, okay.
- MV3 (Rossell) Then, uhm... we charge a premium to Avicola [phonetic], it passes it on to us and we distribute it.
- MV2 (Rojas) And Levington [phonetic] is that company that... uhm...
- MV3 (Rossell) Yeah... That's where it's going to start to you... because we have started its liquidation... it's going... we're going to be sending you about... three hundred thousand dollars, perhaps... a little more.
- MV2 (Rojas) It... It... has a small cost... There are some... there are some shelters that involve costs... other don't involve costs. This one has a cost on the part of the insurance company because you have to contract a fronting, as... as that's called. And a commission that Levington also charges, right?

MV1 (JGG)

Okay.

MV3 (Rossell)

What's important is that from these ninety-... this is what will... reach the stockholders' hands."

72. It is difficult to comprehend why Rossell would have referred to policies that "don't exist" and "false premiums that are paid and then Levington returns them and they're distributed..." [emphasis added] if risks were genuinely transferred under the Transportation Policies as well as under the later Property Policies. It is true that Mr. Bailie supported Rossell in his attempt (via his written evidence) to sanitise these words as simply trying to explain complex concepts in simple terms by indicating that such explanations are not unheard of in the captive world outside of professional captive management circles. It is also true that the admissions relied upon by Lisa can only be construed as such in relation to one portion of the reinsurance programme, and that, to that extent at least, Rossell's explanation as to why he used this language carries some weight. Such words coming from the mouth of a captive owner or officer in the context of a corporate group the activities of which were otherwise beyond reproach would be one thing. But when the officer has admitted to institutionalised practices designed to deceive his local tax authorities on the part of the primary insureds, the relevant policies ran for some 13 years with not a single claim, the officer is unwilling to have his exculpatory account tested by cross-examination, and an executive incentive plan rewards the managers of the primary insureds by giving them a share of the captive's profits based on the amount of premiums ceded, one is dealing with an entirely different scenario. It is also significant that the financial record indicates that Leamington, after an initial period during which no dividends were paid, was effectively used as a "cash cow" with premiums frequently flowing in and distributions flowing out in rapid succession. In addition, even though transport risks were supposedly known to be low, it seems a curious coincidence that Leamington itself sought no reinsurance protection of its own.

73. Asensio and Briz (in their written evidence) give stock explanations for the creation of the Leamington programme while the broker Tercero gives a more detailed account of how the programme worked. Briz significantly notes, however, that no income tax was payable on dividends distributed by Leamington under Guatemalan law. Briz's assertion that some claims were made on the Transport Policies was not substantiated at trial. Donald Baker's Witness Statement in relation to Jardine Pinehurst Management Company Limited and its management of Leamington from 1994 until he left Jardine in 1996 adds little of substance. Rojas, CFO of AVSA, dealt with the executive incentive programme and it is unclear what basis he had for his understanding that genuine risks were transferred by the primary insureds. None of these witnesses were available for cross-examination. Briz and Asensio, nearly 20 years earlier, had visited Bermuda and in their trip report recorded the following approach to the reinsurance programme:

*"It was decided to submit claims to Leamington sporadically in order to maintain an appropriate image for the authorities. With such claims, the equity of some of the members of the Poultry Farming division can be redeemed."*²⁶

74. At this stage, December 4-7 1989, only the Transport Policies existed and no claims were ever submitted. But the report does suggest that these policies were not genuine risk-transferring instruments where either (a) claims would or (b) would not arise, and the "authorities" would assess the programme on its merits. It is consistent with the concerns expressed in the 1989 trip report that genuine Property Policies were issued in the mid-1990's under which claims were "sporadically" submitted. At the primary insurance level it is possibly theoretically correct to say that El Roble was on risk even if the primary insureds unilaterally decided not to submit claims. At the reinsurance level where those

²⁶ Volume G 4, page 136.

paying the premiums (the Avicola companies notionally on behalf of El Roble) and Leamington receiving them had an implicit understanding that no claims would be made, the position at first blush seems markedly different in practical terms. But on closer analysis, there is in the context of a 100% reinsurance of a fronting company's risk no practical distinction at all between the liability of the reinsured and the liability of the reinsurer. Because if a claim was improbably made at the primary level, one would reasonably expect that the claim would be passed on to the captive reinsurer.

75. No claims were in fact submitted by the time the programme was terminated after the commencement of the present litigation, even though the trip report suggests that submitting claims was considered in 1989. It would be highly artificial in the unique circumstances of the present case to hold that genuine risks were transferred merely because it was theoretically possible at one time for the Avicola insureds to make claims which would have triggered claims on Leamington by El Roble under the Transport Policies. What is unique about the present case is that the decision on whether or not to make claims does not appear, in light of the Transcript, to have been made on *bona fide* commercial grounds for reasons which I will come to. Mr. Bailie, when cross-examined about the trip note compiled only two years after Leamington's incorporation, made the following pertinent observations:

"Q. Isn't this an indication that they are suggesting that they would be making false claims in order to give the right appearance?"

A. Well, I don't know, he hasn't said they were deciding to submit false claims, he was deciding [to] submit claims. They may have. They may have been having claims all this time. I expect they probably were, give the nature of the risks.

Q. So you think they had claims but simply hadn't bothered to submit them and this is an indication that it's about time we submitted some?

A. That's a theory, it's possible. You know there might be claims and that they may not be submitted because it's more tax efficient not to."²⁷

76. These answers I find to be very insightful. I accept the judgment of Mr. Bailie that the trip note is probably not evidence of consideration being given to filing false claims. People planning to submit false claims do not ordinarily discuss doing so with their captive managers and keep a written record of their fraudulent intent. Rather, I infer the following from Mr. Bailie's judgment that the nature of the risks were such that he would have expected claims and his educated guess that claims were perhaps not made for tax purposes. It is more likely than not a feature of captive insurance practice for the claims submission process to be affected by judgments as to tax efficiencies. How far one manipulates the claims submission process is a matter of judgment raising potential questions of adverse tax treatment in the parent's domicile and adverse regulatory comment in the captive's domicile. A simple form of such claims submission 'manipulation' occurs daily in the motor insurance market when drivers decide whether or not to file a claim based on a judgment as to the comparative commercial disadvantages of (a) claiming and losing their no-claims bonus, and (b) bearing the cost of the relevant loss. Mr. Bailie conceded that various attributes of the Leamington programme during the period in question represented the use of such companies in an "aggressive" manner for tax purposes. It is therefore not implausible that a corporate group that regarded tax collectors as "terrorists" would set up reinsurance policies that in practical terms involved no risk transfer, because a decision was made at the outset, and adhered to subsequently, not to submit any claims whatsoever.

²⁷ Day 9, page 1568.

77. Alternatively, even if the decision not to submit claims was not fixed and irrevocable so there was some hypothetical or minimal risk transfer, and notwithstanding the fact that Lisa has not proved in commercial terms that the premiums received bore no relationship to the risks assumed, I would find that this alternative limb of its attack on the Transportation Policies was made out. Accepting that captive insurance has unique characteristics and cannot be expected to mirror precisely ordinary insurance and reinsurance contractual relations, under section 1(1) of the Insurance Act 1978 "*insurer*" means a person carrying on insurance business". The same section also provides:

"insurance business" means the business of effecting and carrying out contracts —

(a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed; or

(b) to pay a sum of money or render money's worth upon the happening of an event, and includes re-insurance business.."

78. As a licensed Bermuda insurer, the legitimacy of Leamington contracts which purport to be insurance contracts fall to be tested against that statutory standard. Where the predominant function of what purports to be a reinsurance contract entails neither (a) protecting (in the captive context at least) the underlying insureds against potential losses, nor (b) paying a sum to the actual insured on the occurrence of a contingency, it must be open to this Court to find that the relevant contractual arrangements are not genuine reinsurance.

79. In concluding that the Transport Policies were not genuine reinsurance policies as contended by Lisa, I also have regard to the "*working hypothesis*" of the elements

of reinsurance set out by the learned authors of O'Neill and Woloniecki. *The Law of Reinsurance in England and Bermuda*, 2nd edition, at pages 34-35²⁸.

- “(1) *A reinsurance contract is a transaction involving the transfer of risk acquired through providing insurance to another or others which is governed by the legal principle of uberrima fides.*
- (2) *The transferor (the reinsured) transfers risk to one or more transferees (the reinsurer/s) in consideration for the payment of money (the reinsurance premium).*
- (3) *The risk which the reinsured transfers may arise either (a) under a contract or contracts of insurance, or a contract or contracts of reinsurance, which contracts the reinsured has entered into before the making of the reinsurance contract; or (b) following the making of the reinsurance contract, under future contracts of insurance or reinsurance, which are in the contemplation of the parties at the time the reinsurance contract is made.*
- (4) *The reinsurance contract under which the risk is transferred is separate and distinct from the insurance or reinsurance contract or contracts under which the reinsured has assumed the risk.*
- (5) *The reinsurer may assume 100 per cent of the risk which the reinsured has assumed, or will in the future assume, under a contract or contracts of insurance or reinsurance.*
- (6) *The nature and extent of the obligation of the reinsurer to pay money to the reinsured is defined solely by the terms of the particular insurance contract.*
- (7) *There will frequently be elements of reinsurance which do not constitute an acceptance of the reinsured's “insurable interest” in the underlying subject-matter.*

²⁸ (Sweet & Maxwell: London, 2004). The highlighted portion of the quoted passage was put to Mr. Baillie in cross-examination.

We submit that it is preferable to avoid inquiries into what is the 'subject matter' of the original insurance, and to focus on the commercial purpose of reinsurance. The search for a comprehensive definition of reinsurance is not merely elusive, but may also prove illusory. It is unnecessary to postulate whether reinsurance is a form of insurance, or a particular form of liability insurance. The essential elements, common to insurance and reinsurance, are the transfer of risk and the principle of uberrima fides or utmost good faith."[emphasis added]

80. If the reinsurance contracts are legally separate and distinct from the underlying contracts with El Roble, the validity of the Transport Policies between El Roble and Leamington does not stand or fall with the underlying contracts. The mere fact that genuine risks were transferred at the primary level does not automatically mean that genuine risks were transferred at the reinsurance level, even in the case of a 100% reinsurer such as Leamington. Such an analysis would be highly technical and factually inappropriate in the present case. In the present case the most realistic view of the entire insurance and reinsurance arrangements in relation to the transportation policies is that risks were non-existent at both primary and reinsurance levels because the individuals controlling the primary insureds never intended to submit any claims, even though it seems probable that the fronting El Roble had no knowledge of this fact.
81. And if there were some very ethereal risk which was transferred, as the trip note relied upon by Lisa in fact suggests (i.e. the making of claims was contemplated but never pursued), the premiums paid clearly bore no relationship to the *de minimis* risk transferred. Mr. Spragg's conclusion as to the premium levels being wholly unrelated to the risks transferred, properly analysed in light of the unusual

circumstances of the present case,²⁹ does not require reference to the usual commercial rates.

Factual findings: did Leamington and /or AVSA intend to and in fact injure Lisa?

82. In my judgment the overwhelming weight of the evidence suggests that the Controllers were primarily concerned with avoiding and/or evading tax obligations when Leamington was established and the transportation insurance and reinsurance programme was set up. Lisa has failed to prove the highest level of its pleaded case, namely that the predominant purpose of the scheme was to launder the proceeds of the off-books live chicken sales and to deprive Lisa of its share of all of this unreported income. However it seems more likely than not that some of the "black money" was "whitened" by being used to pay the premiums which were then distributed as purportedly legitimate corporate profits, and that the Controllers intended to deprive Lisa of its rightful share of the profits generated by Avicola.
83. Lisa's position on injury is set out in Mr. Hargun's closing Submissions in salient part as follows:

"72. Lisa refutes the contention that there was no intention to injure or that Lisa was in fact not injured in relation to the Avicola's reinsurance program with Leamington. Lisa refers to the following facts:-

72.1 At the Toronto Meeting, Rossell advised Juan Guillermo that Leamington had not declared any dividends since Leamington was building up its reserves. The fact that Rossell made this statement at the Toronto Meeting has not been challenged. That statement was untrue on both counts. First, during the

²⁹ In particular, the fact of no claims being submitted at all over 13 years for policies in relation to which Mr. Bailie felt losses would have occurred after only two years.

period 1996 – 1998, Leamington declared US\$10 million by way of dividends to its registered shareholder Villamorey. This is admitted in ¶22 of the Re-Amended Defence of Leamington. Secondly, Leamington was not building up its reserves at all. Leamington was declaring dividends as fast as its premium income permitted and, as stated above, had declared \$10 million in dividends in the previous two years. Again, this evidence is unchallenged (see ¶s 34 - 37 above).

72.2 Until recently, Lisa believed that Villamorey had not distributed the \$10 million received from Leamington by way of dividends during 1996 - 1998 because of the dramatic increase in Villamorey's expenses. Those expenses included the payment of "black salaries" to the executives. However, according to the witness statement of Villaverde, filed on behalf of Leamington, the dividends declared by Leamington during 1996 – 1998 and paid to Villamorey, were in fact transferred by Villamorey to La Brana for distribution for the benefit of the Gutierrez Mayorga and Bosch Gutierrez families. Accordingly, the end result is that all the dividends declared between 1996 and 1998 by Leamington were paid to the other two branches of the family to the exclusion of Lisa. This is the clearest evidence of injury to Lisa and the underlying facts are unchallenged.

72.3 In their witness statements, Villaverde and Rossell maintain that all the dividends declared by Leamington were paid to Villamorey, as the registered shareholder, and thereafter to the three branches of the family, including Lisa. They maintain that the only reason why Lisa did not receive any dividends from Villamorey, in respect of the dividends

declared by Leamington, after 1995 was because Lisa had sold its shareholding in Leamington to La Brana. This assertion is wrong on two counts. First, even in respect of the pre-1995 period, it is now accepted by the Defendants that Lisa did not receive its proportionate share of the dividends declared by Leamington. It is accepted by Maria Yip, the expert on behalf of the Defendants, that Lisa did not receive its share of the dividends declared prior to 1995. Indeed, in anticipation of this trial, La Brana has tendered, by letter dated 30 April 2008 payment of US\$229,301.61 (representing US\$105,607 plus interest) in respect of dividends declared by Leamington pre-1995. Secondly, the contention by the Defendants that Lisa had sold its indirect shareholding in Leamington in 1995 is, it is respectfully submitted, false. The Defendants admit that but for the contention that Lisa sold its indirect shareholding in Leamington in 1995, Lisa would have received, with interest, \$5,947,164. Lisa's contention that the suggestion of the alleged sale is false is further analysed in ¶s 65 - 70 below.

72.4 Even if the true position is that Lisa had sold its shareholding in Leamington in 1995, Lisa would still be entitled to its share of the "premiums" paid in respect of the transportation policies to Leamington as a result of its direct shareholding in Avicola and indirect shareholding through Villamorey. At the Toronto Meeting, Rossell advised Juan Guillermo that Lisa would start to receive dividends from Leamington. Subsequent to the Toronto Meeting, Lisa did indeed receive three payments after the Toronto Meeting. Rossell now contends that two of those payments were not made to Lisa in its capacity as a indirect shareholder of Leamington, but they

were *ex gratia* payments on par with the "incentive" payments made to the executives of the Avicola companies. Rossell says "In as much as the Poultry Companies paid premiums for Transport Policies reinsured by Leamington, Multi-Inversiones directors agreed to make *ex gratia* payments related thereto in favour of the other stakeholders in the poultry companies, including Lisa". What is clear is that Lisa did not receive these payments after the alleged sale in 1995 and despite the subsequent promise in August 1998, has only received a small portion of it. The Defendants appear to admit that had Lisa received the entirety of the "*ex gratia* payments", Lisa would have received an additional \$1,900,085 exclusive of interest. This is confirmed by Rossell when he says that Avicola commenced making these payments in 1998 but had not finished doing so when these proceedings were commenced in Bermuda. Lisa has not received any payment from any entity associated with the Avicola Group since 1998, despite maintaining one third economic interest in Avicola. Again, none of these facts are challenged by the Defendants.

72.5 Rojas confirms that the executives of the Avicola operating companies were paid "*ex gratia* payments" or "bonuses" by reference to the net amount of the premiums ceded to the Leamington transportation policies and their percentage share in the underlying Avicola companies. Villaverde confirms that these payments in relation to the Leamington programme to the executives were in fact made by Villamorey. Villaverde has confirmed that all the premiums received by Villamorey from Leamington after 1995 were transferred to La Brana for the benefit of the Gutierrez

Mayorga and Bosch Gutierrez families. The only other source of funds available to Villamorey was its shareholding in the Avicola companies. It appears, therefore, that the "distributions" made by Avicola (whether on the books or off the books) to Villamorey were used, in part, to make the incentive payments to the executives of the Avicola operating companies. Lisa, being a one third shareholder of Villamorey, was necessarily injured as a result of those payments."

84. Leamington submitted in paragraphs 15 to 18 of its Skeleton Argument as follows:

15. The essence of Lisa's claim is that the first defendant Leamington, a Bermudian Class I reinsurance captive, was a fraudulent vehicle used to distribute AVSA's funds to AVSA's other shareholders to the exclusion of Lisa. Lisa claims that Leamington perpetrated this alleged fraud by means of issuing policies covering non-existent risks at grossly inflated premiums. Lisa appears to be suggesting that Leamington was used as a vehicle for laundering "off-book" cash generated in Guatemala through the alleged background frauds. However, Lisa offers no explanation as to why a perpetrator of such a fraud would want to remit "cash" proceeds to a closely regulated corporate vehicle operating in a heavily scrutinized jurisdiction, a vehicle in which Lisa moreover, prior to 1995, had an equivalent interest. This suggestion accordingly makes no sense.

16. It is important to emphasise that fraud is the essence of Lisa's claim. Unless it can establish that the whole purpose of the Leamington reinsurance programme was to deprive it of sums which it would otherwise have received in its capacity as a

shareholder in AVSA, its pleaded claim will fail. If, for example, the most that Lisa could establish was that companies in the Poultry Group paid inflated re-insurance premiums to Leamington with a view to say, minimising tax paid in Guatemala and/or building up reserves in a tax friendly environment such as Bermuda, that would get Lisa nowhere: it had after all the same shareholding in Leamington as it had in the poultry companies, at any rate until 1995 when it disposed of its indirect interest in Leamington. Lisa has accordingly to go further and show that the whole purpose of the Leamington reinsurance programme was to deprive it of sums it would otherwise have received as distributions in its capacity as a shareholder in AVSA.

17. In this regard, Lisa's case faces a number of insuperable difficulties:

(i) It is common ground between the parties that Leamington only wrote two kinds of re-insurance business: transport policies and all-risks property policies. Lisa's Re-Amended Statement of Claim acknowledged (paragraph 15 – Trial Bundle ref) that Leamington wrote some genuine re-insurance business, but without any indication of which business was genuine and which was alleged to be fraudulent. Although Lisa was pressed to give particulars of which policies it was challenging, it was apparently unable to do so before service of its experts' reports. Accordingly, and for this reason, Kawaley J ordered sequential service (rather than simultaneous exchange) of experts' reports on 24 August 2007. From the relevant reports (see in particular), it is apparent that Lisa is not challenging the bona fides of the all-risks property policies, as opposed to the transport policies. However, the only reinsurance that AVSA itself ever purchased was property all-risks reinsurance. Accordingly, unless

it can make good its new case on the "de-facto" group, its claim will fail even if it is able to establish that the premiums paid by the other Poultry Companies in respect of transport re-insurance were grossly inflated.

(ii) Prior to its sale of its indirect interest in Leamington in 1995, Lisa in fact received dividends from Villamorey totalling some \$816,660, which reflected Lisa's share of the dividends declared by Leamington. Even after that sale, Lisa received ex gratia payments by reference to the profits that had been generated by Leamington on business with companies in which Lisa still had a shareholding interest. The result of such dividends and ex gratia payments is wholly inconsistent with the thrust of Lisa's case; namely, that Leamington was used as a vehicle to defraud it of sums that it would otherwise have received by way of dividends qua shareholder in AVSA.

18. Further, Lisa's case as regards the alleged Leamington fraud is riddled with inconsistencies:

(i) Lisa's principal witness of fact, Juan Guillermo Gutierrez, goes to great lengths to stress that Leamington's operations cannot be justified simply on the basis that tax advantages arose from its use. Yet Lisa's expert on insurance matters, Mr Spragg, appears to base many of his manifold criticisms of Leamington on the very fact that it appears, in his view, to have been used primarily as a mechanism for reducing tax payable in Guatemala.

(ii) AVSA would not have enjoyed any tax advantage from the Leamington programme if it had been used to launder "off book" cash from the sale of live chickens. On Lisa's case such cash sales were, in fact, being effected in order to avoid paying tax in

Guatemala. Conversely, there might well be tax advantages to be gained from the Leamington re-insurance programme to the extent that "on the books" legitimate profits that would have been subject to tax in Guatemala were reduced through the payment of premiums to Leamington.

85. In Leamington's Headline Points for Closing, it is submitted that Lisa cannot maintain a claim for any loss it suffered otherwise than as a shareholder of AVSA, a broad contention which has already been rejected above. This is a point which can validly be advanced by AVSA itself, but has no or no material bearing on Leamington's liability for any damage it has caused since Lisa has from the outset explicitly sought to recover losses referable to Avicola as a whole. Leamington's Headline Points for Closing do not directly address the following issues at all: (a) whether Leamington intended to injure Lisa, (b) whether Lisa in fact was injured as an Avicola Group shareholder. Leamington's case, based on its Skeleton Argument, may be summarised as follows. There was no intention to damage Lisa because (a) Lisa has failed to show that *"the whole purpose of the Leamington reinsurance programme was to deprive it of sums it would otherwise have received as distributions in its capacity as a shareholder in AVSA"*; (b) prior to the sale of its Leamington interest in 1995, Lisa received its share of dividends (and an accidental shortfall was later tendered) and after the sale it received an *ex gratia* payment equivalent to that received by the Avicola executives. This is inconsistent with a fraud on Lisa; and (c) Lisa's expert evidence suggests Leamington was used for tax purposes, which is inconsistent with Juan Guillermo's assertion that it was a money laundering vehicle.
86. Subject to considering the legal elements of the conspiracy and other claims, which are dealt with separately below, I reject the broad submission that Lisa can only complain of loss if it proves that the entire purpose of the Leamington programme was to defraud Lisa. However, I accept the narrower argument advanced by Mr. Riihiluoma that the averments that Leamington was primarily a money laundering vehicle have not been proved. In my judgment Leamington was

established primarily for tax purposes and Lisa itself was forced to concede that the Property All Risks programme was legitimate reinsurance.

87. The crucial evidential question is whether or not Leamington may be said to have injured Lisa as a shareholder of the Avicola Group. This may helpfully be considered in relation to three main scenarios: (1) post-1995 assuming Lisa's Leamington interest was not sold by Villamorey to La Brana; (2) post-1995 assuming Lisa's Leamington interest was sold by Villamorey to La Brana. I consider the latter scenario in case my primary finding that Lisa did not sell its indirect interest in Leamington is held to be wrong; and (3) whether Lisa suffered actionable injury under Guatemalan law?

Injury to Lisa: the post-1995 period assuming Lisa's Leamington interest was not sold by Villamorey to La Brana

88. The principal evidence which supports an intention to deliberately injure comes from two facts which cannot be disputed. Firstly, in the August 20, 1998 meeting, Rossell, an officer of Leamington, represented that substantial dividends had not yet been distributed by Leamington:

"You are going to start to receive all the profits... because we have left Levington [phonetic] a little over time...in order to strengthen the company and we hadn't distributed dividends...So, from today forward the money will start to come in to you...today I believe that, umh...ninety-five was cleared, I think it was? But throughout the rest of the year, we're going to send you all the pending amounts to get up-to-date on...on Levington..."³⁰

89. Secondly, it is clear that Lisa had received some of its dividend entitlement for the period 1990 to 1994 so that Rossell must have been speaking about the period 1995 onwards. Moreover, the phrase *"You are going to start to receive all the*

³⁰ Volume E, pages 192-193.

profits" in the present continuous tense is clearly prospective and cannot sensibly be read as a statement limited to what overdue amounts from the pre-1995 era. This rebuts the notion that Lisa's interest in Leamington had been sold in 1995, in which case no commitment to pay Lisa a dividend for 1995 (already "approved") and other "pending" dividends would have arisen for discussion. But more importantly, it is admitted that approximately \$10 million was in fact declared and distributed by Leamington through Villamorey between 1996 and 1998 so this excuse for non-payment of Lisa was plainly false. Ms. Yip does not dispute Mr. Gardemal's assertions in his November 29, 2007 Report where he outlines the following sample dividend payments:

- (i) February 2, 1996, Leamington distributed a \$1.2 million dividend to Villamorey, less than a month after a similar amount was paid into Leamington by Ancona by way of premium;
- (ii) April 28, 1997, Leamington distributed \$3 million to Villamorey by way of dividend;
- (iii) February 23, 1998, Leamington declared a dividend for \$3 million which was paid on February 1, 20 and March 12, 1998 in equal instalments.

90. Rossell by his own account has been General Manager and a director of Multi-Inversiones "*in charge of coordinating risk management for Multi-Inversiones and its affiliated or related companies*" (Witness Statement, paragraph 3). He has also been Leamington's Secretary and Treasurer since 1993 who "*held periodic meetings with Lionel Asensio and representatives of the Poultry Companies as to risks to be insured and the best use of Leamington*" (Witness Statement, paragraph 4). He must have known at the August 20, 1998 Toronto meeting that these and other substantial distributions had been made by Leamington.

Leamington's discovery documents show that requests for these distributions were typically made during this time period by Alameda with which Briz (Leamington's President) was associated. For example Briz spoke to Don Baker of Leamington's Insurance Managers about the availability of cash for dividends on November 10, 1995. Briz was then informed that on November 15, 1995 a \$1.1 million dividend had been paid to Villamorey. In each case Briz was faxed at Alameda³¹. Alameda consistently gave the dividend instructions during this period although Asensio often signed the relevant correspondence³². Briz himself on January 22, 1996 requested "*a Declaration of Dividends to be paid as soon as possible to VILLAMOREY, S.A.*", writing on Alameda letterhead and using the title "General Manager"³³. The link between Leamington's President, Briz, and Alameda, may explain why instructions from Asensio in relation to matters unrelated to the reinsurance programme (e.g. dividend and capital structure matters) appear to have been routinely accepted by Leamington's Bermuda-based agents. According to Gardemal's Report, Briz himself in a June 23, 1994 letter characterised Alameda as the "*functional division and office in charge of insurance and reinsurance*" for Multi-Inversiones³⁴.

91. Briz as the Multi-Inversiones treasurer would likely have worked under the general supervision of the General Manager Rossell. Briz was also at all material times President of Leamington and General Manager of Multi-Inversiones controlled Alameda. This constellation of facts not only illustrates why the best available evidence strongly points to Multi-Inversiones (and not AVSA) being viewed as the corporate entity which controlled Leamington. It also demonstrates that Rossell was in real terms a key agent and directing mind of Leamington, whose admissions and knowledge may properly be attributed to the First Defendant.

³¹ Volume K8, pages 434, 443.

³² Volume K [], pages [].

³³ Volume K8, page 383.

³⁴ Volume G 1, page 20, paragraph 2.

92. So Rossell was deliberately misleading Juan Guillermo on August 20, 1998 when he represented that Leamington had made no distributions since 1994, a 1995 dividend had merely been approved and further dividends were pending, while acknowledging that Lisa was entitled to participate in distributions which in fact had been made. His knowledge that Lisa had not received its share of these distributions and collusion in concealing the true position from Lisa is attributable to Leamington, which I find intended to injure Lisa and did injure Lisa to this extent. Leamington was allowing itself to be used as a vehicle to defraud Lisa by making distributions to Villamorey which were not being distributed (or promptly distributed) to Lisa but which had been, as Mr. Gardemal found without contradiction, actually distributed to the other two Villamorey shareholders at the date of the August 20, 1998 Toronto meeting . Of course, there is no suggestion whatsoever that any of these facts could possibly have come to the attention of Leamington's Bermuda-based insurance and/or legal representatives.
93. It is perhaps somewhat unclear whether Lisa would have received some or all of its entitlement had the present proceedings not been commenced and the secret recording not been revealed, as Rossell promised in Toronto in August 1998. On any view at that juncture, Lisa in fact had not received what is now admitted to be its full entitlement in respect of pre-1995 dividends, and was prejudiced by the delay in receiving the post-1995 dividends which had been distributed to Avicola's other shareholders. Dividing a Villamorey dividend into three is far from high science, yet Lisa was only offered its full pre-1995 dividend share in April 1998, ten years after it began investigating the financial position. Assuming Villamorey is indeed still the sole shareholder of Leamington, there is no doubt that Lisa has been injured by being deprived of its rightful third share of the post-1995 dividends described above. The position in economic terms is essentially the same as Lisa would any event have been entitled to one-third of the profits of the Avicola Group and Villamorey even if the Leamington interest had been sold.

94. Lisa cannot complain of being deprived of its share of the Villamorey dividends directly in the present proceedings because it abandoned any such claim years ago. But Lisa can complain that if the premiums which generated those profits, essentially through bogus reinsurance arrangements (the Transportation Policies) were not funnelled out to Leamington in that way, Lisa would as a shareholder of Avicola have participated in those monies in any event. The Plaintiff's primary case is that those profits ought to have been distributed by the Avicola companies themselves, and not channelled through Leamington at all.

Injury to Lisa: the post-1995 period (assuming Lisa's Leamington interest was sold by Villamorey to La Brana)

95. I now consider the position on the hypothesis that Lisa's indirect Leamington interest was indeed sold in 1995 as Leamington contends, in circumstances where the Transportation Policies were not genuine reinsurance and were a vehicle to gain illicit tax advantages for the two branches of the Gutierrez family to the exclusion of Lisa.

96. On this hypothesis, which clearly was not advanced by Lisa at all, the case for construing the transportation aspects of the Leamington programme as calculated to injure Lisa is, it seems to me, even stronger³⁵. The financial record shows that the overwhelming majority of dividend payments were made after the purported sale. This would suggest even more strongly that once Lisa sold its interest in Leamington, the Controllers decided to exclude Lisa altogether from the Avicola-generated profits by distributing them through a corporate vehicle (Leamington) in which Lisa had no interest at all. It would also suggest that Lisa was misled into selling its interest in the highly profitable Leamington for nominal consideration, because Rossell's 1998 explanation of how Leamington worked strongly suggests that Rossell had reason to believe that Lisa at that late stage did not fully understand the role played by Leamington.

³⁵ It is possible that the loss calculation is more complicated and it seems obvious that accepting that the sale of a valuable interest for nominal consideration in fact took place in 1995 is contrary to Lisa's commercial interests.

97. If Lisa's interest was sold for nominal consideration shortly before Leamington started to distribute the bulk of its dividends generated by Avicola "premium" income, I would have found that from this point (if not from the outset) a substantial purpose of Leamington was to defraud Lisa of its share of the Avicola Group profits.
98. But for the reasons I have already stated, my primary finding is that a proposed sale of Lisa's interest in Leamington was never consummated, and that defrauding or injuring Lisa was only a subsidiary function of the purported Transportation Policies which were predominantly used for tax evasion/avoidance purposes.

Legal and factual findings: did Lisa suffer actionable injury under Guatemalan law?

99. Professor Gordon very robustly asserted that Lisa could sue a third party such as Leamington for damage suffered by it in relation to its AVSA shareholding. Such injury would be direct injury and not merely reflective of Avicola's loss (Reply Report, paragraph 21). Mr. Iburguen very firmly asserted that Lisa could not assert a claim against AVSA or Lisa under the Commercial or Civil Codes of Guatemala because it could only complain of suffering direct or personal loss in respect of AVSA dividends which had been declared but not paid.
100. I have already found that Lisa's case against AVSA based on the theory that it was the *de facto* parent of those Avicola companies which were reinsured by Leamington under the Transportation Policies has not been proved. No need to consider the position as regards AVSA arises. Had I been required to decide the liability of AVSA under Guatemalan law, I would have accepted the opinions expressed by Mr. Iburguen in his oral evidence and, in particular, paragraphs 22 - 23 of his Third Affidavit and held that the claims against AVSA failed under Guatemalan law because no direct injury was suffered.

101. What is relevant is whether as regards the double actionability rule Lisa has proved that the tort of conspiracy claim is maintainable against Leamington under both Bermuda law and Guatemalan law on the assumption that the tort was substantially committed in Guatemala. This was decided as a preliminary issue by me (and subsequently affirmed by the Court of Appeal) as follows:

“46. The Defendants correctly assert that to justify an action in Bermuda for a tort committed abroad, the claim must be both actionable in Bermuda and the place where the tort was committed: Chaplin –v–Boys [1971] A.C. 356. The Plaintiff answers that the claims under paragraphs 15 and 16 are for equitable fraud, not tort at all. And the tortious conspiracy cause of action is based on acts committed by Leamington in Bermuda, not on torts committed abroad. Further and in any event, all claims would be actionable in Guatemala as causing intentional or negligent harm under Article 1645.

47. I accept Mr. Hargun’s submission that Lisa’s claims under paragraphs 15 and 16 do not engage the double actionability rule at all, because they are not foreign tort claims. As far as the conspiracy claim is concerned, the crucial test advanced by the Plaintiff’s Counsel is the following dictum of Slade LJ in Metal & Rohstoff–v– Donaldson Inc. [1990] 1 Q.B 391 at 446:

“In our judgment, in double locality cases our courts should first consider whether, by reference exclusively to English law, it can properly be said that a tort has been committed within the jurisdiction of our courts. In answering this question, they should apply the now familiar ‘substance’ test...If on the application of this test, they find that the tort was in substance committed in this country, they can wholly disregard the rule in Boys v. Chaplin ...; the fact that some of the relevant acts occurred abroad will thenceforth have no bearing on the defendant’s liability in tort. On the other hand, if they find that the tort was in substance committed in some

foreign country, they should apply the rule and impose liability in tort under English law, only if both (a) the relevant events would have given rise to liability in tort in English law if they had all taken place in England, and (b) the alleged tort would be actionable in the country where it was committed. We appreciate that the application of the substance test may give rise to difficult problems on the facts of some cases..."

48. *It is far from clear, having regard to the Plaintiff's pleaded case alone, where the tort was in substance committed. The conspiracy case is particularized in reliance on paragraphs 1-15 of the ASC, which embraces three frauds admittedly committed abroad. On balance, it seems to me that the alleged tort was in substance committed abroad, thus engaging the double actionability requirement.*

49. *I am satisfied that although the double actionability rule is engaged as regards paragraph 17 of the ASC, the acts complained of would be actionable in Bermuda and under Guatemalan law, in particular, under article 1645 of the Civil Code. To the extent that the pleading suggests that relevant acts may have occurred in El Salvador and Honduras³⁶, in the absence of expert evidence, this Court is entitled to rely on the presumption that foreign law is the same as Bermudian law. So I would reject the objection to Lisa's standing based on the application of the double actionability rule."³⁷*

102. Having regard to the evidence adduced at trial, I find that the conspiracy complained of was partly committed in Bermuda (where the dividends were formally declared), but substantially committed in Guatemala where the controlling minds of Leamington were primarily based. How was the conspiracy

³⁶ The domicile of two of the fronting companies according to paragraph 14 of the ASC.

³⁷ Volume B2 TAB 27; [2006] Bda LR 9.

actionable under Guatemalan law? I accept the evidence of Mr. Ibarguen that simulation requires both parties to the transaction to intend it to be a sham³⁸. Mr. Ibarguen agreed that in general terms Lisa's case would give rise to an action against the Administrators³⁹; but this would be a shareholder claim, not a claim against a third party such as Leamington. Mr. Ibarguen was bound to admit in general terms that where a legal person causes direct injury to another, they would be liable under Article 1645 of the Civil Code⁴⁰. Professor Gordon was therefore in my judgment right to assert quite confidently that the conspiracy to defraud claim against Leamington (and AVSA) if proved would be actionable under Guatemalan law:

"...Article 1645. Any person who has caused damage or injury to another, intentionally or negligently, is obligated to repair it, except where it is established that the damage or injury was produced by the fault or negligence of the victim...This provision is common to every civil law tradition nation law dealing with negligent or intentional injury...The possible examples are endless. The common thread is that (1) a person...(including artificial persons) has (2) caused (3) injury (4) intentionally or negligently (5) to another...It is my opinion that Lisa has a separate cause of action under Guatemalan Civil Code Article 1645 against Avicola or Leamington...Guatemala has no provisions which directly create conspiracy as a civil action. However, Article 1645 applies to collective actions by more than one person, and conspiración is recognised in the civil law as two persons joining together for an unlawful purpose."⁴¹

Legal and factual findings: conspiracy to defraud claim

103. In terms of identifying the legal elements of the tort of conspiracy to defraud, it is necessary to distinguish two main scenarios. Firstly, where the conspiracy

³⁸ Day 8, pages 1316-1317, 1364-1367.

³⁹ Day 8, page 1346.

⁴⁰ Ibid, pages 1380-1382.

⁴¹ Report, paragraphs 20-21.

involves unlawful means, an intention to injure the claimant is all that need be proved: *Clerk & Lindsell on Torts*, 14th edition (Sweet & Maxwell: London, 2006), paragraph 25-123. Ancillary to this point is the requirement that where the illegality relied upon involves the contravention of a statutory provision, as opposed to fraudulent means alone, the relevant statute must be construed to determine whether civil action is permissible for the contravention in question: *Clerk & Lindsell*, paragraphs 25-130-25-136. Where the conspiracy is effected by lawful means, the predominant purpose of the conspiracy must be shown to have been to injure the claimant: *Clerk & Lindsell*, paragraphs 25-130-25-136. In determining whether or not Leamington participated in the conspiracy, this Court must ascertain whether the Plaintiff has proved that its participation took place with the requisite knowledge of the unlawfulness of the conspiracy⁴².

104. The conspiracy to defraud claim is, as previously set out above, pleaded as follows:

“17. Further, and in the alternative, the matters complained of in paragraph 15 and 16 hereof were committed by Leamington pursuant to a conspiracy between the Controllers (and in particular Rosell) and Leamington and (by reason of the matters set out in paragraph 17C and 17F below) Avicola to defraud Lisa of its true entitlement as a shareholder of Avicola of the distributions made by Avicola. The parties to the conspiracy included Losen, Rojas, Bonifasi, Rossell, Avicola and Leamington. Leamington joined the conspiracy after its incorporation on 23 July 19[8]7.”

105. The primary plea was a conspiracy to defraud. However, the particulars relied upon under paragraph 15(i) cross-refer to the Pollos Vivos, Los Cedros and

⁴² See *Walsh and Taal –v- Horizon Bank International* [2008] Bda LR 16; [2008] SC (Bda) 20 Com, paragraphs 114-120, 130

Ancona Frauds. It is true that these "background frauds" make reference to breaches of Guatemalan tax law and laundering which have not been adequately proven, but the main thrust of the allegations is a fraudulent exclusion of Lisa from its share of the Avicola profits. It follows that the main thrust of the pleaded case on the Leamington fraud is that the reinsurance programme (limited at trial to the Transportation Policies programme) was fraudulently used as a means to exclude Lisa from its rightful share of the Avicola profits. The central allegation is that the policies were not genuine. The conspiracy alleged was neither a lawful means conspiracy nor was it an unlawful conspiracy requiring construction of the statutes allegedly contravened.

106. Although I am not satisfied that the predominant purpose of the conspiracy was to injure Lisa, the Plaintiff has proved that there was an intention to injure Lisa in relation to a conspiracy involving the use of (fraudulently) unlawful means. Lisa has also proved that the conspiracy involved the Controllers and was joined by Leamington after its incorporation in 1987. It is clear that Rossell, in particular, had actual knowledge of all of the facts which made the conspiracy unlawful. The most cogent evidence of this is his frontline role at the August 20, 1998 meeting in misleading Lisa's principal about the distributions made by Leamington from which Lisa had been indirectly excluded. His knowledge may be imputed to Leamington because "*an officer of a company must surely be under a duty, if he is aware that a transaction into which his company or a wholly owned subsidiary is about to enter is illegal or tainted with illegality, to inform the board of that company of the fact. Where an officer is under a duty to make such a disclosure to his company, his knowledge is imputed to the company*": *Belmont Finance Corporation-v- Williams Furniture Ltd.* (No.2) [1980] 1 All ER 393 at 404 (per Buckley LJ). Rossell was admittedly (a) both secretary and treasurer of Leamington from 1993, (b) in charge of coordinating risk management for Avicola, (c) in charge of Lionel Asensio, who ran Agencia de Seguros Empresariales, S.A., an insurance brokerage company, under his supervision and (d) at all material times also an officer of Multi-Inversiones. As such Rossell (and

Leamington's President Briz) knew that no genuine transfer of risk took place under the Transport Policies and that the profits generated were not being distributed to Lisa.

107. The Plaintiff has proved its tortious conspiracy to defraud claim.

Legal and factual findings: Lisa's equitable fraud claim

108. In its Closing Submissions, Lisa submitted as follows:

"130. The factual allegations in relation to Lisa's case on equitable fraud are set out in ¶s 8 & 15 of the Amended Statement of Claim. Lisa contends that Leamington was a participant in this fraudulent scheme to launder monies (whether on or off the books), to reduce the profits of Avicola and to reduce the dividends which would otherwise be payable to the Plaintiff. Lisa also asserts that knowledge of Rossell, as president, director and secretary of Leamington, is to be attributable to Leamington and that Rossell has been at all material times the controlling mind of Leamington (¶18). Lisa puts this case under equitable fraud in two ways.

131. First, on the basis of the plea that the transportation reinsurance contracts in substance were a sham and a fraud, Bermuda law will in those circumstances impose a constructive trust on Leamington as the fraudulent recipient of the premium. Equity will recognise the proprietary interest of the party defrauded.

132. Second, Lisa puts its case on the basis of dishonest assistance/knowing receipt – see further below.

133. In terms of remedies for equitable fraud, Lisa claims constructive trust (¶1 of the relief), return of the monies held upon trust, (¶2), accounting (¶5) and payments of monies due upon the taking of account (¶6)."

109. This claim, which relies on the same facts as the conspiracy to defraud claim in respect of a more straight forward cause of action, has also been proved. I find that the Transportation Policies were in substance a sham and a fraud because (a) they were not genuine reinsurance, and (b) were used in part to defraud Lisa of its rightful share of the Avicola profits. It bears repeating that the policies were valid on their face and that this finding is not based on a technical analysis of the reinsurance arrangements which Leamington's Bermuda-based insurance managers or lawyers ought to have carried out. Rather it is based substantially on an analysis of the surrounding evidence as to (a) the motivations of the controlling minds of Leamington, as partially evidenced by their own admissions, and (b) the fact that after Leamington's dividends were declared in Bermuda, Lisa was excluded from participating in the distributions made by Leamington's Panamanian shareholder, Villamorey.
110. I further find that Lisa's 1/3rd share of the premiums received by Leamington in respect of the Transportation Policies were received by Leamington with knowledge of that fraud constituting the First Defendant a constructive trustee in the Plaintiff's favour of the sums received. For the reasons already set out above, the relevant knowledge of Rossell and Briz as controlling minds of Leamington is attributable to Leamington.

Legal and factual findings: Lisa's claim for dishonest assistance/knowing receipt

111. This claim which relies on the same facts as applicable to the two aforementioned claims is also proved as against Leamington. Lisa's closing Submissions stated as follows:

"135. As set out above in ¶s 130 - 134, there was a constructive trust on Leamington as the fraudulent recipient of the false reinsurance premiums.

136. In addition, Leamington (by Rossell at the very least) well knew that the "premiums" received by it ultimately from Avicola were not bona fide insurance premiums but were fraudulent in nature. Leamington (by Rossell at the very least) was party to the scheme to launder the monies of Avicola (whether on or off the books) through Leamington by false insurance premiums. In those circumstances, the party defrauded (Lisa) is entitled to enforce a constructive trust over the proceeds of the fraud on the basis of dishonest assistance and/or knowing receipt (see El Ajou v Dollar Land Holdings PLC [1994] 2 All ER 685).

137. The elements giving rise to the cause of action for dishonest assistance are:

137.1A trust or other fiduciary relationship;

137.2A breach of trust or other fiduciary duty on the part of the trustee or other fiduciary;

137.3A causal link between the breach and the loss to the beneficiaries,

137.4 Assistance by the defendant in the breach;

137.5A dishonest state of mind on the part of the assistant.

See Underhill & Hayton, The Law of Trusts & Trustees, 17th ed, at para 100.18.

138. The elements giving rise to the cause of action for knowing receipt are:

138.1 Property held on trust or subject to some other fiduciary duty;

138.2 Misapplication of the property by the trustees or fiduciary in breach of trust or fiduciary duty;

138.3 Receipt of the property or its traceable proceeds by the defendant;

138.4A causal link between the defendant's receipt and the breach of trust or fiduciary duty;

138.5A dealing with the property by the defendant for its own benefit, and not in his character as agent for another party;

138.6 Knowledge by the defendant that the property has been transferred in breach of trust or fiduciary duty, either at the time of receipt or at any other time prior to his dealing with the property for his own benefit.

See Underhill & Hayton, The Law of Trusts & Trustees, 17th ed, at para 100.52.

139. These elements are all made out on the present facts. In particular, claims under these causes of action are not limited to situations where an express trustee has misappropriated trust property. They can also lie against defendants who have assisted in or received property misappropriated by other

fiduciaries who have voluntarily assumed responsibility for managing the property or where a defendant has received or helped a constructive or resulting trustee to misapply the trust property: see Bank Tejerat v Hong Kong & Shanghai Banking Corporation (CI) Ltd [1995] 1 Lloyds' Rep 239 and Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd's Rep Bank 511. Avicola and the Controllers are here liable as constructive trustees for the misappropriation of Avicola's assets. Leamington is liable for its role in receiving those assets by way of fraudulent reinsurance premiums and/or assistance in laundering those assets.

140. The pleas of equitable fraud and relief of constructive trust seek to obtain restitution from Leamington. As a matter of Bermuda conflict rules, the obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation. The proper law of the obligation is (if the obligation arises otherwise than in connection with a contract or land) the law of the country where the enrichment occurs (see Rule 200 of Dicey & Morris: The Conflict of Laws, 13th Edition. Furthermore, only Bermuda law is relevant on the basis that the acts complained of took place in Bermuda."

112. I find that Leamington knowingly assisted a misapplication of the Transportation Policies by its receipt and distribution of the premiums paid in respect of the Transportation Policies and that the elements of the claim as delineated in the above submissions have been made out. Two points require further analysis as regards both constructive trust claims, and which arise from the above submissions.

113. In relation to the tortious conspiracy claim, I have found that the tort was substantially committed in Guatemala where it seems to me the tortious acts substantially occurred. It was there that the relevant instructions were given, implemented in Bermuda, which caused Lisa loss. Is it possible to find in the context of these alternative constructive trust claims that Bermuda law governs the obligation to make restitution because this is where the enrichment occurred? The discussion in *Dacey and Morris* on Rule 200 suggests: (a) where a restitutionary obligation is created following the commission of a tort, the law which governs the tort should also govern the equitable obligation to make restitution; (b) although the law where the enrichment occurs generally determines a constructive trust claim, this principle is not overwhelmingly supported by clear judicial authority, and factual variations may justify a different approach. The need to consider the constructive trust claims only arises in the present case on the hypothesis that no tort has in fact been committed at all (either because I am wrong in holding that the elements of the tort have been proved under Bermuda law or wrong in holding that the conduct complained of is actionable in Guatemala). In any event, I have found that Bermuda law governs the tort claim because the tort was partially committed abroad and the double actionability rule is met. In terms of looking at where the unjust enrichment occurs in relation of the constructive trust claims, however, the unjust enrichment complained of (as opposed to the acts causing it) substantially occurred in Bermuda to the extent that the premiums were (a) received by a Bermuda company, and (b) distributed with the approval of Board resolutions passed at meetings held in Bermuda.
114. The second issue which is not self-evident is the requirement that the constructive trustee knew of the breach of trust either (a) when the monies were received, or (b) before they were distributed in breach of trust. It is clear that the knowledge of Rossell can be attributed to Leamington from 1993 when he became an officer of Leamington and became deeply involved with the Avicola risk management programme. It is unclear precisely when in 1993 Rossell became involved, and

\$200,000 was declared that year. The vast majority of dividends were declared after 1993, and although \$2.5 million was paid before 1993, it is common ground that Lisa was partially paid its share of all pre-1995 monies and the entitlement of Lisa to the shortfall is not in dispute. It therefore is not necessary to consider the pre-1993 position in terms of what knowledge can properly be attributed to Leamington.

115. Although the preponderance of the evidence does suggest that Briz, admittedly Treasurer of Multi-Inversiones from 1984 to 2003, had actual knowledge of any breach of trust before the Leamington dividends were distributed, it accordingly matters not that the position prior to 1993 is ambiguous. Not only was Briz President of Leamington at all material times. Although he omits mention of this in his Affidavit, he was intimately involved with the dividend process. Firstly, as already mentioned when discussing the broad question of a fraud on Lisa above, he held himself out to be General Manager of Alameda. This was a company of which Lionel Asensio was Operations Manager, and Asensio was involved in both forwarding premiums and requesting the payment of dividends. Alameda, it seems obvious, was acting on behalf of the other two branches of the Gutierrez family, who owned Multi-Inversiones. Thus Briz on June 30, 1992 wrote to Leamington's insurance managers on Alameda letterhead stating: "*We hereby request a declaration of dividends to be paid to VILLAMOREY S.A. in the amount of U.S. \$1,300,000.*"⁴³ On that date \$1.3 million was paid to Villamorey, and \$200,000 was lent to Alameda. The dividend was retroactively approved in November 1992 when Lisa received 1/3rd of the total "distribution", even though only \$1.3 million was formally approved as a dividend. It is unclear that the comparatively small pre-1995 deficit is attributable to the pre-1993 era before Rossell entered the stage. But Briz' involvement as President of Leamington and agent for Villamorey, through Alameda, in 1992 strongly supports the inference that he knew that Leamington was acting in breach of trust in declaring dividends which were not paid to Lisa in the post-1993 period. On January 22, 1996, writing

⁴³ Volume K8, page 97.

as General Manager of Alameda, he requested that a dividend of \$750,000 should be paid by Leamington to Villamorey⁴⁴. A similar request had previously been made by him on November 13, 1995 for a \$1.1 million dividend⁴⁵. It seems more likely than not that Briz made these requests both with knowledge that Villamorey would exclude Lisa from its share of these monies and well-knowing that Lisa was a shareholder of Villamorey. Such knowledge on the part of Leamington's President is attributable to Leamington itself. It is in the face of these distribution requests that Briz himself admits that at all material times Villamorey was the sole shareholder of Leamington, and does not support the proposition that Villamorey sold its shareholding in Leamington in early 1995.

116. The general pattern appears to have been that before Leamington declared the dividend or made a distribution, a request came from Alameda. On a balance of probabilities it seems to me to be clear that when the request was made for a distribution, it was known how the funds were going to be disbursed. There can be no suggestion (in the absence of positive evidence to this effect) that it was only after Villamorey received the funds that a decision was made to exclude Lisa from the ultimate distribution. Briz' knowledge supports the knowing receipt claim alone, while Rossell's knowledge supports both the dishonest assistance and knowing receipt claims. In assessing the cogency of the evidence as to their knowledge generally, it is noteworthy that neither of these officers was willing to give oral evidence on oath to deny or refute the prejudicial inferences which clearly arise from the documentary and other evidence before this Court.

Legal and factual findings: Leamington's defence to the fraud and constructive trust claims

117. Leamington defended its position on three broad fronts: (a) the assertion that the Transportation Policies were not fraudulent, and (b) the following submissions set out in paragraph 5(i) of its Headline Points for Closing:

⁴⁴ Volume K8, page 383.

⁴⁵ Volume K8, page 438.

“Lisa’s case that Leamington was used as a vehicle to launder moneys generated by purported off-book sales of live chickens, oranges and manure is entirely irrelevant to the relief sought against Leamington. But, on any view, that case was shot to pieces at trial. Leaving aside the inherent improbability of AVSA or the other poultry companies using alleged off-book, untaxed monies to pay premiums on policies re-insured by Leamington (thereby gaining no tax advantage), rather than reducing their taxable profits by using on-book funds to pay the premiums (thereby throwing up profits in a low tax environment), Lisa’s accounting expert freely stated that he could not determine whether on-book or off-book funds were used to pay the premiums on policies reinsured by Leamington. [7/1146, line 7- 7/1148. line 10]. It is for Lisa, as claimant, to prove its case. If it cannot do so now, after ten years of litigation, its case cannot succeed.”

118. And (c), in its Supplemental Headline points for Closing, Leamington made the following additional points:

“1. In essence, Leamington submits the point is this: vicarious liability can be used to make defendants other than the primary wrongdoer liable for matters that have been pleaded. It cannot be used to make a defendant liable for matters that have not been pleaded.

2. A few simple propositions may help to explain Leamington's position. Assume that Lisa has suffered a loss of \$X as a shareholder in AVSA and \$Y as a shareholder in the other 18 companies. Assume also that all 19 companies are found to be co-conspirators against Lisa.

- i. *There is no reason in principle why, if all 19 companies are joined as defendants each one of the 19 should not be jointly and severally liable for \$X plus \$Y.*
- ii. *Equally, if only one of them is joined as a defendant (say, AVSA), Lisa can still hold that one defendant liable for the damage it has suffered as a shareholder in all of them – i.e. for \$X plus \$Y, if its claim is appropriately made. It would have to bring the claim in its capacity as a shareholder in all 19 companies, not just as a shareholder in AVSA; and it would have to plead the loss it had suffered as a shareholder in each.*
- iii. *However, if the only loss claimed is the loss suffered as a shareholder in AVSA, the claim being brought as a shareholder in that company but not the other 18 companies, Lisa can only ever recover \$X. (unless, relying on the de facto parent allegations, Lisa can show that the \$Y loss sustained in respect of the other 19 companies would in fact have impacted on the amount of dividends it would have received from AVSA, because the profits of the other 18 companies were paid through AVSA). In this situation, vicarious liability cannot assist Lisa – it cannot be used to make AVSA liable for unpleaded losses suffered by Lisa, suffered in a different capacity to that in which it brought the claim.*

Leamington submits that the point may seem technical, but it is not an empty pleading point. A claim for the loss suffered in any one of the other 18 companies would, in fact, be a different cause of action. It would have required Lisa to prove different facts – most obviously, its position as a shareholder in that company – than those required to be proved in the action as presently constituted.

If Lisa had made an appropriate amendment whilst it was still open to it to do so, expanding the claim to cover loss suffered in its capacity as a shareholder in the other 18 companies, the position may have been different. But Lisa has left it too late to do that, the relevant limitation period having expired; this is undoubtedly why Lisa has chosen to advance its claim via de facto parent allegations.”

119. The last point will be dealt with first. I have already set out above why I reject Leamington’s pleading point that Lisa is not entitled to seek relief in respect of loss suffered in respect of its shareholding in the Avicola companies generally as opposed to simply AVSA. From Leamington’s perspective, the quantum of loss is unaffected because Lisa’s original claim against Leamington was for the loss of its rightful share of the profits of the Avicola Group. Of course the scope of loss is favourably affected from Leamington’s perspective in that it is limited only to the premiums paid by those Group members who were in fact insured under the Transport Policies. The fact that AVSA is not in fact the parent company of the Group has substantive impact on the case against AVSA, but not on the loss sought from Leamington. The suggestion that the other Avicola companies should have been joined by Lisa because it was necessary for Lisa to prove a wholly different case as regards its status of a shareholder of those companies, advanced by Leamington, is wholly unmeritorious. There is no dispute that Lisa is a shareholder of the other poultry companies which were reinsured under the Transportation Policies.
120. If Leamington would have wished to seek a contribution from a joint tortfeasor as this submission appeared to imply, it has always been open to it to serve a third party notice (a) from the outset on AVSA, and (b) from the date of the Plaintiff’s voluntary Further and Better Particulars, on the other Avicola companies concerned. It is not for a Plaintiff to join every potential tortfeasor so as to minimize the exposure of any one of joint tortfeasors. This point is highly

artificial since Leamington and the non-party companies are affiliates, and Leamington and AVSA had common representation for several years. In any event, the alternative constructive trust claims can properly be maintained against Leamington alone.

121. It is true that Lisa has failed to strictly prove that Leamington was a money laundering vehicle, and that this was not an essential element of its case. But this submission is not a substantive answer to the claim that Leamington was used to defraud Lisa. The main substantive defence advanced in respect of the Leamington Fraud was to contend, based primarily on expert evidence, that the Transportation Policies were genuine reinsurance policies. This argument has been rejected above primarily on the basis of an analysis of the factual evidence of fraud which Leamington elected not to call a single witness to controvert through oral testimony. The First Defendant has, on the facts and in the face of admissions by one of its significant operational officers that the reinsurance policies were a sham, essentially put the Plaintiff to strict proof of its core allegations.

Legal and factual findings: Lisa's loss

122. Leamington did not address factual issues of quantum in its Skeleton Argument or its Headline Points for Closing, its case being clearly set out in its expert evidence. I reject as a matter of Bermuda law the broad traverse that the loss claimed is irrecoverable because it is merely reflective of loss suffered by the Avicola reinsureds. On the facts of the present case the loss complained of by Lisa has always been (since the derivative claim was abandoned) alleged to be loss it has suffered separate and apart from the shareholders of the companies as a whole. Having regard to the fact that the Avicola companies are demonstrably under the control of those who are causing the damage complained of, Lisa must be entitled to seek direct relief even if it is theoretically open to it to compel the companies to take the requisite legal action on their behalf: *Johnson-v-Gore-Wood* [2002] 2 AC 1; *Giles-v-Rhind* [2002] EWCA Civ 142.

123. As far as Guatemalan law is concerned, for the reasons previously stated, I am satisfied that the tortious conduct complained of would be actionable against Leamington at the instance of Lisa under Article 1654 of the Civil Code. The position would likely be otherwise as regards AVSA where I found Mr. Ibarguen's evidence that shareholder claims are narrowly prescribed more persuasive.
124. It remains to consider the damages Lisa is entitled to recover for its tortious conspiracy claim and/or the compensation Lisa is entitled to recover for its constructive trust claims. It was agreed that Lisa's interest in the Avicola companies was one-third, taking its Villamorey interest into account. I summarily reject the submission that Lisa should be able to recover 50% of what the other two shareholding interests have received. I also reject the submission, if it was advanced as regards Leamington at all, that Lisa should be able to recover compensation for the executive incentive payments made. This claim would only not be double recovery if it relates to premiums paid in respect of the genuine Property Policies. I am not satisfied, having regard to all the evidence, that such payments (while admittedly unusual, according to Mr. Bailie) fall within the ambit of the Plaintiff's pleaded claims and were made in whole or in part either fraudulently or in breach of trust.
125. The loss has been analysed in two segments; firstly, the pre-1995 loss and secondly the post-1995 loss. Ms. Yip initially agreed that it appeared that Lisa was entitled to \$1,900,085 in respect of the post-1995 period. Mr. Gardemal contended that this was understated by 43%, and Ms. Yip agreed that this figure was understated by 41%. Mr. Gardemal's figure was based on an estimate as he was unhappy to rely on Leamington's documentation alone, and some of the underlying premium documentation could not be found. His percentage was based on an entirely logical estimation process. I find that there is no reason to doubt the accuracy of the premium income reflected in Leamington's audited financial statements on which Ms. Yip relied, and accordingly the post-1995 loss of Lisa is

\$1,900,085 plus \$54,019.14 as Ms. Yip agreed in her oral evidence in respect of arrears owing for the pre-1995 period (including a cheque recently tendered by La Brana in this regard). Mr. Gardemal in his Scenario Y calculated Lisa's one-third share of the premiums paid under the Transportation Policies as \$4,934, 515. But this covered premiums paid by both Poultry Companies and Mills. Scenario X was Poultry Companies only, and this was \$2, 388,039, using a 43% figure which I have rejected in favour of Ms. Yip's 41%.

126. Leamington objected to the production of the June 17, 2008 Update Gardemal Report. I reject that objection as it is always possible for experts to update their evidence in the course of the trial, and the Update was designed to give notice of supplementary calculations. Schedule A to Lisa's FBPs, however, lists nineteen companies which form part of the Avicola Group for the purposes of Lisa's claim. It is Leamington's case that none of these companies are Mills companies. Apart from attempting to broaden the financial scope of a claim which has clearly been substantially reduced by Leamington's success in forcing Lisa to concede the Property Policies were valid reinsurance, it is difficult to comprehend this aspect of Lisa's compensation claim. None of the Mills companies appear in Schedule A to the FBPs, and accordingly they fall outside of the scope of Lisa's pleaded case on loss, generously and purposively read. I am unwilling in these circumstances to infer as against Leamington that Avicola premiums were used to fund the policies of these companies on the grounds that AVSA has failed to make full disclosure.
127. Lisa is entitled to recover these sums plus interest at the statutory rate of 7%. Mr. Hargun invited the Court to leave the parties to calculate the interest, and no submissions were made as to the precise date from which interest should or should not run. In principle, interest should run from the date the relevant premiums were received by Leamington until payment (or possibly until tender of payment.) I will hear argument on the question of interest if necessary.

Summary

128. All claims against AVSA are dismissed on the grounds that there was no sufficient evidence that it was a participant in the Leamington Fraud.
129. Lisa's claims in tort for conspiracy to defraud and the alternative constructive trust claims succeed as against Leamington. Lisa is entitled to recover the total sum of \$1,954,104.14 plus pre- and post-judgment interest at the rate of seven per cent.
130. I will hear counsel as to costs and the computation of interest if required.

Dated this 5th day of September, 2008



KAWALEY J

This is Exhibit "B" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

Villamorey, S.A.
Informe del Auditor Independiente
Al 31 de diciembre de 2010 y 2009

HLB Guatemala**Bámaca Morales & Asociados**

Contadores Públicos y Auditores

Dictamen del Auditor Independiente

Al Consejo de Administración
y a los Accionistas de
Villamorey, S.A.

He auditado los estados financieros que se adjuntan de Villamorey, S. A., entidad domiciliada en Panamá, que incluyen los balances generales al 31 de diciembre de 2010 y 2009, los estados de resultados, de cambios en el patrimonio de los accionistas y de flujo de efectivo por los años que terminaron en esas fecha, así como un resumen de las políticas contables importantes y otras notas aclaratorias.

Responsabilidad de la administración por los estados financieros

La administración es responsable por la preparación y presentación razonable de estos estados financieros de conformidad con principios de contabilidad generalmente aceptados. Esta responsabilidad incluye: el diseño, la implementación y el mantenimiento de control interno para la preparación de una presentación razonable de los estados financieros, que estén libres de errores importantes, ya sea como resultado de fraude o error; la selección y aplicación de las políticas contables adecuadas y la elaboración de estimaciones contables que sean razonables de acuerdo a las circunstancias.


Responsabilidad del auditor

Mi responsabilidad es expresar una opinión independiente sobre los estados financieros basada en mi auditoría. Excepto por lo que se indica en los párrafos siguientes, realicé mi auditoría de acuerdo con Normas Internacionales de Auditoría. Esas normas requieren que cumpla con los requerimientos éticos y que planee y lleve a cabo la auditoría para obtener una certeza razonable de si los estados financieros están libres de errores importantes. Una auditoría también comprende aplicar procedimientos para obtener evidencia de auditoría sobre los montos y revelaciones en los estados financieros. Los procedimientos seleccionados dependen de mi criterio profesional, incluyendo la evaluación de los riesgos de errores importantes de los estados financieros, derivados de fraude o error. Al conducir las evaluaciones de los riesgos tengo en cuenta el control interno para la elaboración y presentación razonable de los estados financieros de la compañía, para diseñar procedimientos de auditoría que sean convenientes de acuerdo a las circunstancias, pero no con el propósito de expresar una opinión sobre el control interno.

Una auditoría también incluye evaluar la conveniencia de las políticas contables utilizadas, lo razonable de las estimaciones contables emitidas por la administración y la presentación general de los estados financieros.

Considero que la evidencia de auditoría que he obtenido es suficiente y apropiada para basar mi opinión de la auditoría.

7a. Avenida 6-53, Zona 4 Edif. El Triángulo, Nivel 16 Oficina 163
PBX: (502) 2360-9619, Fax: 2331-5424, Guatemala, C. A.

Bámaca Morales & Asociados, a member of  International. A worldwide organisation of accounting firms and business advisers.

BDT000190

Al 31 de diciembre de 2010 y 2009 existen las siguientes situaciones especiales:

- 1) La compañía no cuenta, en sus registros contables, con la integración de la inversión inicial en acciones en otras compañías por Q18,178,219. A partir de cierta fecha hasta el 31 de diciembre de 2,010 y 2,009 las transacciones ocurridas están debidamente integradas. Sin embargo, por no tener aquella integración y porque los registros contables no permiten la aplicación de procedimientos alternos de auditoría para determinar la composición de tales inversiones, no fue posible satisfacerme de la razonabilidad de tal monto inicial.
- 2) Fui informado por la administración de la Compañía y, en lo aplicable, confirmado por los abogados de la empresa acerca de las siguientes situaciones de índole legal:
 - a) Lisa, S.A. quien posee el 33% de las acciones comunes del capital pagado de Villamorey, S. A. y en esa calidad, en el año 2000 presentó dos demandas en Panamá: a) la primera, en el Juzgado Undécimo de Circuito del Primer Circuito Judicial de Panamá en contra de Villamorey, S.A. y otras dos entidades, reclamando el pago de daños y perjuicios, y b) la segunda, en el Juzgado Duodécimo del Circuito de lo Civil del Primer Circuito Judicial de Panamá, en contra de Villamorey, S.A. solicitando la nulidad de los acuerdos tomados en la Reunión Ordinaria de Accionistas de la Sociedad, celebrada en la ciudad de Guatemala, el diecisiete de noviembre de 2000.
 - b) En la primera demanda, el 11 de julio de 2008 el tribunal dictó sentencia en la cual declaró: a) desestimada la demanda porque Lisa, S.A. no probó su pretensión de daños, b) se le condenó al pago en costas por la suma de US\$ 1,200,000, c) se le fijó la suma de US\$200,000 por daños causados a Villamorey, S.A., y d) se le condenó al pago de US\$ 40,000 por costas de la reconvención.
 - c) En la segunda demanda, el 21 de octubre de 2008 el tribunal dictó sentencia en la cual declaró: a) desestimada la demanda, y b) se le condenó al pago en costas por la suma de US\$ 1,250 a favor de Villamorey, S.A. Lisa, S.A. por no estar de acuerdo apeló las dos sentencias, por lo que están pendientes las resoluciones de segunda instancia.
 - d) Villamorey, S.A. para garantizar el pago de las sumas de dinero, solicitó el embargo de las acciones y dividendos que Lisa, S.A. tiene en la sociedad y en otras siete sociedades guatemaltecas en las que ambas son accionistas.
 - e) El 21 de Junio de 2002, Lisa, S.A. presentó una nueva demanda en el Tribunal de Distrito de Estados Unidos de América, Distrito del Sur de Florida, identificado como Caso Número 02-21931 CIV-MOORE, en contra de sesenta personas individuales y jurídicas, incluyendo a Villamorey, S.A. Esta demanda fue desestimada por el tribunal de la Florida, resolviendo que son los tribunales guatemaltecos los competentes para conocer el caso, actualmente esa demanda no ha sido presentada, y para lo cual no se le fijó plazo.

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- f) El 6 de abril de 2,011, Lisa, S. A. presentó una demanda en los tribunales de la ciudad de Toronto, Canadá, por US\$400,000,000; esta demanda fue notificada el 27 de abril de 2,011 y actualmente se prepara la defensa del caso.
- g) Las sentencias en los dos primeros procesos fueron favorables a Villamorey, S.A. por lo que se harán todas las gestiones hasta la finalización de los casos. Por ser todos los procesos de conocimiento, no es posible determinar el tiempo de su finalización ni cuantificar el monto de honorarios y gastos. En consecuencia, no se ha registrado ninguna reserva para pérdidas. Sin embargo, ha efectuado una provisión para probables gastos legales derivados de estos juicios por la suma de Q14,876,920.
- 3) La Compañía tiene la política de reconocer sus ingresos por concepto de dividendos sobre la base de lo percibido, lo cual difiere de lo estipulado por los principios de contabilidad generalmente aceptados donde se indica que deben reconocerse por el método de lo devengado. Debido a esta forma de contabilización, pudiera haber dividendos decretados por las compañías poseídas, que pudieran no haber sido reconocidos como ingresos.
- 4) En nuestro dictamen de fecha 12 de abril de 2,010 sobre los estados financieros de Villamorey, S. A. al 31 de diciembre de 2,009 y 2,008, incluimos un párrafo de énfasis relacionado con recuperabilidad del saldo de cuentas por cobrar por Q21,856,916 al 31 de diciembre de 2,009, tal como se indica en la nota 5 a los estados financieros. Este saldo fue cobrado en su totalidad en el año 2,010.

Opinión

En mi opinión, excepto por los ajustes que pudieran ser necesarios, derivados de los asuntos que se indican en los numerales del 1) al 3), anteriores, los estados financieros que se adjuntan ofrecen una presentación razonable en todos los aspectos importantes de la posición financiera de Villamorey, S. A. al 31 de diciembre de 2010 y 2009 y de su desempeño financiero y flujos de efectivo para los años que terminaron en esas fechas, de conformidad con principios de contabilidad generalmente aceptados.



David Roberto Bámaca Morales
Contador Público y Auditor
Colegiado N° 879

Guatemala, 24 de mayo de 2011

VILLAMOREY, S. A.**Balances Generales****Al 31 de diciembre de 2,010 y 2,009****(Cifras expresadas en Quetzales)**

	Nota		<u>2,010</u>		<u>2,009</u>
ACTIVO					
Activo Corriente					
Caja y Bancos	4	Q	76,686,611	Q	80,013,973
Cuentas por Cobrar	5 y 7		-		21,856,916
Inversiones en Acciones	6 y 7		119,912,333		120,008,193
<hr/>					
TOTAL ACTIVO		Q	196,598,944	Q	221,879,082
<hr/>					
PASIVO					
Pasivo Corriente					
Cuentas por Pagar a Accionistas	7	Q	2,265,928	Q	2,265,928
Dividendos por Pagar	7		33,872,478		-
Provisión para contingencias legales	8 y 9		14,876,920		14,876,920
Otras Cuentas por Pagar			66,967		121,640
<hr/>					
TOTAL PASIVO		Q	51,082,293	Q	17,264,488
<hr/>					
PATRIMONIO DE LOS ACCIONISTAS					
Capital Pagado	10		1,000,000		1,000,000
Utilidades Retenidas			103,614,015		152,917,128
Utilidad del período			40,902,637		50,697,466
<hr/>					
TOTAL PATRIMONIO DE LOS ACCIONISTAS		Q	145,516,651	Q	204,614,594
<hr/>					
TOTAL PASIVO Y PATRIMONIO DE LOS ACCIONISTAS		Q	196,598,944	Q	221,879,082

Las notas adjuntas son parte integral de los estados financieros.

VILLAMOREY, S. A.**Estados de Resultados****Años terminados el 31 de diciembre de 2,010 y 2,009****(Cifras expresadas en Quetzales)**

	Nota	<u>2,010</u>	<u>2,009</u>
Ingresos			
Dividendos	7	Q 39,618,148	Q 46,078,922
Gastos de Operación			
Gastos de Administración		201,141	564,780
Gastos financieros		<u>188</u>	<u>1,359</u>
Total de Gastos de Operación		<u>201,329</u>	<u>566,138</u>
Otros Ingresos y Gastos - Neto-	7	1,485,818	5,184,682
Utilidad Neta		Q 40,902,637	Q 50,697,466

La notas adjuntas son parte integral de los estados financieros.

VILLAMOREY, S. A.**Estados de Movimiento de Patrimonio de los Accionistas****Al 31 de diciembre de 2,010 y 2,009****(Cifras expresadas en Quetzales)**

		CAPITAL PAGADO		UTILIDADES RETENIDAS		TOTAL
Saldo al 31 de diciembre de 2,008	Q	1,000,000	Q	152,917,128	Q	153,917,128
Utilidad del año 2,009				50,697,466		50,697,466
Saldo al 31 de diciembre de 2,009		1,000,000		203,614,594		204,614,594
Utilidad del año 2,010				40,902,637		40,902,637
Ajuste a resultados de años anteriores				4,796		4,796
Pago de Dividendos				100,005,375		100,005,375
Saldo al 31 de diciembre de 2,010	Q	1,000,000	Q	144,516,651	Q	145,516,651

Las notas adjuntas son parte integral de los estados financieros.

VILLAMOREY, S. A.**Estados de Flujos de Efectivo****Años terminados el 31 de diciembre de 2,010 y 2,009****(Cifras expresadas en Quetzales)**

	<u>2,010</u>	<u>2,009</u>
Flujos de Efectivo de las actividades de operación		
Resultados de las actividades de operación	Q 40,902,637	Q 50,697,466
Menos partidas que no requirieron flujos de efectivo		
Baja en inversiones	100,000	-
Ajuste a los resultados de ejercicios anteriores	4,796	-
<u>Cambios netos en los activos y pasivos</u>		
(Aumento) Disminución en cuentas por cobrar	21,856,916	-1,664,387
Aumento (Disminución) en dividendos por pagar	33,872,478	-
Aumento (Disminución) en cuentas por pagar	-54,673	121,640
Efectivo neto obtenido por las actividades de operación	96,682,153	49,154,719
Flujos de efectivo por las actividades de inversión		
Aumento en Inversiones	4,140	-
Efectivo neto usado en las actividades de inversión	4,140	-
Flujos de efectivo por las actividades de financiamiento		
Pago de dividendos	100,005,375	
Efectivo neto usado en las actividades de inversión	100,005,375	-
Cambio neto en el efectivo	-3,327,362	49,154,719
Efectivo al inicio del año	80,013,973	30,859,254
Efectivo al final del año	Q 76,686,611	Q 80,013,973

Las notas adjuntas son parte integral de los estados financieros.

(1) Operaciones de la Compañía

Villamorey, S. A., fue constituida en junio de 1,971, bajo las leyes de la República de Panamá, por tiempo indefinido, para que pueda operar fuera de dicho país. Se dedica principalmente a efectuar inversiones en el capital social de compañías guatemaltecas. Desde el inicio de sus operaciones sus registros contables los mantiene y prepara sus estados financieros en Quetzales, moneda oficial de la República de Guatemala; la base contable utilizada se explica más adelante.

(2) Resumen de las Políticas Contables más significativas

Los estados financieros han sido preparados en todos sus aspectos importantes de acuerdo con principios de contabilidad generalmente aceptados. Las principales políticas contables adoptadas en la contabilización de sus operaciones y en la preparación de su información financiera se resumen a continuación:

a) Inversiones Temporales

Las inversiones temporales se presentan al costo más los intereses acumulados, el cual se aproxima al valor de mercado. Estas inversiones se encuentran colocadas con vencimiento a la vista.

b) Inversiones Permanentes

Las inversiones efectuadas en acciones representativas del capital pagado de compañías guatemaltecas están registradas al costo de adquisición.

c) Transacciones en moneda extranjera

Las transacciones en moneda extranjera se registran en moneda nacional (Quetzales), al tipo de cambio vigente al momento de la operación. Los saldos de activos y pasivos en moneda extranjera son reexpresados en moneda nacional al final de cada año, utilizando el tipo de cambio prevaleciente en el sistema bancario y el efecto correspondiente es incluido como parte de los resultados del período.

d) Reconocimiento de ingresos y gastos

Los ingresos provenientes de los dividendos son reconocidos por el método de lo percibido; los que provienen de inversiones en pagarés y otros títulos valores así como los que provienen de saldos de cuentas bancarias se reconocen por el método de lo devengado.

Los gastos se reconocen en el momento en que se incurren.

e) Instrumentos financieros

El valor razonable de un instrumento financiero representa la cantidad por la cual puede ser negociado en una transacción actual libre de presiones entre partes interesadas. Los siguientes métodos y suposiciones fueron utilizados al estimar el valor razonable de cada clase de instrumento financiero.

- **Efectivo:** Su valor en libros se aproxima al valor razonable debido a que son valores expresados en Quetzales que es la moneda de reporte y los saldos en moneda extranjera están convertidos al tipo de cambio vigente a la fecha de cierre.
- **Cuentas por cobrar:** Su valor en libros se aproxima al valor razonable debido a su corto vencimiento y fueron recuperadas en su totalidad.
- **Cuentas por pagar:** Su valor en libros se aproxima al valor razonable debido a su corto vencimiento.

(3) Unidad monetaria y tipo de cambio

Los estados financieros se expresan en Quetzales, moneda oficial de la República de Guatemala. El valor del Quetzal con respecto al Dólar de los Estados Unidos de América (US\$), se fija en el mercado bancario nacional a través de la oferta y demanda de divisas. A partir del 2 de diciembre de 2006 el tipo de cambio de compra y venta fue unificado, quedando vigente el tipo de cambio de referencia. Al 31 de diciembre de 2010 y 2,009 los tipos de cambio de referencia en el mercado bancario eran de Q8.01 y Q8.35 por US \$ 1.00, respectivamente.

No hay restricciones cambiarias en Guatemala para la repatriación de capitales, pago de acreedurías o cualquier otro fin. La divisa extranjera puede comprarse y venderse en cualquier monto en bancos del sistema o en casas de cambio autorizadas.

(4) Efectivo

Al 31 de diciembre, el saldo de efectivo se integra de la siguiente forma:

		<u>2,010</u>		<u>2,009</u>
Saldos en Quetzales	Q	41,563,968	Q	55,684,081
Saldos en Dólares de los Estados Unidos		<u>35,122,643</u>		<u>24,329,892</u>
	Q	<u>76,686,611</u>	Q	<u>80,013,973</u>

Dentro de los saldos en US\$ del 2,009, se incluyen US\$ 2,041,491, que devengaban una tasa de interés anual variable y se encontraban depositados en una entidad relacionada.

De manera voluntaria, se ha creado un fondo de Q33, 872,478, equivalente al monto de los dividendos por pagar, para garantizar su pago.

(5) Cuentas por cobrar

Este saldo proviene de una deuda más los intereses acumulados. Al 31 de diciembre, el saldo de estas cuentas por cobrar se integra de la siguiente forma:

		<u>2,010</u>		<u>2,009</u>
Rioneri Investors Inc.				
Elba Capital Inc.	Q	-	Q	10,928,458
		<u>-</u>		<u>10,928,458</u>
	Q	<u>-</u>	Q	<u>21,856,916</u>

Estas deudas devengaban una tasa de interés anual variable determinada, equivalente al promedio de la tasa bancaria pasiva que publique el Banco de Guatemala para la moneda local. Se estimó que la recuperación de estos saldos no tiene ningún riesgo importante.

(6) Inversiones en Acciones

Al 31 de diciembre, el saldo de las inversiones en acciones se integra de la siguiente forma:

		<u>2,010</u>		<u>2,009</u>
ADMINISTRADORA DE RESTAURANTES, S.A.	Q	34,629	Q	34,629
ADMINISTRADORA DE RESTAURANTES, S.A.		20		-
AGROPROCESOS AVICOLAS, S.A.		30,473,154		30,473,154
ALIMENTOS PARA ANIMALES, S.A.		12,466,290		12,466,290
AVICOLA DEL PACIFICO, S.A.		140,000		140,000
AVICOLA LAS MARGARITAS, S.A.		10,388,575		10,388,575
AVICOLA VILLALOBOS, S.A.		1,662,172		1,662,172
CERRO COLORADO, S.A.		5,886,859		5,886,859
COMPAÑIA ALIMENTICIA DE CENTROAMERICA, S.A.		34,629		34,629
COMPAÑIA ALIMENTICIA DE CENTROAMERICA, S.A.		20		-
COMPAÑIA IMPORTADORA LA PERLA, S. A.		1,020		-
COMPRAVENTA DE PRODUCTOS ALIMENTICIOS, S.A.		34,629		34,629
COMPRAVENTA DE PRODUCTOS ALIMENTICIOS, S.A.		20		-
CRECIMIENTO, S.A.		50,000		50,000
DISTRIBUIDORA AVICOLA DEL NORTE, S. A.		1,000		-
EL LLANO, S.A.		8,310,860		8,310,860
ESCOBIO, S.A.		6,233,145		6,233,145
IMPORTADORA DE ALIMENTOS DE GUATEMALA, S. A.		38,091		38,091
IMPORTADORA DE ALIMENTOS DE GUATEMALA, S. A.		20		-
INCUBACION, S.A.		54,800		54,800
INDUSTRIA AVICOLA DE PALIN, S.A.		1,000		1,000
INDUSTRIA AVICOLA DEL SUR, S.A.		6,925,717		6,925,717
INDUSTRIA FORRAJERA DE MAZATENANGO, S.A.		34,629		34,629
INVERSIONES EMPRESARIALES, S.A.		34,629		34,629
INVERSIONES TORRE NOVA, S. A.		1,020		-
LOS ABETOS, S.A.		5,194,288		5,194,288
MULTIPLICACION, S.A.		51,800		51,800
POLLO REY, S. A.		1,020		-
REPRODUCTORES AVICOLAS, S.A.		20,777,150		20,777,150
SAN JOSE EL RECUERDO, S.A.		4,848,002		4,848,002
SAN JUAN, S.A.		5,540,573		5,540,573
SISTEMAS Y EQUIPOS, S.A.		692,572		692,572
BASIC RESOURCES INTERNATIONAL, S. A.		-		100,000
	Q	119,912,333	Q	120,008,193

VILLAMOREY, S.A.

Notas a los Estados Financieros

Al 31 de diciembre de 2010 y 2009

(7) Saldos y Transacciones con Partes Relacionadas

Villamorey, S. A. forma parte de un grupo de compañías que cuenta con una administración común; un volumen significativo de transacciones con efectos económicos es efectuado con las compañías de este grupo, bajo ciertas condiciones que son determinadas entre ellas.

Las transacciones con partes relacionadas durante los años terminados el 31 de diciembre fueron las siguientes:

Dividendos recibidos:

	<u>2,010</u>		<u>2,009</u>	
ADMINISTRADORA DE RESTAURANTES, S.A.	Q	58,600	Q	34,920
AGROPROCESOS AVICOLAS, S.A.		2,848,502		4,102,453
ALIMENTOS PARA ANIMALES, S.A.		6,458,260		6,313,019
AVICOLA LAS MARGARITAS, S.A.		2,359,400		3,302,139
AVICOLA VILLALOBOS, S.A.		6,216,226		11,171,296
CERRO COLORADO, S.A.		2,800,584		1,812,736
COMPAÑIA ALIMENTICIA DE CENTROAMERICA, S.A.		264,200		1,746,776
COMPRAVENTA DE PRODUCTOS ALIMENTICIOS, S.A.		310,000		1,656,501
EL LLANO, S.A.		1,660,252		2,440,779
ESCOBIO, S.A.		2,254,280		3,066,752
IMPORTADORA DE ALIMENTOS DE GUATEMALA, S. A.		338,200		463,467
INDUSTRIA AVICOLA DEL SUR, S.A.		819,068		1,677,971
INDUSTRIA FORRAJERA DE MAZATENANGO, S.A.		62,000		58,717
INVERSIONES EMPRESARIALES, S.A.		2,206,800		770,933
LOS ABETOS, S.A.		1,738,628		2,413,360
REPRODUCTORES AVICOLAS, S.A.		1,428,034		1,861,365
SAN JOSE EL RECUERDO, S.A.		1,804,976		2,331,104
SAN JUAN, S.A.		2,412,196		717,283
SISTEMAS Y EQUIPOS, S.A.		3,577,942		137,352
TOTAL DE DIVIDENDOS RECIBIDOS	Q	39,618,148	Q	46,078,922

Intereses devengados:

	<u>2,010</u>		<u>2,009</u>	
Ancona Finance, S. A.	Q	250,316	Q	1,169,627
Rioneri Investors Inc.		277,696		1,776,721
Elba Capital Inc.		277,696		1,776,721
	Q	805,708	Q	4,723,069

Derivado de esas transacciones y de otras habidas en años anteriores al 31 de diciembre, los saldos por cobrar y pagar son los siguientes:

Saldos por cobrar:

	<u>2,010</u>		<u>2,009</u>
Rioneri Investors Inc.	Q -	Q	10,928,458
Elba Capital Inc.	-		10,928,458
	<u>Q -</u>	<u>Q</u>	<u>21,856,916</u>

Saldos por pagar a accionistas:

	<u>2,010</u>		<u>2,009</u>
Accionistas con acciones nominativas	Q 643,555	Q	643,555
Accionistas con acciones al portador	1,622,373		1,622,373
	<u>Q 2,265,928</u>	<u>Q</u>	<u>2,265,928</u>

Saldos de dividendos por pagar a accionistas:

	<u>2,010</u>		<u>2,009</u>
Dividendos por pagar de accionista con acciones nominativas	Q 33,331,791	Q	-
Intereses acumulados sobre dividendos por pagar	540,686		-
	<u>Q 33,872,478</u>	<u>Q</u>	<u>-</u>

(8) Cuentas por Pagar - Provisión para Contingencias Legales

La provisión para contingencias legales ha sido creada para que, de manera conservadora, se tenga un monto destinado a cubrir parcialmente las eventualidades que pudieran derivarse de los procesos judiciales que se mencionan en la nota (9), siguiente.

9) Procesos Judiciales

Lisa, S.A. es accionista de la Compañía y en esa calidad, en el año 2000 presentó dos demandas en Panamá: a) la primera, en el Juzgado Undécimo de Circuito del Primer Circuito Judicial de Panamá en contra de Villamorey, S.A. y otras dos entidades, reclamando el pago de daños y perjuicios, y b) la segunda, en el Juzgado Duodécimo del Circuito de lo Civil del Primer Circuito Judicial de Panamá, en contra de Villamorey, S.A. solicitando la nulidad de los acuerdos tomados en la Reunión Ordinaria de Accionistas de la Sociedad, celebrada en la ciudad de Guatemala, el diecisiete de noviembre de 2000.

En la primera demanda, el 11 de julio de 2008 el tribunal dictó sentencia en la cual declaró: a) desestimada la demanda porque Lisa, S.A. no probó su pretensión de daños; b) se le condenó al pago en costas por la suma de US\$ 1,200,000; c) se le fijó la suma de US\$200,000 por daños causados a Villamorey, S.A., y d) se le condenó al pago de US\$ 40,000 por costas de la reconvenición.

En la segunda demanda, el 21 de octubre de 2008 el tribunal dictó sentencia en la cual declaró: a) desestimada la demanda, y b) se le condenó al pago en costas por la suma de US\$ 1,250 a favor de Villamorey, S.A. Lisa, S.A. por no estar de acuerdo apeló las dos sentencias, por lo que están pendientes las resoluciones de segunda instancia.

Villamorey, S.A. para garantizar el pago de las sumas de dinero, solicitó el embargo de las acciones y dividendos que Lisa, S.A. tiene en la sociedad y en otras siete sociedades guatemaltecas en las que ambas son accionistas.

El 21 de Junio de 2002, Lisa, S.A. presentó una nueva demanda en el Tribunal de Distrito de Estados Unidos de América, Distrito del Sur de Florida, identificado como Caso Número 02-21931 CIV-MOORE, en contra de sesenta personas individuales y jurídicas, incluyendo a Villamorey, S.A. Esta demanda fue desestimada por el tribunal de la Florida, resolviendo que son los tribunales guatemaltecos los competentes para conocer el caso, actualmente está pendiente que presente tal demanda, y para lo cual no se le fijó plazo.

El 6 de abril de 2,011, Lisa, S. A. presentó una demanda en los tribunales de la ciudad de Toronto, Canadá, por US\$400,000,000; esta demanda fue notificada el 27 de abril de 2,011 y actualmente se prepara la defensa del caso.

Derivado de esas actuaciones judiciales, la Compañía se ha visto en la necesidad de realizar desembolsos importantes para las defensas legales correspondientes, dentro y fuera de Guatemala.

Las sentencias en los dos primeros procesos fueron favorables a Villamorey, S.A. por lo que se harán todas las gestiones hasta la finalización de los casos. Por ser todos procesos de conocimiento, no es posible determinar el tiempo de su finalización ni cuantificar el monto de honorarios y gastos. En consecuencia, no se ha registrado ninguna reserva para pérdidas. Sin embargo, ha efectuado una provisión para probables gastos legales derivados de estos juicios por la suma de Q14,876,920.

(10) Capital

El capital autorizado, suscrito y pagado de la sociedad es de US\$1,000,000 y está dividido y representado en 10,000 acciones comunes, pudiendo ser nominativas o al portador, con un valor nominal de US\$100.00 cada una.

Como se explica en la Nota N°1, desde el inicio de sus operaciones, los registros contables se llevan en Quetzales, derivado de ello este capital pagado esta registrado en esta moneda; adicionalmente en la fecha que se colocaron las acciones, el tipo de cambio del Quetzal era Q1.00 igual a US\$1.00.

This is Exhibit "C" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.



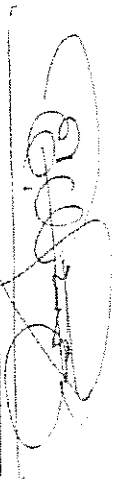
Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

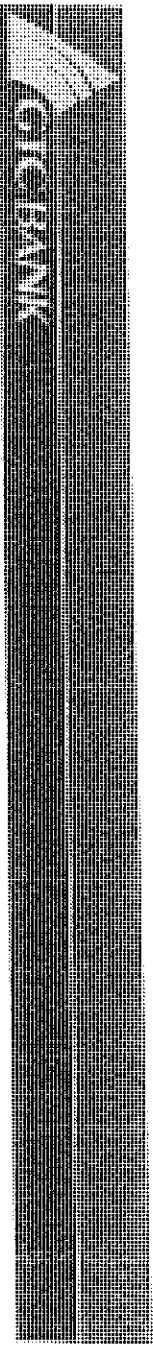


El Contador General de GTC BANK INC. CERTIFICA: que las presentes fotocopias de los estados de cuenta en hojas enumeradas del 001 al 028 de la cuenta 900-05126-4 a nombre de la empresa VillalMorey, S.A., correspondientes al periodo de Mayo 2010 a Agosto 2012 son copia fiel de sus originales por haberlos impreso del sistema de control de depósitos del banco.

Y para los usos legales que al interesado convenga firmo y sello la presente en la ciudad de Guatemala a los veintin días del mes de Agosto del año dos mil doce.



Eswir López Tercero
Contador General
GTC BANK INC.



EN GUATEMALA: RIVERSAFACTORES GTC, S.A.
5A. AVENIDA 5-55, ZONA 14, TURQUESA WORLD BUSINESS CENTER, TORRE IV NIVEL 16.
PHX (502) 2285-9707 y (502) 2383-9797, FAX: (502) 2383-9711

Fecha/hora : 21/08/12 08:58:15
Pág. : 1

ESTADO DE CUENTA --- MAY/2010
CORPORACION G Y P COMPLEMENTAL
GTC BARR

Nombre del contratador: VILLAMORBY, S.A.
Dirección de correspondencia: GUATEMALA

Asesor : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS 5.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00		00.00
06/05/2010	Traslado de 900004999		4,166,250.00	4,166,250.00
25/01/2010	Traslado Apertura cd 010152676	4,166,250.00	00.00	00.00
31/05/2010	ENGD DE INTERESES		2,710.92	2,710.92
	Saldo Inicial	(-) Débitos 001	(+) Créditos 002	Saldo Final
	00.00	4,166,250.00	4,168,960.92	2,710.92

000001

85

855

CORPORACION G Y T CONTINENTAL
GTC BANK

ESTADO DE CUENTA -- JUN/2010

Fecha/Hora : 17/08/12 10:26:51
Pag. : 1

Nombre del contrato:
VILLABREY, S.A.
Direccion de correspondencia:
GUATEMALA

Asesor : A21
Num. Cuenta : 900651264
Producto : CUENTA ESPECIAL CORFINA 2
Moneda : DOLARES AMERICANOS 5.

Fecha	Descripcion	Debitos	Creditos	Saldo
	Saldo Anterior.....:	00.00	00.60	2,710.92
30/06/2010	PAGO DE INTERESES	(-) Debitos 000	(+) Creditos 001	Saldo Final
	Saldo Inicial	00.00	00.60	2,711.92

000002

CORPORACION G Y T CONTINENTAL
OTC PARK

ESTADO DE CUENTA -- JUL/2010

Fecha/hora : 17/08/12 10:24:56

Pag. : 1

Hombre del contrato:
VILLAMOREY, S.A.
Direccion de correspondencia:
GUATEMALA

Asesor : A24
Hom. Cuenta : 900091264
Producto : CUENTA ESPECIAL CORFINSA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Debitos	Creditos	Saldo
31/07/2010	PAGO DE INTERESES	00.00	00.62	2,711.52
	Saldo Anterior.....:			2,712.14
	Saldo Inicial	(-) Debitos 000	(+) Creditos 001	Saldo Final
	2,711.52	00.00	00.62	2,712.14

000003

CORPORACION G Y F CONTINENTAL Fecha/hora : 17/08/12 10:26:58
GFC BANK Pag. : 1

ESTADO DE CUENTA -- AUG/2010

Nombre del contrato: Agosor : A24
VILLABREY, S.A. Num. Cuenta : 900051264
Direccion de correspondencia: Producto : CUENTA ESPECIAL COFINSA 2
GUNTERRAUA Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.62	2,712.14
31/08/2010	PAGO DE INTERESES			2,712.76
	Saldo Inicial	(-) Débitos: 00.00	(+) Créditos: 00.62	Saldo Final
		00.00	00.62	2,712.76

000004

COMERCIALIZACION G Y T CONTINENTAL
GTC BANK

ESTADO DE CUENTA -- SEP/2010

Fecha/hora : 17/08/12 10:25:05
Pag. : 1

Nombre del contrato:
VILLAMORCY, S.A.
Dirección de correspondencia:
GUATEMALA

Aseesor : M24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
10/09/2010	Saldo Anterior.....:		00.00	2,712.76
	Saldo Inicial	(-) Débitos 000	(+) Créditos 001	2,713.06
		00.00	00.30	2,713.06
				Saldo Final
				2,713.06

000005

CONDOMINIO G Y T CONTINENTAL
GTC BANR

ESTADO DE CUENTA -- OCT/2010

Fecha/Nota : 17/08/12 10:25:08
Pag. : 1

Nombre del contrato:
VILLAMORAY, S.A.
DIRECCION DE CORRESPONDENCIA:
GUATEMALA

Asesor : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.31	2,713.06
31/10/2010	PAGO DE INTERESES	(-) Débitos 000	(+) Créditos 001	2,713.37
	Saldo Inicial	00.00	00.31	2,713.37

000006

860

CORPORACION G Y T CONTINENTAL
GTC BANK

ESTADO DE CUENTA -- NOV/2010

Fecha/hora : 17/08/12 10:36:42
Pag. : 1

Hombre del contrato:
VILLAMOREY, S.A.
Direccion de correspondencia:
GUATEMALA

Asesor : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.00	2,713.37
30/11/2010	PAGO DE INTERESES	-) Débitos 000	(+) Créditos 001	2,713.67
	Saldo Inicial	00.00	00.00	2,713.67
	Saldo Final			2,713.67

000007

CONFORMACION G Y T CONTINENTAL
GTC BANK

ESTADO DE CUENTA -- DEC/2010

Fecha/nota : 17/08/12 10:27:13
Pag. : 1

NOMBRE del CONTRATADO:
VILLAMOREY, S.A.
DIRECCION de correspondencia:
GUATEMALA

Asesor : A29
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS 5.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.31	2,713.67
31/12/2010	PAGO DE INTERESES	(-) Débitos 000	(+) Créditos 001	2,713.98
	Saldo Final	00.00	00.31	2,713.98
	Saldo Inicial	2,713.67		2,713.67

000008

862

CONEXION G Y T COMPLEMENTAL
GTC BANK

ESTADO DE CUENTA -- JAN/2011

Fecha/hora : 17/08/12 10:34:17
Pag. : 1

Nombre del contratista:
VILLAMOREI, S.A.
Direccion de correspondencia:
GUATEMALA

Asesor : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARIS AMERICANOS S.

Fecha	Descripcion	Debitos	Creditos	Saldo
	Saldo Anterior.....	00.00	00.31	2,713.98
31/01/2011	PAGO DE INTERESES	-1		
	Saldo Inicial	00.00	(*) Creditos 00.31	2,714.29
		2,713.98		2,714.29

000009

863

CONDONACION G Y F CONTINENTAL
GVC BARR

ESTADO DE CUENTA -- FEB/2011

Fecha/hora : 21/08/12 08:58:37
Pag. : 1

Nombre del contratista:
VILLASOREY, S.A.
Dirección de correspondencia:
GUTERMANA

Asesor : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.28	2,714.29
28/02/2011	PAGO DE INTERESES			2,714.57
	Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
		00.00	00.28	2,714.57

000010

CONFIRMACION G T T CONTINENTAL
CTC BANR

ESTADO DE CUENTA -- MAR/2011

Fecha/hora : 17/08/12 10:34:24
Pág. : 1

Nombre del contrato:
VILLARROY, S.A.
Direccion de correspondencia:
GUATEMALA

Asesor : A24
Num. Cuenta : 900051264
Produtora : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.31	2,714.57
31/03/2011	PAGO DE INTERESES	(-) Débitos 000 00.00	(+) Créditos 001 00.31	2,714.08
	Saldo Inicial			2,714.57
	Saldo Final			2,714.08

000011

865

----- CORPORAACION G Y T CONTINENTAL ----- Fecha/nora : 21/09/12 09:00:44

GTC BANK ----- Pág. : 1

ESTADO DE CUENTA -- APR/2011

Nombre del contrato: AGESOR : AZ4
VILLANOBY, S.A. Num. Cuenta : 900051264
Direccion de correspondencia: GUATEMALA Honeda : DOLARES AMERICANOS 5.
Producto : CUENTA ESPECIAL CORFINSA 2

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.30	2,714.08
30/04/2011	PAGO DE INTERESES			2,715.18
	Saldo Inicial	(-) Débitos 000	(+) Créditos 001	
	2,714.08	09.09	00.30	Saldo Final
				2,715.18

000012

866

CORPORACION G Y T CONTINENTAL
GTC BMR

ESTADO DE CUENTA -- MAY/2011

Fecha/hora : 17/09/12 10:32:32
Pág. : 1

Nombre del contrato:
VILLAMOREY, S.A.
Direccion de correspondencia:
GOVERNALLA

Asesor : AZA
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL CONFUSA 2
Moneda : DOLARES AMERICANOS 5.

Fecha	Descripcion	Debitos	Creditos	Saldo
31/05/2011	Saldo Anterior.....:	00.00	00.31	2,715.18
	Saldo Inicial	(-) Debitos 000	(+) Creditos 001	2,715.49
		60.00	00.31	2,715.49

000013

867

CORPORACION G Y T CONTINENTAL
GTC BANK

ESTADO DE CUENTA --- JUN/2011

Fecha/Hora : 17/08/12 10:34:34
Pag. : 1

Nombre del contrato:
VILLAMONEY, S.A.
Dirección de correspondencia:
GUATEMALA

Aseesor : R24
Hm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS 5.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.30	2,715.49
30/06/2011	PAGO DE INTERESES			2,715.79
	Saldo Inicial	(-) Débitos 000 00.00	(+) Créditos 001 00.30	Saldo Final 2,715.79

000014

868

CORPORACION G T T CONTINENTAL
GTC BANK

ESTADO DE CUENTA -- JUL/2011

Fecha/hora : 21/08/12 09:05:07

pag. : 1

Hombre del contrato:
VILLAMOREY, S.A.
Direccion de correspondencia:
GIMTERVALIA

Asesor : A24
Hum. Cuenta : 900051264
Producto : CUENTA ESPECIAL COPINSA 2
Moneda : DOLARES AMERICANOS \$.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.31	2,715.79
31/07/2011	PAGO DE IMPUESTOS	(-) Débitos 660 00.00	(+) Créditos 001 00.31	2,716.10
	Saldo Inicial			2,715.79
	Saldo Final			2,716.10

000015

CORPORACION G T CONTINENTAL
GTC BANK

ESTADO DE CUENTA -- AUG/2011

Fecha/Nota : 21/08/12 09:03:08
Pag. : 1

Nombre del contrato:
VILLAMOREY, S.A.
Difusión de correspondencia:
GUATEMALA

Aysoce : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
31/08/2011	Saldo Anterior.....:	00.00	00.31	2,716.10
	PAGO DE INTERESES	(-) Débitos 000	(-) Créditos 001	2,716.41
	Saldo Inicial	00.00	00.31	2,716.41
	Saldo Final			2,716.41

000016

870

CORREGACION G Y T CONTINENTAL
CTC BANR

ESTADO DE CUENTA --- SEP/2011

Fecha/hora : 21/08/12 09:03:11
Pag. : 1

Nombre del contrato:
VILLAMORFY, S.A.
Direccion de correspondencia:
GUATEMALA

Asesor : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL CONTINENTAL 2
Moneda : DOLARES AMERICANOS 5.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.30	2,716.41
30/09/2011	PAGO DE INTERESES	(-) Débitos 000	(+) Créditos 001	2,716.71
	Saldo Inicial	00.90	00.30	2,716.71

000017

CORPORACION G Y T CONTINENTAL
GTC BANK
ESTADO DE CUENTA -- OCT/2011
Fecha/hora : 21/08/12 09:05:17
Pag. : 1

Nombre del contrato: VILLAMOREY, S.A.
Direccion de correspondencia: GOVERNALLA
Asesor : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL CORINSA Z
Moneda : DOLARES AMERICANOS S.

Fecha	Descripcion	Débitos	Créditos	Saldo
31/10/2011	PAGO DE INTERESES	00.00	00.31	2,716.71
	Saldo Anterior.....:			2,717.02
	Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
	2,716.71	00.00	00.31	2,717.02

000018

872

CONEXION G Y T CONTINENTAL
GTC BANR

ESTADO DE CUENTA --- NOV/2011

Fecha/Hora : 21/08/12 09:03:18
Pag. : 1

Nombre del contratista:
VILLAMONTI, S.A.
Direccion de correspondencia:
GUATEMALA

Aseesor : R24
Num. Cuenta : 900091364
Producto : CUENTA ESPECIAL COFINER 2
Moneda : DOLARES AMERICANOS \$.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.30	2,717.02
10/11/2011	PAGO DE INTERESES	(-) Débitos 000	(+) Créditos 001	Saldo final
		00.00	00.30	2,717.32

000019

873

----- CORPORACION G Y T CONTINENTAL ----- Fecha/Hora : 21/06/12 09:12:51
GTC BANK Pág. : 1

ESTADO DE CUENTA -- DEC/2011

Nombre del contrato: RESOR : A24
VILLAMOREY, S.A. Num. Cuenta : 900051264
Dirección de correspondencia: PRODUCTO : CUENTA ESPECIAL COFINSA 2
GUATEMALA Moneda : DOLARES AMERICANOS \$.

Fecha	Descripción	Débitos	Créditos	Saldo
31/12/2011	PAGO DE INTERESES	00.00	00.00	2,117.32
	Saldo Anterior.....:			2,117.63
	Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
	2,717.32	00.00	00.31	2,717.63

000020

874

----- CORPORACION G Y F CONTINENTAL ----- Fecha/hora : 21/08/12 09:13:43
GFC BANK Pag. : 1

ESTADO DE CUENTA -- JAN/2012

Nombre del contrato: Asesor : A24
VILLAMOREY, S.A. Num. Cuenta : 9000051264
Direccion de correspondencia: CUENTA ESPECIAL COFINSA 2
GUATEMALA Moneda : DOLARES AMERICANOS \$.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.31	2,717.63
31/01/2012	PAGO DE INTERESES			2,717.94
	Saldo Inicial	(-) Débitos 000 00.00	(+) Créditos 001 00.31	Saldo Final
				2,717.94

000021

CORRECCION G Y T CONTINENTAL ESTADO DE CUENTA -- FEB/2012
 GTC BANK
 Nombre del contrato: VILLAMOREY, S.A.
 Dirección de correspondencia: GOATEMALA
 Fecha: 29/02/2012 PAGO DE INTERESES

Fecha/hora : 21/08/12 09:15:49
 pag. : 1

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....	00.00	00.29	2,717.94
	Saldo Inicial	(-) Débitos 000	(+) Créditos 001	2,710.23
		00.00	00.29	2,718.23

Asesor : A24
 Núm. Cuenta : 900051264
 Producto : CUENTA ESPECIAL COPINSA 2
 Moneda : DOLARES AMERICANOS \$.

000022

876

COMPROBACION G Y T CONTINENTAL
CTC BARR

ESTADO DE CUENTA -- MAR/2012

Fecha/hora : 21/08/12 09:13:50
Pág. : 1

Nombre del contrato: Asesor : A24
VILLAMOREY, S.A. Hum. Cuenta : 900051264
Dirección de correspondencia: Producto : CUENTA ESPECIAL CONTINENTAL 2
GUATEMALA Moneda : DOLARES AMERICANOS 5.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.31	2,718.23
31/03/2012	PRGO DE INTERESES			2,718.54
	Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
	2,718.23	00.00	00.31	2,718.54

000023

8.4

CORPORACION G Y T CONTINENTAL
GTC BANK

ESTADO DE CUENTA -- APR/2012

Fecha/Hora : 21/08/12 09:13:53
Pag. : 1

Nombre del contrato:
VILLAMONTE, S.A.
Direccion de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COPINSA 2
Moneda : DOLARES AMERICANOS \$.

Fecha	Descripción	Débitos		Créditos		Saldo
	Saldo Anterior.....:		00.00		00.30	2,718.54
30/04/2012	PAGO DE IPTENUSES	(-)	Débitos 000	(+)	Créditos 001	2,718.04
	Saldo Inicial		00.00		00.30	2,718.04

000024

----- CORPORAACION G Y T CONTINENTAL ----- Fecha/hora : 21/08/12 09:15:59
CIRC BANK pag. : 1

ESTADO DE CUENTA -- MAY/2012

Hombre del contrato: Asesor : A24
VILLAMOREY, S.A. Num. Cuenta : 9000031264
Direccion de correspondencia: Producto : CUENTA ESPECIAL COFIRSA 2
GOVERNAMA Moneda : DOLARES AMERICANOS \$.

Fecha	Descripcion	Debitos	Creditos	Saldo
	Saldo Anterior.....:	00.00	00.31	2,719.84
31/05/2012	PAGO DE INTERESES	(-) Debitos 000 00.00	(+) Creditos 001 00.31	2,719.15
	Saldo Inicial			2,719.84
	Saldo Final			2,719.15

000025

871

CORPORACION G Y T CONTINENTAL
GTC BANK

ESTADO DE CUENTA --- JUN/2012

Fecha/hora : 21/09/12 09:23:23
Pag. : 1

Hombre del contratador:
VILLANOREY, S.A.
DIRECCION de correspondencia:
GUAYENNA

Asesor : A24
Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COPINSA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos		Créditos		Saldo
	Saldo Anterior.....:		00.00		00.30	2,719.15
30/06/2012	PAGO DE INTERESES	(-)	00.00	(+)	00.30	2,719.45
	Saldo Inicial		00.00		00.30	2,719.45

000026

88L

----- CORPORAION G Y T CONTINENTAL ----- Fecha/hora : 21/08/12 09:21:24
GTC BANK Pag. : 1

ESTADO DE CUENTA --- JUL/2012

Membre del confilato: Asesor : A21
VILLAMOREY, S.A. Num. Cuenta : 900051264
Direccion de correspondencia: Producto : CUENTA ESPECIAL COFINSA 2
GUATEMALA Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:	00.00	00.31	2,719.45
31/07/2012	PAGO DE INTERESES	(-) Débitos 000	(+) Créditos 001	2,719.76
	Saldo Inicial	00.00	00.31	2,719.45
				Saldo Final
				2,719.76

000027

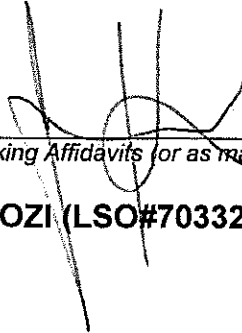
COMPORACION G Y T CONTINENTAL ESTADO DE CUENTA -- AUG/2012 Fecha/hora : 21/08/12 09:21:27
GTC BANK Pag. : 1

Nombre del contrato: VILLAMOREY, S.A. Asesor : A24
Direccion de correspondencia: GUAYMENA, GUAYMENA Num. Cuenta : 900051264
Producto : CUENTA ESPECIAL COPISA 2
Moneda : DOLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,719.76
	Saldo Inicial	(-) Débitos 000	(+) Créditos 000	Saldo final
	2,719.76	00.00	00.00	2,719.76

000028

This is Exhibit "D" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

000000



SAU.

134

INVERSION A PLAZO FIJO CORPORATIVA

Intereses al vencimiento: Intereses mensuales:

Nombre de la cuenta: Williamer, S.A. Cuenta Especial

Razón social de la empresa: Villa morey, S.A. Cuenta Especial

Dirección de la Empresa: Scito Paray ave. Federico Boyd No. 18

YALBE SA DISOS 9,10,11. Pavones Teléfono: (507) 263-5633

Número de cuenta: 900051264 Fecha de apertura: 06/05/2010

Monto inicial: 4 Mill. 250.00 Plazo de la inversión: _____

Fecha inicio de la inversión: _____ Fecha vencimiento de la inversión: _____

Tasa a devengar: 0.10 Manejo de firmas: individual

Dirección entrega correspondencia: SAU. 15-45 zona 10 Centro

Forma de renovación: Empresarial tore I nivel 8

Autonómica: no renovación automática Incluir intereses no incluir intereses

Por el mismo plazo otras instrucciones: _____

Intereses en sus predecesores a otra cuenta del Banco: _____

Nombre del Representante Legal: _____

El Representante Legal acepta que todos los datos anteriores son correctos

[Handwritten signature]

Firma

Información de Representante Legal

-Nombre completo: Jon Lys Rosal GoHernz

-Dirección domicilio: cofriccioir los Encinos casa 2 km 6.2 carre. el Salvador

-No. teléfono domicilio: (502) 2333-3602 e-mail: lshq@guide.net

-País de residencia: Guatemala No. de Cédula o Pasaporte: A-1 424075

-País donde fue empleado: Guatemala ocupación: Ejecutivo

-Empresa para la que trabaja: Hulh - Inversiones

-Posición que ocupa: CO - presidente

-Dirección de la empresa: SAU. 15-45 zona 10 torre I pent house.

-Número de teléfono: 2333-7106

Para usp exclusivo del Banco

Código del oficial: A-71

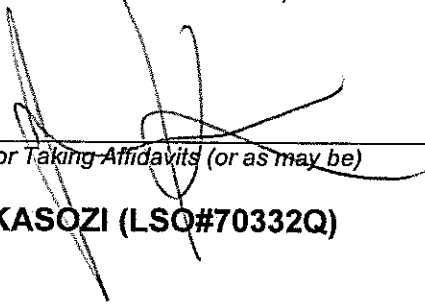
Firma: *[Handwritten signature]*

Nombre: Estelinda Antez

Descripción del documento: smasido 90004999

Código: 0000000000

This is Exhibit "E" referred to in the Affidavit of JUAN
GUILLERMO GUTIERREZ sworn March 22, 2020.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

Court File No. CV11906200CL

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 JUAN ARTURO GUTIERREZ

Respondents

This is the CrossExamination of MARGARITA CASTILLO, the Applicant herein, on affidavits sworn the 17th day of January 2011 and the 9th day of September 2011, taken at the offices of Network Reporting & Mediation, One First Canadian Place, Suite 3600, 100 King Street West, Toronto, Ontario, M5X 1E3, on the 17th day of April, 2012.

A P P E A R A N C E S:

Jeffrey S. Leon
Jason W.J. Woycheshyn

For the Plaintiff

Peter Manderville
Mark Crane

for the Respondents

Also Present:

Juan J. Rodriguez, Esq.
Juan Guillermo Gutierrez

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27, 86, 87, 119, 157, 162 163, 169, 170

*** The list of refusals is provided as a service to counsel and does not purport to be complete or binding upon the parties.

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April 17th, 2012

Margarita Castillo

1 Upon commencing at 10:04 a.m.

2 MARGARITA CASTILLO; Sworn.

3 CROSSEXAMINATION BY MR. MANDERVILLE:

4 1 Q. Will you state your name for the
5 record, please, ma'am?

6 A. Margarita Castillo.

7 2 Q. Ms. Castillo, you're an applicant in a
8 legal proceeding in Ontario Superior Court, court
9 file number CV11906200CL?

10 A. Yes.

11 3 Q. And you're the applicant in that
12 proceeding?

13 A. Yes, I am.

14 4 Q. In connection with that proceeding, you
15 have sworn three separate affidavits?

16 A. Yes.

17 5 Q. Just so you know, it's not really a
18 memory test.

19 A. No.

20 6 Q. If you're not sure, I'll refer you to
21 something and... Before we began, your counsel Mr.
22 Leon and I agreed that we would mark the various
23 application records and responding records as
24 exhibits and just refer to the contents by

25 **386**

individual tab number.

NETWORK REPORTING & MEDIATION (416) 3590305

April 17th, 2012

Margarita Castillo

1 Correct, Mr. Leon?

2 MR. LEON: Yes, subject to I don't think
3 there are any documents here that are in dispute in
4 terms of the authenticity, but why don't we just
5 mark it, and if there are, I'll let you know.

6 MR. MANDERVILLE: We can raise it at the
7 time.

8 MR. LEON: I don't mind if we mark your
9 clients' application record, but there are some
10 documents that may be disputed documents, so I just
11 want to make it since this is a
12 crossexamination rather than a discovery, I don't
13 want the suggestion by marking it somehow we've
14 accepted that they're admissible in the proceeding.

15 MR. MANDERVILLE: I'm content with that. I
16 suspect I'll raise a similar caution when the time
17 comes.

18 BY MR. MANDERVILLE:

19 7 Q. Ms. Castillo, I'm showing you Volumes 1
20 and 2 of your application record.

21 A. Yes.

22 8 Q. Mr. Leon, I'd like to make this Exhibit
23 1, both of them, or one will be Exhibit 1, Volume
24 2, tab such and such and so on.

MR. LEON: Okay. What are you marking,

NETWORK REPORTING & MEDIATION (416) 3590305

April 17th, 2012

Margarita Castillo

1 Exhibit 11 and 12?

2 MR. MANDERVILLE: Sure.

3 MR. LEON: Maybe what makes most sense is
4 to mark her or, sorry, the applicant's motion
5 material or application material with numbers and
6 yours with letters and that way there's no

7 MR. MANDERVILLE: For the purpose of this
8 examination.

9 MR. LEON: For the purpose of this
10 examination, yes.

11 EXHIBIT NO. 11: Application Record,
12 Applicant.

13 EXHIBIT NO. 12: Application Record
14 Applicant.

15 BY MR. MANDERVILLE:

16 9 Q. Ms. Castillo, I'm showing you a
17 document entitled "Reply Application Record."

18 A. Yes.

19 10 Q. This will be Exhibit 2.

20 EXHIBIT NO. 2: Reply Application Record.

21 MR. LEON: Yes.

22 BY MR. MANDERVILLE:

23 11 Q. Ms. Castillo, I'm showing you a
24 document entitled "Second Reply Application
Record."

A. Yes, I see.

NETWORK REPORTING & MEDIATION (416) 3590305

April 17th, 2012

Margarita Castillo

1 12 Q. Mr. Leon, this will be Exhibit 3.

2 MR. LEON: Yes.

3 EXHIBIT NO. 3: Second Reply Application

4 Record.

5 BY MR. MANDERVILLE:

6 13 Q. Ms. Castillo, I'm showing you a

7 document entitled "Responding Application Record,

8 Volume 1."

9 A. Okay.

10 14 Q. I'm also showing you a document

11 entitled "Responding Application Record, Volume 2."

12 A. Okay.

13 15 Q. We have agreed that these will be

14 marked A1 and A2.

15 EXHIBIT A1: Responding Application

16 Record, Volume 1.

17 EXHIBIT A2: Responding Application

18 Record, Volume 2.

19 MR. LEON: Yes.

20 BY MR. MANDERVILLE:

21 16 Q. Ms. Castillo, I'm showing you a

22 document entitled "Supplemental Application

23 Record."

24 A. Yes.

Q. Mr. Leon, this will be Exhibit B.

NETWORK REPORTING & MEDIATION (416) 3590305

April 17th, 2012

Margarita Castillo

1 MR. LEON: Yes.

2 EXHIBIT B: Supplemental Application

3 Record.

4 MR. LEON: Although technically it should
5 be Supplemental Respondent to Reply Affidavit.

6 MR. MANDERVILLE: I appreciate you
7 overlooking that.

8 BY MR. MANDERVILLE:

9 18 Q. Lastly, Ms. Castillo I'm showing you a
10 document entitled "Affidavit of Juan Guillermo
11 Gutierrez, sworn September 27th, 2011?"

12 A. Yes.

13 19 Q. Mr. Leon, this will be Exhibit C.

14 MR. LEON: Yes.

15 EXHIBIT C: Affidavit Juan Guillermo
16 Gutierrez, Sworn September 27, 2011.

17 BY MR. MANDERVILLE:

18 20 Q. Ms. Castillo, you've been sworn today?

19 A. Yes, I have.

20 21 Q. What is your date of birth?

21 A. May 30, 1958.

22 22 Q. Have you completed your high school
23 education?

24 A. No, I didn't finish high school.

Q. What is your highest level of education

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1 you completed?

2 A. I went to the equivalent of Grade 8 and
3 then I went into I did three years of
4 secretarial school.

5 24 Q. Okay.

6 A. Bilingual secretarial school.

7 25 Q. Spanish and English?

8 A. Yes.

9 26 Q. Where was the secretarial school? Was
10 that like a community college?

11 A. No, it was a specific school for
12 secretarial.

13 27 Q. This is in Guatemala City?

14 A. That's correct.

15 28 Q. Did you graduate from that program?

16 A. I did.

17 29 Q. And you have three daughters?

18 A. I do have three daughters.

19 30 Q. What are their ages, please?

20 A. The oldest is 30, the middle one is 27
21 and the youngest is 22.

22 31 Q. I understand that after you completed
23 the secretarial school program you went to work for
24 your father?

A. Yes. That wasn't my original plan, but

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1 that's how I did, yes.

2 32 Q. And according to an affidavit of your
3 father you went to work for him in or about 1977,
4 and I take it at the time you would have been age
5 18 or 19?

6 A. Yes, that's correct.

7 33 Q. And you met your husband, Ricardo, at
8 your father's offices?

9 A. Yes.

10 34 Q. And he was a typewriter salesperson for
11 IBM at the time?

12 A. He was office products salesman for
13 IBM.

14 35 Q. To your knowledge, what is Ricardo's
15 level, highest level of education?

16 A. He finished high school and then he
17 went into university in Idaho, Moscow, Idaho. And
18 then

19 36 Q. Sorry, where?

20 A. Moscow, Idaho. And then he started law
21 school in Guatemala.

22 37 Q. Did he obtain a degree in Idaho?

23 A. I'm not I believe he did.

24 38 Q. Did he complete law school?

A. He was missing out a few classes but

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1 that was about the time that we moved here, so he
2 never went back and finished.

3 39 Q. And you and Ricardo married in October
4 1980?

5 A. Yes, that's correct.

6 40 Q. And your first daughter, the 30year
7 old was born in November of '81?

8 A. Yes.

9 41 Q. And at that point you ceased working
10 outside the home?

11 A. I still after maternity leave, I
12 still came back to work but I was asking for time
13 to go, and so that's why my father told me that it
14 would probably be better that I go do a very
15 important job that was take care of my daughter.

16 42 Q. So would it be accurate for me to say
17 that you left the workforce in or about 1982?

18 A. Yes, that's accurate.

19 43 Q. At the time of your wedding your father
20 bought you and Ricardo a home in Guatemala City?

21 A. Yes.

22 44 Q. We've seen that your father decided to
23 leave Guatemala in 1982; correct?

24 A. That's correct.

Q. At the time, if my arithmetic is

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- 1 correct, you were 24 years old?
- 2 A. Yes.
- 3 46 Q. One child or two grandchildren now?
- 4 A. One.
- 5 47 Q. At the time your father decided to
- 6 leave Guatemala, what was Ricardo's source of
- 7 income at the time?
- 8 A. He was working for IBM.
- 9 48 Q. When your father elected to leave
- 10 Guatemala, you decided that you wanted to move with
- 11 your parents as well?
- 12 A. Yeah, he told me the idea and we agreed
- 13 that it's was a good opportunity, so we decided
- 14 to do it.
- 15 49 Q. I understand that ultimately your
- 16 father settled in Toronto in 1984?
- 17 A. Yes.
- 18 50 Q. And you did as well?
- 19 A. Yes, I came two months later.
- 20 51 Q. From 1982 to 1984, your father at least
- 21 resided primarily in Miami; is that correct?
- 22 A. Yes.
- 23 52 Q. Where did you live?
- 24 A. We were in Miami, too, but coming back

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1 53 Q. Did you have your own place in Miami or
2 did you live with your parents?

3 A. No, at some point we rented our own
4 apartment.

5 54 Q. Upon moving to Toronto, your father
6 Arturo gave you and Ricardo a house?

7 A. Yes.

8 55 Q. He bought it for you?

9 A. Yes.

10 56 Q. He also gave you shares in his
11 business?

12 A. Yes, he did.

13 57 Q. And he gave you an income stream from
14 the business?

15 A. Yes, that's how it was.

16 58 Q. At some point he also gave you and
17 Ricardo a cottage in the Muskoka area?

18 A. He helped us buyed it buy it
19 Reporter Appeals.

20 A. Yes, he did.

21 MR. LEON: No, repeat what you said.

22 THE DEPONENT: Oh, yes, he helped us to buy
23 the cottage in Muskoka.

24 BY MR. MANDERVILLE:

Q. Did you and Ricardo put up some of the

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1 price of the cottage?

2 A. Not at that time.

3 60 Q. And I take it upon moving to Toronto
4 you elected to stay at home and raise your
5 children?

6 A. Yes, I stayed at home and raised my
7 children, to which I feel very lucky to have been
8 able to do it.

9 61 Q. And Ricardo was hired by your father to
10 work at your father's business?

11 A. Yes.

12 62 Q. Now, we know you became a director of
13 Xela in 2007. I believe it was May. Is that
14 correct?

15 A. I don't remember the exact date, but
16 yes, that sounds correct.

17 63 Q. From 1984, when you first arrived in
18 Toronto, until 2007, what involvement did you have
19 in the family business?

20 A. Before 2007 I was already going
21 sometimes to the board meetings just to listen
22 because I expressed to my father that I would like
23 to learn more about the business.

24 64 Q. How frequently would you do that?

A. I think every board meeting that there

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1 was.

2 65 Q. So from 1984 to

3 A. Oh, no, it was more I was elected a
4 director in 2007, so I think, if I remember
5 correctly, maybe 2006 I started going.

6 66 Q. And prior to 2006 would you go?

7 A. No. I would go to the office
8 occasionally but...

9 67 Q. Prior to 2007, how closely would you
10 say you monitored the company's affairs?

11 A. I did not personally monitor them.

12 68 Q. How frequently would you ask Ricardo
13 what's going on at the office?

14 A. Cannot pinpoint how frequent it was
15 because I know that he wanted to whenever he
16 came home from the office, it was family time in
17 his mind, so we didn't talk about business.

18 69 Q. Would it be fair for me to suggest that
19 from 1984 until 2006 at least, you generally did
20 not concern yourself with what was going on in the
21 business?

22 A. Oh, no, I was always curious to know
23 how things were going.

24 70 Q. Who would you ask about it, if not

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- 1 A. My father.
- 2 71 Q. How frequently would that happen?
- 3 A. I don't know exactly how frequency. I
- 4 cannot say exactly how many times or anything like
- 5 that.
- 6 72 Q. And until and I want to divide
- 7 between, say, before 2006 and afterwards. Until
- 8 2006 would you ever ask about the financial status
- 9 of the business or the financial statements or
- 10 anything like that?
- 11 A. Not that I remember. I know in '96
- 12 when there was the estate freeze, I know at that
- 13 time I learned more.
- 14 73 Q. Yes.
- 15 A. Mmhmm.
- 16 74 Q. Yes, and we'll talk about that.
- 17 A. Okay.
- 18 75 Q. I want to take a look at your first
- 19 affidavit which is in Volume 1 of the application
- 20 record, so Exhibit 11. It's at tab 2.
- 21 If you turn to the back of it, page numbered
- 22 88, and that's your signature on the back of it?
- 23 A. Yes, that's my signature.
- 24 76 Q. It indicates that it was sworn on

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January 17th, 2011?

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1 A. That's correct, that's what it says.

2 77 Q. And at the time you swore to Mr.

3 Woycheshyn that everything in the affidavit was
4 true?

5 A. Yes, I did.

6 78 Q. The exhibits or the affidavits in the
7 materials that we've marked as letter exhibits,
8 have you read those affidavits?

9 A. Yes, I did.

10 79 Q. Affidavits of your father and your
11 brother and Mr. Korol?

12 A. Yes, I did read them.

13 80 Q. And Mr. Shields as well?

14 A. Yes.

15 81 Q. Mr. Leon, I would like to you get Ms.
16 Castillo Exhibit A2, please, the Responding
17 Application Record, Volume 2.

18 In particular, Ms. Castillo, I would like you
19 to turn behind tab 2 which is the first affidavit of
20 Juan Arturo Gutierrez, sworn June 17, 2011.

21 A. Yes.

22 82 Q. And first off I should caution you some
23 of the paragraphs are misnumbered in this
24 affidavit. There appear to be two paragraphs 2 and

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two paragraphs 3.

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1 A. Yes, I see that.

2 83 Q. So to make sure we know what we're
3 talking about, I'll sort of draw your attention to
4 which I am referring to so you know.

5 A. Okay.

6 84 Q. The first paragraph 3 under the
7 heading, "Family History of the Gutierrez Group in
8 Guatemala"

9 A. That's page 2, yes.

10 85 Q. Correct. That be a good way to go
11 about it. Have you read that paragraph of your
12 father's affidavit?

13 A. Yes, I read it.

14 86 Q. Did you read Exhibit A with his lengthy
15 letter that provides an account of the family
16 history?

17 A. Yes, I read that letter.

18 87 Q. And that letter is written in the
19 latter part of 1998 according to your father?

20 A. Yes. It says yeah, it says the
21 letter, it's not dated, but that's what he says
22 here in the application.

23 88 Q. Would it be fair for me to suggest that
24 you were not aware of the family history at the

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time you swore your initial affidavit?

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1 A. No, I knew the family history.

2 89 Q. You would agree with me that your
3 father, having written that letter of the family
4 history in 1998, 13 years before your application
5 started, obviously the letter was not prepared with
6 the idea of responding to your application;
7 correct?

8 A. That's correct.

9 90 Q. I'd like you to keep your father's
10 affidavit handy because we'll refer back to it.

11 I'm going to turn to your first affidavit,
12 please. Now, paragraph 6, you indicate:

13 "In 1989 Ricardo, one of his colleagues
14 and I founded Tropic International Ltd., a
15 separate company from the family business."
16 Do you see that?

17 A. Yes, I see that.

18 91 Q. At the time you swore this first
19 affidavit, were you aware of the history of Tropic
20 that your father recounts in his affidavit?

21 A. No, I wasn't aware.

22 92 Q. I take it then you weren't aware of the
23 circumstances behind the startup and the failure of
24 your husband's partnership with Charles Graham?

A. I knew that the business didn't go the

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1 way they would wanted it to go.

2 93 Q. Did you understand at the time you
3 swore your first affidavit, did you understand that
4 your husband did not put up any financing for the
5 Tropic venture?

6 A. Yes, I understood that.

7 94 Q. Did you understand at the time you
8 swore your first affidavit that Xela or your father
9 had financed the Tropic venture from the startup?

10 A. Yes, that's what I knew.

11 95 Q. Did you understand when the initial
12 Tropic venture with Mr. Graham failed that Xela
13 paid off all the losses arising from the startup?

14 A. Yes, that's what I was told.

15 96 Q. And is it your understanding that your
16 husband Ricardo never put up any consideration for
17 the shares he had in Tropic?

18 A. Yes, the same way I never put anything
19 for anything else that my father gifted us.

20 97 Q. So, yes, you did understand that?

21 A. Yes.

22 98 Q. Mr. Leon, I apologize, but I want to
23 take about four minutes, maybe even three.

24 MR. LEON: All right.

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Recess at 10:42 a.m.

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1 BY MR. MANDERVILLE:

2 99 Q. Ms. Castillo, before we broke, we had
3 taken a look at your father's first affidavit and
4 generally paragraph 3 on page 2 of it.

5 A. Yes.

6 MR. LEON: You've referred her to it. I'm
7 not sure she read it.

8 BY MR. MANDERVILLE:

9 100 Q. If you want to read through it, by all
10 means.

11 A. Okay, I'm ready to go.

12 101 Q. Before you became a director of Xela, I
13 take it you were well aware of the longstanding
14 dispute between your father and Xela, on the one
15 hand, and your father's nephews, your cousins in
16 Guatemala, on the other hand?

17 A. Yes, I was aware of that dispute.

18 102 Q. Before you became a director, you were
19 aware that Xela and your father contend that they
20 were owed a considerable amount of money, perhaps
21 in the hundreds of millions of dollars, by your
22 cousins?

23 A. Yes, that's what I understood from the
24 information that I had.

Q. And you knew before you became a

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1 director this was a significant dispute, a
2 significant source of discontent with your father
3 and with the company?

4 A. Yes, I knew that.

5 104 Q. Would you agree with me that if Xela is
6 owed perhaps hundreds of millions of dollars by the
7 nephews and their companies, it is in the best
8 interests of the corporation to try and obtain it?

9 A. Yes, I believe it would be in the best
10 interests of the company to resolve that matter.

11 105 Q. I'd ask you to take a look at paragraph
12 9 of your father's affidavit, first affidavit.
13 It's at page it begins at page 10.

14 A. Okay. Could I read it?

15 106 Q. Oh, absolutely.

16 A. I have read it.

17 107 Q. At the time you swore your first
18 affidavit, Ms. Castillo, were you aware of your
19 father's and perhaps your brother's dissatisfaction
20 with Ricardo's performance at the company?

21 A. Not to this point.

22 108 Q. Were you aware that it's contended that
23 he would play computer games during board meetings?

24 A. I wasn't present at those board

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meetings, so I would not be able to say if that's

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1 the fact or not.

2 109 Q. You were not aware that that is the
3 assertion?

4 A. No.

5 110 Q. And in the same volume, Exhibit A2,
6 can you turn to tab 4, please. That is the
7 affidavit of your brother Juan Guillermo Gutierrez,
8 sworn June 20th, 2011?

9 A. Yes, I see that.

10 111 Q. Turn to paragraph 15 of that affidavit,
11 please. It's at page 8.

12 A. Paragraph 15?

13 112 Q. Yes, that's right, and by all means
14 take your time and read it.

15 A. I have read it.

16 113 Q. I take it at the time you swore your
17 first affidavit, you were not aware of the facts
18 set out by your brother in paragraph 15 that you've
19 just read?

20 MR. LEON: Well, you're not asking her, are
21 you, to acknowledge those are facts? You're just
22 saying is she aware of those statements?

23 MR. MANDERVILLE: Fair enough.

24 BY MR. MANDERVILLE:

Q. With your counsel's qualification I'll

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1 rephrase. At the time you swore your first
2 affidavit, am I correct that you were not aware of
3 the sorts of statements that your brother sets out
4 in paragraph 15 of his affidavit?

5 MR. LEON: Well, sorry, I don't want to
6 interrupt. There's a lot of statements there. Can
7 you just maybe explain to the witness she doesn't
8 have to answer "yes" or "no".

9 BY MR. MANDERVILLE:

10 115 Q. Sure, I'll okay. Your brother
11 contends at paragraph 15 of his affidavit that
12 Ricardo, your husband, used Xela's corporate credit
13 card to fund a trip with your daughters to the
14 World Cup in 2006, including plane tickets and many
15 of the expenses during their stay in Germany,
16 including restaurant bills.

17 At the time that you swore your first
18 affidavit, were you aware of that assertion?

19 A. I'm aware that when he made that trip
20 he would use the corporate card sometimes because
21 of the bigger credit limit, but I am as far as I
22 know, everything was accounted as it was a
23 personal. He never tried to put it as a business
24 expense or anything of the sort.

Q. To your knowledge, did he reimburse the

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1 company for those expenses?

2 A. I don't know how he accounted for those
3 expenses but...

4 117 Q. Fair to say that you don't know if he
5 did or not?

6 A. No, I don't know.

7 118 Q. Your brother Juan Guillermo also
8 contends in paragraph 15 of his affidavit that your
9 husband Ricardo used company funds to pay for a New
10 Year's trip to Australia and for his daughter
11 Daniella's school in Australia.

12 At the time you swore your first affidavit,
13 were you aware of that assertion concerning your
14 husband?

15 A. I am aware that he used the credit
16 card, the corporate credit card to pay for the
17 initial semester of her schooling due to the fact
18 that, like I said again, there was not enough time
19 to send a wire transfer, so the easiest was to use
20 a credit card in order to assure her placement in
21 the program, and then due to the fact of the larger
22 credit limit we used the card.

23 119 Q. Again, I take it, you're not aware as
24 to whether or not those funds were reimbursed to

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1 A. No. Like I said before, I'm not
2 exactly sure how they accounted for those because
3 he wasn't the only one using the corporate credit
4 card for personal uses.

5 120 Q. Well, no, I understand your response.
6 My question was I take it you're not aware as to
7 whether or not he reimbursed the company for those
8 personal expenses?

9 A. No, I'm not aware of that.

10 121 Q. Well, is there anything from preventing
11 Ricardo from increasing the credit limit on his
12 personal cards?

13 MR. LEON: You are asking her whether she
14 knows whether there was?

15 THE DEPONENT: Well, I don't know.

16 BY MR. MANDERVILLE:

17 122 Q. To your knowledge?

18 A. No, I don't know why he wouldn't do it
19 or why he didn't do it.

20 123 Q. Now, you subsequently became a director
21 of the company, and upon becoming a director, if
22 not before, you came to understand that as a
23 director you had certain duties and obligations to
24 the company?

A. Yes, that was my understanding.

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1 124 Q. Well, you knew that as a director you
2 were to prefer the company's interests to your own
3 personal interests?

4 A. In company matters, yes.

5 125 Q. Correct?

6 A. Yes.

7 126 Q. Would you agree with me that if the
8 company was not reimbursed for personal expenses
9 like your daughter's tuition or trips to Australia
10 or Germany, that would not be appropriate?

11 MR. LEON: Well, don't answer that. That's
12 a question of law.

13 REFUSAL

14 BY MR. MANDERVILLE:

15 127 Q. Based on your experience as a director,
16 Ms. Castillo, would you agree with me that using
17 corporate funds for personal expenses is not
18 something a director should be doing?

19 MR. LEON: Again, I don't think that's a
20 proper question to the witness.

21 BY MR. MANDERVILLE:

22 128 Q. What's the nature of your objection to
23 that question, Mr. Leon? I don't think it's a
24 question of law. I just want to have you clarify.

MR. LEON: Well, either you're relating it

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1 to specific facts or you're asking a theoretical
2 question. Either way there's a problem.

3 BY MR. MANDERVILLE:

4 129 Q. During your time as a director of Xela,
5 Ms. Castillo, was it your understanding that you
6 could use corporate funds for personal expenses?

7 A. No, I did not use any corporate funds.

8 130 Q. Was it your understanding that that was
9 permitted or not permitted?

10 A. The way that the company was run, I
11 didn't see anything wrong about doing it. I did
12 not do it personally because I did not have any
13 access to credit cards or anything like that from
14 the corporate.

15 131 Q. Was it your understanding and your
16 counsel may want me to rephrase, but I'll give it a
17 shot. Was it your understanding that, if corporate
18 funds were used for personal expenses, they were to
19 be reimbursed to the corporation?

20 A. I don't know how what arrangements
21 were made regarding that, so I cannot answer that
22 question.

23 132 Q. What was your understanding?

24 A. No, I told you, I don't know how they

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1 company, so I don't know.

2 133 Q. Do you dispute your father's and
3 brother's assertion in their affidavits that when
4 your husband was confronted with these allegations,
5 he elected to resign from the company?

6 A. I don't know exactly if he was
7 confronted or when he was confronted, but I know
8 that he was thinking about resigning way before it
9 happened. So I don't see why that would be said
10 that that was the matter.

11 134 Q. I'm not sure you have answered my
12 question. I know you have given me your answer.
13 My question was do you

14 MR. LEON: Sorry, go ahead.

15 BY MR. MANDERVILLE:

16 135 Q. Do you dispute the assertion by your
17 father and by your brother in their affidavits that
18 when your father confronted your husband over
19 perhaps improper expenses, your husband elected to
20 resign from the company?

21 MR. LEON: I think she did answer it, but
22 she can answer it again.

23 THE DEPONENT: Well, like I said, I know
24 from conversations with my husband that he was

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thinking about resigning because he wasn't happy

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1 there anymore. I don't I don't think he was
2 in I don't know if or when he was confronted
3 about that, if that was the case, which, to my
4 knowledge, it wasn't the case.

5 BY MR. MANDERVILLE:

6 136 Q. And your husband has never advised you
7 of this sort of thing?

8 A. No.

9 137 Q. Now, have you ever heard of a business
10 called Digalta?

11 A. Yes, I am aware of that business.

12 138 Q. At the time you swore your first
13 affidavit, were you aware of the transfer of
14 Digalta to your husband by your father?

15 A. Yes, I'm aware of that.

16 139 Q. What is your understanding of why
17 Digalta was transferred to Ricardo?

18 A. It was actually transferred to a
19 company that we it's not in Ricardo's name.
20 It's in a company in all our names, namely Ricardo,
21 my daughters and me under a trust and it's we
22 actually bought Digalta from Xela at that time.

23 MR. LEON: Xela is also sometimes
24 pronounced Xela. It's the same word, Xela.

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1 pronunciation.

2 BY MR. MANDERVILLE:

3 140 Q. Anglophones mispronounce it as Xela.

4 A. I'll remember to say Xela.

5 So it was a transaction made like we got
6 but that's our company actually bought Digalta from
7 Xela.

8 141 Q. In return for what?

9 A. There is a promissory note that we are
10 going to pay when the time comes.

11 142 Q. This is the promissory note that
12 matures in 2013?

13 A. I believe that's the date, yes.

14 143 Q. When Arturo says he offered Ricardo
15 Digalta in return for the transfer of the Tropic
16 shares to you, do you dispute that?

17 A. That's what he offer at the time, but
18 it was not exactly like that.

19 144 Q. What's your understanding of how it was
20 executed?

21 A. Well, the transfer of Digalta was done
22 previous to he transferred to the shares to my
23 name. It wasn't an exchange one for the other.
24 That's what I meant.

Q. When did the transfer of Digalta take

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1 place?

2 A. I don't remember the exact date.

3 146 Q. Can I ask you to turn to paragraphs 10
4 and 11 of your father's first affidavit, please.

5 A. Which is page?

6 147 Q. Sorry, page 11.

7 A. Page 11.

8 MR. LEON: Here, let me help you find it.

9 THE DEPONENT: Yes. And you said paragraph
10 number?

11 BY MR. MANDERVILLE:

12 148 Q. Paragraphs 10 through 12 actually.
13 It's on page 11.

14 A. Can I read it?

15 149 Q. Yes, absolutely.

16 MR. WOYCHESHYN: You might want to clarify
17 on the record, Mr. Manderville, that Exhibits A1
18 and A2, the actual records aren't numbered. So
19 the page references that you are referring the
20 witness to aren't the page numbers of the
21 respective affidavits.

22 MR. MANDERVILLE: That's correct. Thank
23 you.

24 THE DEPONENT: Is it 10 to 12?

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1 150 Q. Yes, it is.

2 A. I have read them.

3 151 Q. Do you accept the accuracy of what is
4 set out in paragraphs 10 through 12 of your
5 father's affidavit?

6 MR. LEON: Again, I don't think it's a fair
7 question when there's that much set out there to
8 just ask the broad question as you've asked,
9 particularly since she's already told you her
10 understanding. If you want to ask her specifics,
11 you can.

12 MR. MANDERVILLE: Well, Mr. Leon, I think
13 your client can answer "yes" or "no" or "I don't
14 know" or "some but not all," can she not, and then
15 we can move on from there?

16 MR. LEON: Okay. Go ahead and we'll see
17 where we get to.

18 THE DEPONENT: What was your question?

19 BY MR. MANDERVILLE:

20 152 Q. Do you accept the accuracy of what your
21 father has deposed to in paragraphs 10 through 12
22 of the affidavit we're looking at?

23 A. No, I don't agree with everything he
24 says here.

Q. Now, two options, I suppose. Are there

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1 things he says here you simply do not know about
2 and then some things you say are inaccurate?

3 A. I said I didn't agree with the way he
4 puts it here.

5 154 Q. Paragraph 10 states:

6 "Margarita asserts in her affidavit that
7 she acquired these Tropic shares from
8 Ricardo in 2008. This is untrue.
9 Margarita did not 'acquire' anything
10 from Ricardo, her husband, because she
11 did not pay anything for the acquisition."

12 It's accurate that you did not pay for the
13 acquisition; correct?

14 A. I remembered there being a nominal
15 amount of \$1, I guess, for the transfer between
16 husband and wife.

17 155 Q. Okay.

18 A. That's probably why I came up with the
19 word "acquire."

20 156 Q. Okay. He goes on:

21 "She" meaning you "was the
22 transferee of Ricardo's shares in
23 Tropic at my insistence in order to
24 rectify the original oversight

because those shares in Tropic were

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1 beneficially owned by Xela from the
2 beginning."

3 Do you accept the accuracy of that?

4 A. I would put it more that I understood
5 that he wanted them to be in my name, not
6 necessarily that they were Xela owned in the
7 beginning.

8 157 Q. He goes on to say:

9 "Noticeably missing from Margarita's
10 affidavit" and this is the first
11 affidavit you swore "is any mention
12 of the Digalta transaction which is
13 covered by the affidavit of Xela's
14 CFO Mark Edward Korol, and which I
15 mention here again."

16 Do you agree that you don't mention the
17 Digalta transaction in your first affidavit?

18 A. No, I did not mention the Digalta
19 transaction in my affidavit because I felt it
20 wasn't what the affidavit was about.

21 158 Q. Paragraph 11 of your father's affidavit
22 says:

23 "Shortly after Ricardo's departure from
24 Xela, I asked Ricardo to transfer his

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shares in Tropic to Xela. Ricardo

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1 refused."

2 Do you accept the accuracy of that?

3 A. Yes.

4 159 Q. "As a compromise, I suggested to

5 Ricardo that he transfer the Tropic

6 shares to his wife Margarita for the

7 benefit of Xela, and in exchange Xela

8 would transfer to him Xela's interest

9 in the Russian real estate venture

10 called Digalta. Ricardo accepted."

11 Do you accept the accuracy of that statement?

12 A. Yes, that's what it happened, but I

13 don't think it was exactly in exchange of.

14 160 Q. How would you put it?

15 A. Because like I told you, I he didn't

16 get Digalta in exchange of Tropic because Digalta

17 is a different transaction and he's going to repay.

18 161 Q. "Ricardo then transferred his shares

19 in Tropic to Margarita and he executed

20 general releases in favour of Xela and

21 others for any and all claims relating

22 to Tropic and Fresh Quest."

23 Do you accept the accuracy of that statement?

24 A. Yes, as far as I remember, that's what

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1 Do you accept the accuracy of what is set out
2 there?

3 A. I don't accept the accuracy of saying
4 that it will be uncollectible. I don't understand
5 why he would make that statement.

6 166 Q. Take away the "I believe it will be
7 uncollectible." Do you accept the accuracy of the
8 remainder of that sentence?

9 A. Yes.

10 167 Q. Goes on to say:
11 "Digalta was worth much more than the
12 promissory note, but I understood it
13 would create a tax problem (taxable
14 benefit for Ricardo) if we did not
15 stipulate to a number for the transfer."
16 Do you accept the accuracy of that statement?

17 A. I am not aware of what were the price,
18 the numbers or anything in that transaction. I'm
19 not aware of what it was.

20 168 Q. Okay. "I did this because as I had
21 always done in the past I wanted to know
22 that my daughter and her family were well
23 taken care of, and upon Ricardo's
24 departure from Xela I wanted to give

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1 something of himself and to be a

2 selfsupporting man."

3 Do you accept the accuracy of that statement?

4 MR. LEON: How can she say what he thought?

5 MR. MANDERVILLE: Well, the answer may be,

6 "I don't know."

7 THE DEPONENT: Yeah, I don't know what he

8 was thinking.

9 BY MR. MANDERVILLE:

10 169 Q. Certainly it's true that in the past
11 your father had taken steps to help you financially
12 and to look after you as best he could?

13 A. Yes.

14 170 Q. Your father goes on to state:

15 "By giving him Digalta in Russia with
16 substantial cash in hand, yearly net
17 income of approximately \$300,000, I was
18 hoping to ensure his ability to support
19 my daughter and my grandchildren."

20 Do you accept the accuracy of that statement?

21 A. I don't like the fact that he says "by
22 giving" because it's a business transaction that
23 will be concluded at the time when the promissory
24 note is finished. So when it says "by giving" I

feel that it sounds like he is saying that he just

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1 gave it to Ricardo.

2 171 Q. Okay.

3 A. And besides that, it was the company
4 that while he was working in Xela, that's what he
5 was taking care of and it was successful company
6 because of his management.

7 172 Q. You've used the words "his" a lot?

8 A. I meant he was the one doing that part
9 of the business.

10 173 Q. "He" being Ricardo or "he" being
11 Arturo?

12 A. Ricardo. He was the one travelling.
13 Ricardo was the one travelling to Russia and had
14 the contacts over there.

15 174 Q. And Digalta is a real estate company in
16 Russia?

17 A. Yes, I think you can say it's a real
18 estate, yes. It has buildings and rents offices.
19 Rents the buildings to rent the offices.

20 175 Q. So you take exception to his suggestion
21 that he gave Ricardo Digalta?

22 A. Yes.

23 176 Q. Instead you would say the \$400,000
24 that's been promised to be paid next year

A. Yes, because it's

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1 MR. LEON: Let him finish his question.

2 THE DEPONENT: Sorry.

3 BY MR. MANDERVILLE:

4 177 Q. You would say that the \$400,000 that's
5 been promised to be paid next year would be the
6 consideration for Digalta?

7 A. That's a transaction that was
8 stipulated at the time, the money that was
9 stipulated, and it's hurtful for me to read that he
10 says that he believes it will be uncollectible.

11 178 Q. If you turn back to paragraph 9 of your
12 father's affidavit at page 10, please. You see
13 halfway down the page in that paragraph your father
14 makes reference to:

15 "We also had a venture in Russia involving
16 retail hardware and Ricardo was given that
17 project to oversee. That ended in a
18 dispute with a local partner and a lawsuit
19 filed in Ontario which Xela had to pay to
20 settle."

21 Is that referring to Digalta?

22 A. I'm not sure what refers to it, but I
23 don't know if it was related to Digalta or not or
24 it was a separate entity. I don't know that.

Q. During your time as director, did you

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- 1 become aware of whether or not Xela had any more
2 than a single business venture in Russia?
- 3 A. Not that I know of that I can remember.
- 4 180 Q. Were you aware of any of Xela's
5 business ventures in Russia?
- 6 A. Yes, I was aware of them.
- 7 181 Q. Any other than Digalta?
- 8 A. Well, at the time of I heard about
9 this other venture that is mentioned here.
- 10 182 Q. But you don't know what the name of
11 that one was?
- 12 A. Don't remember the name.
- 13 183 Q. Now, you said to me earlier this
14 morning that in 2006 you started to attend some
15 directors meetings?
- 16 A. I think that's the accurate date, yes.
- 17 184 Q. This was while Ricardo was still a
18 director?
- 19 A. Yes.
- 20 185 Q. And you would both go together?
- 21 A. Yes.
- 22 186 Q. What was your incentive to start
23 attending directors meetings?
- 24 A. I wanted to learn more about the

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business.

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- 1 187 Q. Well, why in 2006? What prompted you?
- 2 A. I don't know exactly why the date is so
3 significant in that. I cannot pinpoint why it was.
- 4 188 Q. No single event spurred you to start
5 attending?
- 6 A. Not that I can think of.
- 7 189 Q. And I take it the other Xela board
8 members never objected to your attending?
- 9 A. That I don't know.
- 10 190 Q. Well, did anyone ever say in your
11 presence, "She is not a director. I don't want
12 Margarita to be in attendance"?
- 13 A. Not that I can remember them saying
14 that.
- 15 191 Q. Were you not, in fact, invited by
16 Arturo to start attending?
- 17 A. Yes, that's probably true.
- 18 192 Q. You became a director in 2007 and you
19 think it was in or about May; correct?
- 20 A. Yes.
- 21 193 Q. How frequently did the board meet?
- 22 A. Every three months, I believe, because
23 it was about four times a year.
- 24 194 Q. And up until February 2010 did you

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attend all the meetings?

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- 1 A. As far as I can remember, yes.
- 2 195 Q. And you received \$5,000 per month as a
- 3 director's fee?
- 4 A. That's correct.
- 5 196 Q. And in addition you also received a
- 6 monthly draw from the company?
- 7 A. Yes.
- 8 197 Q. How much would that be?
- 9 A. \$26,800.
- 10 198 Q. Per month?
- 11 A. Yes.
- 12 199 Q. Typical directors meeting, how long did
- 13 they last?
- 14 A. We go the whole day from 9:30 until
- 15 5:00, 5:30.
- 16 200 Q. You've stated in your second affidavit
- 17 that you did not receive a salary in addition to
- 18 the monthly draw and the director's fee because you
- 19 did not act in a management capacity?
- 20 A. That's correct.
- 21 201 Q. In advance of each directors meeting
- 22 you would receive a package of information?
- 23 A. Yes, I would. I would receive it the
- 24 night before.

Q. And that information included minutes

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1 of previous meetings?

2 A. That's correct.

3 203 Q. And financial details of the companies?

4 A. Yes.

5 204 Q. And I understand that you're not on the

6 audit committee of the board?

7 A. That's correct.

8 205 Q. That's correct you were not?

9 A. Yes, I'm sorry, yes, I wasn't on that.

10 206 Q. It's not your fault. That was an

11 awkwardly phrased question. But the audit

12 committee would present a summary of their

13 deliberations at each board meeting?

14 A. Yes, I believe some of them.

15 207 Q. Did you pay attention at the board

16 meetings?

17 A. I did.

18 208 Q. Did you read all the materials provided

19 to you?

20 A. I did.

21 209 Q. So if my arithmetic is correct, and the

22 board met quarterly and each meeting would be

23 about a full day in duration?

24 A. Yes, that's correct.

Q. So as a director about four days a

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Q. Bear with me one second.

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1 MR. LEON: Maybe this could we take the
2 morning break? Is that
3 MR. MANDERVILLE: Sure, that's fine.
4 Recess at 11:18 a.m.
5 Resuming at 11:29 a.m.
6 BY MR. MANDERVILLE:
7 217 Q. Ms. Castillo, we were talking about
8 your tenure as a director of Xela. During your
9 time as a director who were the other directors?
10 A. There was Mr. Bill Dover. No, I'm
11 sorry, no, he was an advisor. Carl Shields.
12 218 Q. Cal.
13 A. Oh, Cal. It's just Cal, sorry.
14 219 Q. Calvin.
15 A. And then my brother, my father and me.
16 220 Q. What about Patrick Wilson?
17 A. I believe he was an advisor, too.
18 221 Q. You felt he was not a director?
19 A. I'm not sure exactly, but I always felt
20 that Patrick Wilson and Bill Dover were advisors.
21 222 Q. And when your father's affidavit
22 material suggests that there was your father, your
23 brother and you, and three others to make up six,
24 do you dispute that?

A. Maybe I am mistaken. I don't know

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1 exactly what there was, in what capacity the other
2 two were there.

3 223 Q. And your brother Juan, he was not on
4 the audit committee, was he?

5 A. That I don't know because I never I
6 didn't go to any audit committee meetings.

7 224 Q. Do you know who was on the audit
8 committee?

9 A. Yeah, I should rephrase that. I
10 believe that on the audit committee was Bill Dover,
11 Cal Shields and my father, but I don't know who
12 else attended, if anybody else attended the
13 meetings.

14 225 Q. And if I were to tell you that those
15 three were on the audit committee and that Mark
16 Korol, who you know to be the chief financial
17 officer of the company

18 A. Yes.

19 226 Q. and your brother, who you know to be
20 the CEO of the company, would attend on invitation
21 the audit committee periodically would that sound
22 correct to you?

23 A. That sounds about correct.

24 227 Q. So when you say at paragraph 83 of your

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first affidavit that you were the only member of
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1 the board not on the audit committee

2 A. Yes, I'm sorry, I don't need to look at
3 it. Could you repeat it?

4 MR. LEON: You should look at it.

5 THE DEPONENT: I should look at it? 83.

6 Oh.

7 BY MR. MANDERVILLE:

8 228 Q. You say, "Between 2007 and April 2010 I
9 was the only Xela director not on the audit
10 committee." Would you agree with me that's not
11 accurate?

12 A. That's how I understood it at the time.

13 229 Q. Would you agree with me now that that
14 was not accurate?

15 A. Well, you just told me that there were
16 two more members, so probably I wasn't taking
17 everybody's name as being a director.

18 230 Q. So to rephrase, you don't know whether
19 or not Patrick Wilson was on the audit committee?

20 A. I think he was not.

21 231 Q. And you don't know whether or not your
22 brother Juan was on the audit committee?

23 A. I don't know if he would attend the
24 meetings, if you are asking me that. I don't know.

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Q. I wasn't asking you that.

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1 A. Well, I wasn't there.

2 233 Q. I was asking you if you know whether or
3 not your brother Juan was on the audit committee?

4 A. To my understanding, it was the three
5 gentlemen that I said before.

6 234 Q. Now, Ms. Castillo, in all three of your
7 affidavits, I think, you take issue with some of
8 Xela's money being used to fund political causes in
9 Guatemala; correct?

10 A. That's correct.

11 235 Q. And Mr. Shields have you read
12 Mr. Shields' affidavit?

13 A. I did read it.

14 236 Q. He has sworn that the issue of
15 political expenses was discussed regularly at the
16 board and was a "hotly debated topic" I believe was
17 his turn of phrase. Did you read that?

18 A. Yes, I read that.

19 237 Q. So you agree with me that the political
20 expenses by Xela was not a secret?

21 A. No, it was not a secret.

22 238 Q. It was openly discussed at the board?

23 A. I would put it more like it was openly
24 talked, not discussed.

Q. Did you ever raise your objections to

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1 any of the political expenses?

2 A. I did raise my objections to my father
3 privately.

4 240 Q. But never at a board meeting?

5 A. No, not at the board level. I could
6 add that sorry, I could add that because of the
7 way I was raised, I was not going to question or
8 oppose my father's views at the board level.

9 241 Q. Of the six board members, do you recall
10 any others expressing objections to the issue of
11 political expenses?

12 A. I don't recall that.

13 242 Q. Do you recall your understanding of
14 what Xela's rationale was for making political
15 expenses?

16 A. Yes, I could recall that.

17 243 Q. What is your recollection of why?

18 A. It was always said that he was for
19 helping the cause of the dispute about Avicola.

20 244 Q. The dispute with your cousins?

21 A. That's correct.

22 245 Q. Would you agree with me that in the
23 debates concerning political expenses the board
24 decided it was in the best interests of the company

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to make those expenses?

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1 A. I don't know if I can answer that
2 question exactly like that because I don't remember
3 it being put to vote or a decision, and that really
4 surprised me because my father always told me that
5 politics was something that he would never get
6 involved into, and the fact that we left Guatemala,
7 we should forget about Guatemala.

8 So I could not understand, and I raised that
9 to him why and at the time I said we, because I
10 considered myself part of Xela, why we were getting
11 involved in something that he mentioned to me several
12 times that he considered not a good way to go.

13 246 Q. But you understood that the hope was
14 that with the purchase of political influence, it
15 might assist in recovering the monies owed by the
16 cousins; correct?

17 A. That was how they how Juan put it at
18 the time at the board. I don't know if I could say
19 I agree or not agree because I didn't see the point
20 of doing that.

21 247 Q. You had no reason to disbelieve what
22 Juan said?

23 A. I did not agree with it but I didn't
24 disbelieve at the moment. I don't think it was

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1 248 Q. You were concerned it might be throwing
2 good money after bad?

3 A. Could you rephrase that? I don't
4 understand.

5 249 Q. You were concerned that it might be
6 throwing good money, the political expenses, after
7 bad in an effort to recover a debt you might not be
8 able to recover?

9 A. That's probably not the way I would
10 have put it. I just felt

11 250 Q. How would you have put it?

12 A. Sorry, you interrupted me.

13 251 Q. I apologize.

14 A. I probably thought that it's not
15 exactly the way you said it. Like I was saying, it
16 was more that it was an expense that I didn't see
17 it being beneficial the way it was explained.

18 Because, first of all, we were already a number of
19 years out of Guatemala. So you know how things
20 are, out of sight out of mind. So not everybody
21 was concerned about what either my father or my
22 brother were doing. That's how I saw it.

23 252 Q. Similarly, in your affidavits you voice
24 concern of legal expenses Xela was incurring in

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1 A. Yes.

2 253 Q. You understood that the company or its
3 subsidiary Lisa obtained a judgment in Bermuda?

4 A. Yes.

5 254 Q. Against companies controlled by your
6 cousins?

7 A. That's what it was explained to me when
8 the case came.

9 255 Q. You understood that the court in
10 Bermuda found that Lisa had been defrauded by
11 companies controlled by your cousin?

12 A. In that particular case, yes, that's
13 what I understand.

14 256 Q. You were pleased with the result from
15 the Bermuda court?

16 A. Yes, I was pleased. It was a good
17 thing for Xela.

18 257 Q. So at the time that Bermuda decision
19 came out, and you've heard about it, you understood
20 that your cousins had been defrauding your father's
21 businesses?

22 A. That's what I was told and that's how
23 it was explained to me.

24 258 Q. And you believed it?

A. In that respect, yes, I believed it.

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1 259 Q. Do you have any reason to question your
2 father's assertion that he believes he's owed many,
3 many millions of dollars by your cousins?

4 A. I never said that I didn't believe what
5 he thinks in that respect.

6 260 Q. In your view, is that the case, that
7 your father is owed many, many millions of dollars
8 by your cousins?

9 A. I don't know anything about the
10 financial situation of the companies or the
11 financial aspect of that transaction, so I don't
12 I don't know. I'm not going to say how much it is
13 but yes, I believe it's quite a significant amount.

14 261 Q. And I think you told me before that you
15 believe it's in Xela's best interests to try and
16 take steps to collect that?

17 A. Yes.

18 262 Q. Ms. Castillo, in your first affidavit
19 you make assertions as to the state of your
20 father's health. You suggest it's deteriorating.
21 Do you have any evidence at all to substantiate
22 that?

23 A. I went I took him to a hospital more
24 than one time, so I know his health is not of a

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young man.

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1 263 Q. For what purpose?

2 A. A stent, a blockage in one of the
3 arteries.

4 264 Q. All right. Is that it?

5 A. Well, that's the two times that I went
6 with him to the hospital. More than I'm sorry,
7 it's more than two times. I actually flew with him
8 on an air ambulance to the Cleveland Clinic in
9 Cleveland, Ohio once. I also flew down to Florida
10 where they were during the winter for a specific
11 test. Don't recall exactly what time. And the
12 last time was when they called me to here in
13 Toronto, they called me if I could drive them to
14 Sunnybrook Hospital because he was having chest
15 problem, chest pain.

16 265 Q. There was concern about your father's
17 heart?

18 A. Well, I don't know his medical history,
19 but I know he has got cholesterol problems and he
20 gets blockage in his arteries.

21 266 Q. And he had heart surgery in the past?

22 A. He had a triple bypass in 1992, to
23 which I also went and accompanied him at the
24 hospital in Detroit.

Q. What was the purpose of the trip to

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1 Cleveland?

2 A. He was the way I understood at the
3 time, he's been to the Cleveland Clinic on other
4 occasions and he wasn't feeling well. So instead
5 of going here to the hospital, he decided to go
6 back there where he already had a doctor.

7 268 Q. Do you understand the nature of his
8 ailment?

9 A. I don't have any medical knowledge, so
10 I don't understand exactly what it is.

11 269 Q. And you say, you swear that your
12 father's mental health has deteriorated in recent
13 years. Do you have any evidence at all to
14 substantiate that?

15 A. I believe I meant by forgetfulness
16 which that comes with age, and I didn't mean this
17 as any insult or anything. It's just a fact of
18 life.

19 270 Q. Anything other than forgetfulness?

20 A. I don't understand.

21 271 Q. I thought you were going to say you
22 can't remember.

23 A. No, I don't understand exactly what you
24 mean by that.

Q. Well, you say your father's health has

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1 deteriorated in recent years and you've told me
2 that you believe he is as he ages subject to
3 forgetfulness on occasion; correct?

4 A. I'd say that he suffers with
5 forgetting.

6 273 Q. Is there anything else?

7 A. I don't know exactly what's your
8 question there because I have no medical knowledge,
9 so I would not be able to tell you.

10 MR. LEON: Why don't you read the
11 statement. He wants to know whether there is
12 anything else behind why you said what's the
13 paragraph?

14 BY MR. MANDERVILLE:

15 274 Q. Paragraph 3.

16 A. Sorry, what page was it?

17 275 Q. 49.

18 A. 49.

19 276 Q. At the top right.

20 A. At the top.

21 277 Q. There's paragraph 3.

22 A. Okay, I read the paragraph.

23 278 Q. And you've told me on the subject of
24 the deterioration of his mental health that as he

ages, he is subject to forgetfulness on occasion?

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1 A. Yes, that's what I said.

2 279 Q. Is there any other indication of how
3 you say his mental health is deteriorating?

4 A. Well, I would say mental health was too
5 broad. It's more like forgetfulness, like I said.

6 280 Q. When you say here, "My father's
7 physical and mental health has deteriorated in
8 recent years" and this is in January of 2011
9 when you swore his affidavit how do you say his
10 physical health has deteriorated in recent years?

11 A. Well, by the fact that he has had those
12 problems with arteries being blocked by
13 cholesterol.

14 281 Q. The bypass, you mean?

15 A. After the bypass he had other problems.
16 As far as I remember, when I went with him to
17 Sunnybrook Hospital I was present when the doctor
18 was there and by that time he already had about
19 seven stents on different arteries.

20 282 Q. For cholesterol issues?

21 A. That's what I understand, yes.

22 283 Q. Is it fair for me to say that your
23 father, to your knowledge, has not lost any of his
24 intelligence over the years?

A. Not to my knowledge. That's fair to

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1 say. I didn't question his intelligence in any
2 way.

3 284 Q. One figure, one person who figures in
4 these affidavits somewhat prominently is a fellow
5 named Roberto Barillas. He is your nephew;
6 correct?

7 A. Yes, he is my nephew by marriage.

8 285 Q. Is it Ricardo's one of Ricardo's
9 siblings' sons?

10 A. Yes, his sister's son.

11 286 Q. How old is Mr. Barillas?

12 A. I have to do the math. He's 45 now.

13 287 Q. And he had led you to believe that he
14 was an accountant?

15 A. I know he is an accountant.

16 288 Q. If you have read the affidavit material
17 filed by my clients, you'll see that the
18 Institute relevant Institute in Guatemala
19 indicates that he has never completed his
20 accounting program?

21 MR. LEON: Well, there's no evidence from
22 that institute no admissible evidence from that
23 institute or record on this application.

24 So you can ask the question a different way,

but I don't think it's fair to put it that way.

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1 BY MR. MANDERVILLE:

2 289 Q. So can I anticipate that you would take
3 the position that we don't accept the validity of
4 that particular exhibit?

5 MR. LEON: Well, you can take that on any
6 of the hearsay evidence that's in these affidavits
7 from different sources. This is an application and
8 it's evidence in dispute.

9 MR. MANDERVILLE: Okay. Just wanted to
10 have your position on it. That's all.

11 MR. LEON: Yes.

12 MR. MANDERVILLE: We're certainly not going
13 to argue it today.

14 MR. LEON: I'm not trying to preclude you
15 asking her what her

16 MR. MANDERVILLE: No, I understand that.

17 MR. LEON: understanding is on that.

18 MR. MANDERVILLE: No, you are just letting
19 me know ahead of time that we may be squabbling
20 over that, and I accept that and appreciate the
21 warning, the advance warning.

22 BY MR. MANDERVILLE:

23 290 Q. Ms. Castillo, I would ask you to pull
24 up the Responding Application Record, Volume 1,

which is Exhibit A1. It contains Mr. Korol's

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1 first affidavit.

2 MR. LEON: Yes. Is there a clean copy?

3 MR. WOYCHESHYN: Here.

4 BY MR. MANDERVILLE:

5 291 Q. If you could turn to Exhibit A of that
6 volume, please.

7 A. Yes.

8 292 Q. Exhibit A contains a few documents.

9 First is a document entitled "Certificate of
10 Accuracy" from the State of Florida.

11 A. Yes.

12 293 Q. And the second page is a translation, I
13 presume, of the Association of Economists, Public
14 Accountants and Auditors and Business Managers from
15 Guatemala, I note addressed to Attorney Jose Luis
16 Farfan Mancilla. Do you see that?

17 A. Yes, that's what it says.

18 294 Q. And I appreciate your counsel does not
19 accept the relevance or the admissibility of this
20 document, but do you agree with me the document
21 says that in the second paragraph:

22 "Mr. Roberto Barillas Castillo is not
23 registered in the registration book in
24 this Professional Association," which

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1 A. That's what it says, that he's not
2 registered. But that doesn't mean that he is not
3 an accountant.

4 295 Q. I understand that.

5 MR. LEON: Wait for his question.

6 THE DEPONENT: Oh.

7 BY MR. MANDERVILLE:

8 296 Q. On the next page within that exhibit
9 there's a document, onepage document headed
10 "Guatemala Association of Public Accountants and
11 Auditors"?

12 A. Yes, I see that.

13 297 Q. Again, this is an English translation.

14 It states:

15 "According to the letter we received,
16 January 24th, 2011, requesting that
17 we inform if Mr. Roberto Barillas
18 Castillo is registered in this
19 Professional Association as a Public
20 Accountant and Auditor, we wish to
21 advise you that the abovedescribed
22 person is not registered in this
23 professional association. Therefore,
24 such person is not a member of the

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1 Accountants and Auditors."

2 MR. WOYCHESHYN: "This Guatemalan."

3 MR. MANDERVILLE: Correct.

4 MR. LEON: That's what the

5 BY MR. MANDERVILLE:

6 298 Q. See that's what the document says?

7 A. Yes, that's what the document says.

8 299 Q. And the next document, it's again a

9 onepage document with the heading "Association of

10 Economists, Public Accountants and Auditors and

11 Business Managers, Guatemala, January 27th, 2011"?

12 A. Yes.

13 MR. LEON: That's a translation.

14 MR. MANDERVILLE: Yes.

15 MR. LEON: Well, my Spanish isn't that

16 good. The original documents are behind there.

17 MR. MANDERVILLE: I suspect your Spanish is

18 significantly better than mine.

19 BY MR. MANDERVILLE:

20 300 Q. Well, Ms. Castillo, could you read the

21 first Spanish page, "Colegio De Contadores

22 Publicos..."

23 MR. LEON: Yes, I'm not disputing

24 MR. MANDERVILLE: Okay.

MR. LEON: that they're accurate

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1 translations of what's said.

2 BY MR. MANDERVILLE:

3 301 Q. So, Ms. Castillo, you'd agree that
4 according to these documents Mr. Barillas is not
5 registered as a public accountant and auditor in
6 Guatemala?

7 A. According to those documents, that's
8 what it says, yes.

9 MR. LEON: Again, without accepting
10 admissibility, I think it's easier just to allow
11 her to answer and then we can deal with

12 MR. MANDERVILLE: I accept your counsel's
13 caveat.

14 BY MR. MANDERVILLE:

15 302 Q. Am I to presume that you disagree with
16 what those documents say?

17 A. I don't disagree or agree because I
18 don't know the nature of those documents.

19 303 Q. It's your belief that Mr. Barillas is
20 qualified as an accountant?

21 A. I don't know if I would say that
22 because I know him as personal on a personal
23 basis and I know he has graduated as an auditor and
24 accountant.

Q. Well, do you know whether or not he is

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1 a chartered accountant?

2 A. I don't know. I don't know the
3 difference between one and the other.

4 305 Q. And you understood that Mr. Barillas is
5 one of the principals of a company called BPA?

6 A. Yes, I know that.

7 306 Q. And you knew that he provided auditing
8 services to Xela?

9 A. Yes, I know that.

10 307 Q. There's also mention in these
11 affidavits of an individual named Jorge Porrás?

12 A. Yes, he was mentioned in the
13 respondent's affidavit.

14 308 Q. Were you familiar with Mr. Porrás?

15 A. Yes, I know him.

16 MR. LEON: Just so that it's clear, again
17 that's there's no direct evidence from Mr.
18 Porrás, and we don't accept the admissibility of
19 the hearsay evidence that you've put forward.

20 BY MR. MANDERVILLE:

21 309 Q. You understand that Mr. Porrás was or
22 is a lawyer who was with BPA?

23 A. Yes.

24 310 Q. And you understand that he provided

25**510**

corporate solicitor services for Xela in Guatemala?

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25**512**

the privilege is limited to that. I'm not sure you

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1 can ask her what he did or didn't do for her
2 because that's privileged but and at least under
3 our law.

4 BY MR. MANDERVILLE:

5 318 Q. Did you retain Mr. Porras to carry out
6 any other or perform any other legal services
7 other than the power of attorney we were just
8 speaking of?

9 A. As far as I remember, I asked him for
10 advice on another matter previously.

11 319 Q. A matter related to this application?

12 A. No, it doesn't have anything to do with
13 the application.

14 320 Q. Did you retain Mr. Porras personally on
15 any other occasions? You've told me about two.

16 A. Yes, not that I can remember.

17 321 Q. Before we continue, Mr. Leon, I'm going
18 to ask your client some questions about leaving
19 your offices in December 2009, and I guess I'm
20 going to give you an opportunity to decide whether
21 or not you want to invoke any sort of a common
22 interest privilege over what transpired in the
23 meeting because I am going to be asking for notes
24 of those present if it wasn't a privileged

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1 MR. LEON: Well, you go ahead and ask your
2 questions and we'll deal with them as they come
3 along. I mean, it is our position that it was at
4 least in part a privileged occasion, but I don't
5 want to restrict you off the top.

6 BY MR. MANDERVILLE:

7 322 Q. Ms. Castillo, I'd ask you to refer to
8 the second Reply Application Record. It's Exhibit
9 3. This contains your third affidavit sworn
10 September 9, 2011.

11 A. Yes.

12 323 Q. I think this is my first time referring
13 directly to this affidavit. Can you turn to page
14 14 of the document. That's your signature on the
15 document?

16 A. That's my signature.

17 324 Q. And you swore the contents of this
18 affidavit were true?

19 A. Yes.

20 325 Q. Beginning at paragraph 27 of this
21 affidavit, you speak about events of December 2009,
22 and you speak of a meeting that took place at
23 Bennett Jones' offices in December 2009?

24 A. Yes, I'm responding to what they said,

25**516**

so that's what it is.

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1 326 Q. I'd ask you also to turn to my client's
2 Supplemental Application Record which is Exhibit B.
3 If you turn to tab 3 of that document, which should
4 be the supplemental of Juan Guillermo Gutierrez?

5 MR. LEON: Yes, we have it.

6 BY MR. MANDERVILLE:

7 327 Q. Beginning at page 4 of that affidavit,
8 your brother speaks of a conversation with
9 Mr. Porras?

10 A. Yes, that's what it says there.

11 328 Q. I guess I would like you to read
12 paragraphs 10 and 11.

13 MR. LEON: This is the evidence that we say
14 is not admissible as it is hearsay, so but he
15 wants you to read it, so read it.

16 THE DEPONENT: Okay.

17 MR. LEON: It says "we." It doesn't
18 identify who "we" is. But if you're telling me
19 that Juan Guillermo

20 BY MR. MANDERVILLE:

21 329 Q. You mean in the beginning of paragraph
22 11?

23 MR. LEON: Yes.

24 MR. MANDERVILLE: Oh, I okay.

MR. LEON: Was a part of that, then the

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1 witness can consider that.

2 BY MR. MANDERVILLE:

3 330 Q. Mr. Leon, while your client is reading,
4 I take it that you would be feeling similarly
5 constrained with Mr. Barillas' evidence that is
6 referred to in your client's affidavits?

7 MR. LEON: Well, I would rather deal with
8 it on a questionbyquestion basis. I mean, she
9 has you have what she said about it. So there
10 are some Mr. Barillas is not a lawyer, so we're
11 not talking about solicitorclient privilege. As
12 the witness' affidavit said, she had a concern
13 about the conduct that Mr. Barillas brought to her
14 attention. So I'm not going to stop you from
15 asking about that.

16 I mean, I think it's obvious. I don't want
17 to interfere, but you've invited me to say something
18 that Ms. Castillo did not authorize Mr. Porras to
19 have the discussions that he had with whoever "we"
20 is.

21 MR. MANDERVILLE: Well, my invitation to
22 claim accommodant (phonet.) was privilege, if you
23 wished to avail yourself of that, would go beyond
24 Mr. Porras.

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1 there was no action where both of them were
2 defendants at the time these conversations took
3 place. I'm not suggesting that they were they
4 were on the basis of an existing or contemplated
5 proceeding where they had a common interest.

6 BY MR. MANDERVILLE:

7 331 Q. What of Ms. Kay?

8 MR. LEON: In terms of again, there was
9 no common interest with Ms. Kay at all at that
10 time. Whether there is now is probably irrelevant.

11 BY MR. MANDERVILLE:

12 332 Q. Ms. Castillo, have you read

13 A. Yes, I have read it.

14 333 Q. Now, you see at paragraph 10 of your
15 brother's affidavit, he notes that there is a typo
16 in the first sentence. It's May 27, 2011. He was
17 called to a meeting with Mr. Porras in Guatemala?

18 A. That's what it says there.

19 334 Q. You've told me earlier that you
20 understood that Porras was with Mr. Barillas in BPA
21 and had been Xela's corporate counsel in Guatemala?

22 A. Yes, that's accurate.

23 335 Q. Towards the end of that paragraph, your
24 brother says that:

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1 that he had separated himself from
2 Barillas because, 'He didn't agree with
3 the things he had done,' and wanted to
4 continue being our lawyer.'"
5 I take it that you don't know anything about
6 that?

7 A. Well, I know he left BPA, but I don't
8 know under what circumstances or anything else.

9 336 Q. To your understanding, when did
10 Mr. Porras leave BPA?

11 A. I don't know the date.

12 337 Q. Do you know the year?

13 A. Not 2011 sounds accurate.

14 338 Q. Your brother in his affidavit goes on
15 to describe some information received at meetings
16 held with Mr. Porras in paragraph 11?

17 A. Yes, that's what he does.

18 339 Q. In subparagraph (a) of paragraph 11, it
19 would appear that Mr. Porras has advised your
20 brother of meetings at Bennett Jones' offices,
21 which you agreed did occur in December 2009?

22 A. Yes, they occurred.

23 340 Q. Present at the meetings were Mr. Leon
24 and Mr. Woycheshyn and yourself and your husband

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1 Elliott firm?

2 A. Yes.

3 MR. LEON: I should tell you, and you
4 can Katherine Kay was there for only a short
5 period of time, if that assists in your
6 questioning.

7 MR. MANDERVILLE: It might.

8 BY MR. MANDERVILLE:

9 341 Q. And according to your brother's
10 affidavit, he's informed by Mr. Porras that the
11 purpose of the meeting at Bennett Jones' offices in
12 December or meetings, plural, at Bennett Jones'
13 offices in December 2009 was to plan the oppression
14 lawsuit that you filed?

15 A. That was not the case.

16 342 Q. You say that is inaccurate?

17 A. That was as as far as I remember,
18 that was not the purpose of the meeting.

19 343 Q. He goes on to state that:

20 "During the meetings, the lawyers at
21 Bennett Jones and Katherine Kay were
22 informed of the 'financial aid' which
23 would be provided to the Castillos by
24 my cousins" this is your brother

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1 Guatemala." is that accurate?

2 A. I don't even recall that ever being
3 discussed in those meetings.

4 344 Q. So financial aid from your cousins for
5 this application was discussed subsequently?

6 A. I have not received any financial aid
7 from them.

8 345 Q. Zero?

9 A. That's accurate. I have not received
10 any money from them.

11 346 Q. It goes on to state that:

12 "Katherine Kay was present, according
13 to Porrás, because her clients had also
14 funded my brother" who is also your
15 brother "Luis Arturo Gutierrez in
16 suits bought by him against Xela and
17 my father several years ago."

18 Is that accurate?

19 MR. LEON: That she was president or
20 sorry, that she was present for the rest of it? I
21 think you have to break that down.

22 BY MR. MANDERVILLE:

23 347 Q. Well, you've told me Katherine Kay was
24 present?

A. Yes, but I don't know what capacity was

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1 she there.

2 348 Q. Do you know now that she is the lawyer
3 in Canada for your cousins?

4 A. Yes, I'm aware of that now.

5 349 Q. Well, that sentence states:
6 "She was present, according to Porras,
7 because her clients had also funded my
8 brother, Luis Arturo Gutierrez, in suits
9 brought by him against Xela and my father
10 several years ago."

11 Is that accurate to your knowledge?

12 A. I'm not aware of who was my brother's
13 lawyer at the time.

14 350 Q. Sub (b) of paragraph 11:
15 "Porras indicated that my cousins paid
16 Margarita \$2.5 million to induce her
17 to bring the oppression case and to
18 cover her attorney's fees for same."

19 Is that accurate?

20 A. That's not accurate because nobody has
21 paid me anything.

22 351 Q. Goes on to state:
23 "The transaction was framed as a
24 backtoback loan to Margarita whereby

she would borrow up to \$2.5 million

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1 from GTC Bank in Panama against a
2 financial instrument which Porras
3 indicated was a certificate of deposit
4 posted by my cousins as collateral."

5 Is that statement accurate?

6 A. I know I have a line of credit with the
7 GT Bank in Guatemala, but I don't know what's
8 and it's being backed up by my fiduciary. It's a
9 fiduciary loan but out of my net worth. That's how
10 I understand it is.

11 352 Q. Is it a bank in Guatemala or a bank in
12 Panama?

13 A. It's a Guatemalan bank with since
14 Panama it's probably a subsidiary from a Panamanian
15 bank. I'm not sure exactly how that works.

16 353 Q. Was there any certificate of deposit
17 posted by your cousins as collateral?

18 A. No, I don't think so. I don't think
19 that's accurate.

20 354 Q. Well, do you know it's not accurate or
21 do you just think?

22 A. I don't know. I don't know it's
23 accurate but as far I know it's a fiduciary loan
24 but go by my net worth.

Q. Who is the fiduciary?

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1 A. It's my net worth.

2 356 Q. So

3 A. That's what it means; right?

4 357 Q. So your evidence today here that it's

5 straight, "Here's my net worth. Would you please

6 loan me \$2.5 million," and the only collateral is

7 your own net worth?

8 A. That's how I know it is.

9 358 Q. And your evidence today is that your

10 cousins have had nothing to do with this loan?

11 A. I don't know if they had anything to do

12 with it.

13 359 Q. Goes on to state:

14 "The vehicle for the loan was a Panamanian

15 corporation called Hellenic Commercial

16 Group, and through this corporation

17 Barillas was also paid \$1.5 million to

18 bring the false criminal case against

19 me" meaning your brother "in

20 Guatemala relating to Boucheron."

21 Is that statement accurate to your knowledge?

22 A. I don't know anything about that.

23 360 Q. Was the vehicle for your loan a

24 Panamanian corporation called Hellenic Commercial

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1 A. No, I already told you how I went about
2 getting the loan.

3 361 Q. So you are disagreeing with the
4 statement that the vehicle for the loan was a
5 Panamanian corporation called Hellenic Commercial
6 Group.

7 MR. LEON: No, sorry all right, go
8 ahead.

9 THE DEPONENT: I would disagree because I
10 don't know anything about this corporation or this
11 group or anything of that, and as far as I
12 understand, I fill out all the forms that the bank
13 require and they gave me the loan.

14 BY MR. MANDERVILLE:

15 362 Q. Goes on to state:
16 "Margarita signed a power of attorney
17 appointing Roberto Barillas Castillo
18 as attorneyin fact for purposes of
19 executing the loan documentation in
20 Guatemala"?

21 A. Yes.

22 363 Q. That's true; correct?

23 A. That's accurate. Yes, that's true.

24 364 Q. "Porras notarized the document in Miami

on April 23, 2010." That's accurate?

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1 A. Yes.

2 365 Q. "The GTC Bank of Panama has a.
3 representative office in Guatemala at
4 G.T. Continental Bank"?

5 A. Yes, that's accurate. That's how I
6 know it's in Guatemala.

7 366 Q. Sub (c): "With respect to the
8 Boucheron case" and we'll talk
9 some more about that in a little bit
10 "Porrás stated that Barillas has
11 never been the shareholder, as he now
12 claims, and that the intellectual
13 author of the case was Juan Luis
14 Aguilar" I'm sure I mispronounced
15 that the lead litigation counsel
16 for my cousins in Guatemala."

17 Do you know anything about that?

18 A. No, I don't know anything about that.

19 367 Q. Do you know whether or not Barillas
20 Mr. Barillas is a shareholder of Boucheron?

21 A. I don't know what his capacity is with
22 Boucheron.

23 368 Q. Sub (b), he goes on to state that:
24 "Margarita and Ricardo first met with

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1 to plan their various actions in Canada
2 and Guatemala in February, 2010 at the
3 InterContinental Hotel in Guatemala City."

4 Is that accurate?

5 A. I never met with my cousins' counsel.

6 369 Q. At any time?

7 A. No.

8 370 Q. Goes on to state:

9 "There was a subsequent meeting in
10 Guatemala in March 2010 at the Unicentro
11 Building in the offices of Pepsi."

12 Is that accurate?

13 A. If you mean meeting with my cousins,
14 yes, that's accurate.

15 371 Q. In March 2010?

16 A. Yes.

17 372 Q. What was the purpose of that meeting?

18 A. We were getting reacquainted and just
19 to talk about general things.

20 373 Q. What specific things did you talk
21 about?

22 A. I cannot recall exactly what was talked
23 about.

24 374 Q. Did you talk about the possible

commencement of this lawsuit?

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- 1 A. I don't recall if I did or not.
- 2 375 Q. Did you talk about financial assistance
3 from your cousins for this lawsuit?
- 4 A. No, I didn't.
- 5 376 Q. How come you can remember that?
- 6 A. Because I know that I never asked them
7 for money or any financial.
- 8 377 Q. I take it this was a prearranged
9 meeting with your cousins?
- 10 A. We were in Guatemala visiting my
11 motherinlaw, and I understand that's we were
12 there, so that's why it was arranged.
- 13 378 Q. I take it it wasn't a spontaneous
14 decision on you and your husband's part, "Let's go
15 to Pepsi." It was a prearranged meeting; correct?
- 16 A. Oh, to meet in that specific place?
- 17 379 Q. Yes. Did your cousins tell you about
18 why they wanted to meet with you or what did you
19 tell them about why you wanted to meet with them?
- 20 A. I don't remember the specifics on that.
21 You have to remember that I grew up with them, so
22 there was as soon as we establish a connection
23 again, the connection was still there.
- 24 380 Q. In Juan Arturo's or Juan Guillermo's

last affidavit he deposes to the fact that your

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1 cousins are suing you, among others, in a number of
2 lawsuits down in Guatemala; correct?

3 A. Yes, my name is included in the main
4 lawsuit because in some of the changes my name was
5 included there.

6 381 Q. They've named you as a defendant in
7 actions claiming improper behaviour by the company
8 and your father and your brother and you?

9 A. I'm not sure exactly how many or what
10 is the premise of them.

11 382 Q. And I understand you encountered one of
12 your cousins at a music concert, Christmas, New
13 Year's, 2008, in around there?

14 A. Yes.

15 383 Q. That was a chance encounter, I
16 understand?

17 A. Completely by chance.

18 384 Q. Prior to that time, when was the last
19 time you had been in contact with one of your
20 cousins?

21 A. I cannot remember a date but it's
22 probably before the before the Avicola lawsuit
23 started.

24 385 Q. So in the mid1990s perhaps?

A. That's accurate.

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1 386 Q. So a gap of 12, 13 years

2 A. Yeah, probably.

3 387 Q. approximately? And at the time

4 you're meeting with your cousins in March 2010, you

5 do understand that you're still a director of Xela?

6 A. Yes, I was still a director.

7 388 Q. And you understand that Xela contends

8 that these are the cousins who defrauded it of many

9 millions of dollars?

10 A. Yes, I understand that's the case.

11 389 Q. You understood at the time that there

12 was a court in Bermuda that had found as fact that

13 your cousins had defrauded Xela and your father of

14 millions of dollars?

15 A. Yes, I understand that.

16 390 Q. And it's your evidence today that you

17 can't recall what this meeting was about?

18 A. I don't recall exactly what was talked

19 about, yes.

20 391 Q. How long did the meeting last?

21 A. Half an hour, 45 minutes. I'm not

22 sure.

23 392 Q. And your husband Ricardo was there as

24 well?

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- 1 393 Q. And was Mr. Barillas there as well?
- 2 A. Yes, he was with us.
- 3 394 Q. And was anyone else from your side, for
4 want of a better term, there?
- 5 MR. LEON: Yes, I don't accept that
- 6 MR. MANDERVILLE: No, I appreciate that.
- 7 BY MR. MANDERVILLE:
- 8 395 Q. Who else was at the meeting?
- 9 MR. LEON: You can ask her who was there
10 and what she remembers about it.
- 11 BY MR. MANDERVILLE:
- 12 396 Q. Who else was at the meeting?
- 13 A. Three of my cousins.
- 14 397 Q. Which ones?
- 15 A. Or two of them. I'm not you see, I
16 remember exactly was Juan Jose Gutierrez and Felipe
17 Bosch. I don't remember if anybody else.
- 18 398 Q. Did you take any notes at the meeting?
- 19 A. No, I did not.
- 20 399 Q. Did your husband take any notes at the
21 meeting?
- 22 A. No, he didn't.
- 23 400 Q. Did Mr. Barillas take any notes at the
24 meeting?

A. Nobody took notes at the meeting.

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1 401 Q. You remember that?

2 A. No, I don't think we were taking notes
3 because it was an informal meeting.

4 402 Q. Were there lawyers from the cousins
5 on the cousins' behalf there?

6 A. I don't remember if there there was
7 someone else but it wasn't in the capacity of being
8 a lawyer. I don't remember who it was. I am not
9 good with names.

10 403 Q. With respect to the loan you obtained
11 from the Panamanian bank, did you sign a loan
12 application?

13 A. Yes, I did.

14 404 Q. Did you provide financial net worth
15 statements for that?

16 A. Yes, I did.

17 405 Q. I'd like to have those produced, Mr.
18 Leon.

19 MR. LEON: Well, we are going to refuse.

20 REFUSAL

21 BY MR. MANDERVILLE:

22 406 Q. On what basis, please?

23 MR. LEON: Relevancy.

24 MR. MANDERVILLE: Well, your client has

deposed, in particular in her third affidavit, that

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1 she's experiencing financial hardship. Her
2 financial net worth statements might verify that or
3 not. They're relevant given what she's deposed to.

4 MR. LEON: Well, we can deal with that at
5 some point. That's my position.

6 BY MR. MANDERVILLE:

7 407 Q. I'd also like a copy of the loan
8 application, please.

9 MR. LEON: Same answer. That, in
10 particular, I don't see the relevance. Ordinarily
11 how one pays for to fund a lawsuit is not relevant
12 in the context of that lawsuit.

13 I've let you ask about this because you are
14 attempting to make it relevant in the material that
15 was filed by your clients to an extent, but I don't
16 think it goes into the details of her how she is
17 obtaining money to pay for this very lawsuit.

18 REFUSAL

19 BY MR. MANDERVILLE:

20 408 Q. Ms. Castillo, why would you go to a
21 Guatemalan bank for a loan for an Ontario lawsuit
22 when you could go down the street to Bank of Nova
23 Scotia?

24 A. That was a decision that we made with

my husband to go to a Guatemalan bank.

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1 409 Q. Do you have assets in Guatemala? I
2 believe your assets are in Ontario, are they not?
3 A. Yes, they are.
4 410 Q. Do you have assets in Guatemala?
5 A. No, I don't have any assets in
6 Guatemala.
7 411 Q. Do you have assets in Panama?
8 A. No, I don't have any.
9 412 Q. Turn to paragraph 38 of your affidavit,
10 please, your third affidavit.
11 A. The third one?
12 413 Q. Yes. Page 12.
13 A. Yes, what paragraph you said?
14 414 Q. Page 12, paragraph 38.
15 A. I have read it.
16 415 Q. You'll see what you've sworn to there,
17 that you are not in a financial position to
18 personally pay the professional fees necessary to
19 pursue a legal action.
20 "I asked my cousins in Guatemala if
21 they could assist in arranging
22 financing. They did so by arranging
23 for me to obtain a line of credit to
24 finance my application."

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- 1 A. I see that.
- 2 416 Q. And you've sworn that that is true?
- 3 A. The wording probably is not exactly how
- 4 I would put it that moment right now. The way I
- 5 understand it is not arranging by it but just
- 6 pointing us in the right direction, I would say.
- 7 417 Q. So you've sworn that it's true that you
- 8 asked your cousins in Guatemala if they could
- 9 assist in arranging financing for you; correct?
- 10 A. That would be correct, yes.
- 11 418 Q. Well, you've sworn to it. It is
- 12 correct?
- 13 A. Yes, it is correct but it's not that
- 14 they gave me the financial. They pointed me in the
- 15 right direction
- 16 419 Q. You go on to swear that it's true that
- 17 they, your cousins, did so by arranging for you to
- 18 obtain a line of credit to finance this
- 19 application; correct?
- 20 A. That's what it says in my affidavit.
- 21 420 Q. That's true, isn't it? You swore that
- 22 it is.
- 23 A. Yes, but "arrange" is probably a very
- 24 broad word there.

Q. Did they arrange for you to obtain a

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1 line of credit to finance the application or not?

2 A. I don't know if they had anything to do
3 with it or not.

4 422 Q. So when you swore, "They did so by
5 arranging for me to obtain a line of credit to
6 finance my application," you swore that without
7 regard to whether or not it was true?

8 A. No, that's probably what I understood
9 at the moment, but I don't know exactly to what
10 point you're thinking that this the arrangements
11 were because

12 423 Q. Now, you swore that this was true

13 MR. LEON: I'm sorry, she hadn't finished.

14 MR. MANDERVILLE: Sorry. My apologies.

15 THE DEPONENT: Because like I said I went
16 to the way the bank does it. I fill out an
17 application, I presented my papers and they
18 approve.

19 BY MR. MANDERVILLE:

20 424 Q. Now, you swore this affidavit on
21 September 9, 2011, and the financing was put in
22 place sometime in 2010; correct?

23 A. Yes.

24 425 Q. Are you now saying when you swore in

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1 me to obtain a line of credit to finance my
2 application," that that is inaccurate?

3 A. No, I'm just saying that the word
4 "arranging" probably is not the right word that I
5 should have used that day when I swore this
6 affidavit. It's more like they pointed me in the
7 right direction, if you can say it like that,
8 saying what bank.

9 426 Q. I have a handful more questions and
10 then we'll break, if that's okay with you.

11 MR. LEON: Are you okay to keep going a
12 bit?

13 THE DEPONENT: I'm fine, yes.

14 BY MR. MANDERVILLE:

15 427 Q. Turn to paragraph 34 of that same
16 affidavit of yours, please, at page 11.

17 A. I'm going to read it.

18 428 Q. All right. No, please do. I want you
19 to.

20 A. I finished reading it.

21 429 Q. You've sworn there that during this
22 meeting at Bennett Jones' offices on December 10th,
23 2009, that Ms. Kay, Katherine Kay of Stikemans
24 indicated that she was not in a position to act for

Roberto or Jorge. She also indicated that she had

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1 been retained by your cousins in Guatemala?

2 A. Yes, that's what she told us at that
3 moment.

4 430 Q. So in December 2009, more than a year
5 before you start this application, Ms. Kay is
6 attending a meeting and telling you she has been
7 retained by the cousins to act on their behalf?

8 A. Yes, that's accurate.

9 431 Q. You go on to do swear:
10 "My cousins understood that I was
11 becoming frustrated with Xela and
12 were willing to be supportive of my
13 attempts to resolve my concerns
14 whether through litigation or
15 otherwise"?

16 A. Yes, that's what it says in my
17 affidavit.

18 432 Q. And that's true?

19 A. Yes.

20 433 Q. So, Ms. Castillo, if I understand
21 correctly, you're swearing that you've been told by
22 your cousins' lawyer that your cousins were willing
23 to be supportive of your attempts to pursue
24 litigation if you chose to; correct?

A. I don't think she was the one that told

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1 me that.

2 434 Q. Well, could you read I'll have you
3 read the third sentence, "My cousins understood
4 that I was becoming frustrated."

5 Could you read the next sentence after that?

6 A. Okay, yes, if that's what she said. I
7 don't remember what was said in that meeting.

8 435 Q. But you have sworn that Ms. Kay
9 provided you with that information; right?

10 A. Yes, that's what I understand.

11 436 Q. So if I understand correctly, in
12 December 2009, more than a year before you start
13 this application, you were told by the cousins'
14 lawyer that they will support you should you choose
15 to commence litigation; correct?

16 MR. LEON: "Be supportive." I'm not sure
17 those two are the same thing.

18 BY MR. MANDERVILLE:

19 437 Q. You were told your cousins would be
20 supportive of you should you choose to commence
21 litigation; correct?

22 A. That's correct.

23 438 Q. And later on in the same sworn
24 affidavit you knew you were not in a financial

position to personally pay professional fees to

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1 pursue a legal action. You asked your cousins if
2 they could assist in arranging financing and they
3 did so by arranging a line of credit to finance the
4 application; correct?

5 A. Well, I already said that they didn't
6 per se arrange for me to do it.

7 439 Q. But you've sworn that that's what
8 happened; correct?

9 A. That's what happened.

10 440 Q. Do you want to break now, Mr. Leon, if
11 that's okay?

12 MR. LEON: Sure.

13 Luncheon Recess at 12:35 p.m.

14 Resuming at 1:57 p.m.

15 BY MR. MANDERVILLE:

16 441 Q. Ms. Castillo, you understand you're
17 still under oath?

18 A. Yes, I do.

19 442 Q. Before we broke for lunch, we were
20 talking about, among other things, the affidavit of
21 your brother sworn in August 2011.

22 A. Where is that?

23 443 Q. It's found in the Supplemental
24 Application Record, Exhibit B at tab 3.

MR. LEON: Yes.

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1 THE DEPONENT: Yes. I'm sorry, yes. So
2 where do you want me to be?

3 BY MR. MANDERVILLE:

4 444 Q. To paragraph 11, please, which I guess
5 would be at page 5 now of the affidavit.

6 A. Oh, I think I don't have the same one
7 that you do because I don't have any paragraph 11
8 in this one.

9 445 Q. It begins at page 4, paragraph 11. You
10 should see, if you have the correct affidavit
11 should

12 MR. LEON: Which affidavit are you
13 referring to?

14 BY MR. MANDERVILLE:

15 446 Q. Juan Guillermo's affidavit of August
16 2011 in the Supplemental Application Record, tab 3.
17 Paragraph 11 begins at page 4 and continues on to
18 page 5.

19 MR. LEON: Sorry, I've got the wrong
20 document here. Supplemental Application Record.
21 I've got it here. Tab 1?

22 BY MR. MANDERVILLE:

23 447 Q. Tab 3.

24 MR. LEON: Tab 3. Yes.

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1 Do you know anything about the truth or
2 falsity of that statement?

3 A. No, I don't know anything about that.

4 451 Q. And then sub (f) of the same paragraph
5 states:

6 "Lastly, Porras indicated that he feared
7 retaliation by my cousins and would only
8 testify if he was compelled by judicial
9 process under conditions that would ensure
10 his safety."

11 Again, do you know anything about the
12 accuracy of that statement?

13 MR. LEON: That he said it or that he
14 believed it?

15 BY MR. MANDERVILLE:

16 452 Q. Do you know whether or not he said it?

17 A. Don't know.

18 453 Q. Do you know whether or not he believed
19 it?

20 A. I don't know.

21 454 Q. Now, I understand that Xela attempted
22 on a number of occasions, but more recently,
23 attempted settlement discussions with your cousins
24 in the winter of 2009, the beginning of the winter

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1 A. There was talk about going to a
2 settlement discussion in the winter 2009, yes,
3 that's accurate.

4 455 Q. And, in fact, there was a settlement
5 meeting, correct, or a few of them?

6 A. I was present in one that was in 2010.

7 456 Q. Can I refer you to a document titled
8 "Affidavit Juan Guillermo Gutierrez Sworn September
9 27, 2011." That's Exhibit C to your examination.

10 MR. LEON: Your notice said you were
11 crossexamining on her affidavits. I must have
12 read it wrong. Got it.

13 BY MR. MANDERVILLE:

14 457 Q. Turn to paragraph 9 of the affidavit,
15 and I guess I'd like you read paragraphs 9 through
16 11 and then I'll have some questions about those.

17 A. Okay.

18 MR. LEON: I know you didn't draft these
19 affidavits, but those paragraphs sure are long.

20 MR. MANDERVILLE: I was going to refrain
21 from the same observation.

22 THE DEPONENT: Up to 11 you said?

23 MR. MANDERVILLE: Yes.

24 MR. LEON: Just so that it's clear on the

record again, these paragraphs are replete with

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1 hearsay evidence which we say is inappropriate on
2 the application.

3 BY MR. MANDERVILLE:

4 458 Q. Are you familiar with someone named
5 Mauricio Herman?

6 A. Yes, he's a friend of my husband and
7 mine.

8 459 Q. And to your knowledge, is it accurate
9 to say for your brother to have deposed that in
10 late 2008, Mauricio Herman, which he describes as
11 being a friend of your husband's, and Roderico
12 Rossell initiated the possibility of settlement
13 discussions with your cousin?

14 MR. LEON: Now, that's about three
15 questions. Can we break it down?

16 BY MR. MANDERVILLE:

17 460 Q. Look at paragraph 9 of your brother's
18 affidavit here, Ms. Castillo. Do you see the
19 second sentence:

20 "The conversations were initiated in
21 October or early November 2008 through
22 a mutual friend of Ricardo Castillo and
23 Roderico Rossell, a gentleman named
24 Mauricio Herman."

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1 accurate?

2 A. The way I remember, that's how it
3 happened, yes. Actually, I we were at a board
4 meeting, and I got a phone call before I went into
5 the meeting from Ricardo telling me that Mauricio
6 had called him because Mr. Roderico Rossell had
7 approached him to see if there was any way he could
8 get Ricardo's number to call him to maybe talk
9 about this.

10 461 Q. Okay.

11 A. And I immediately relayed that
12 information to Juan and my dad.

13 462 Q. And then subsequently there was an
14 initial settlement conference involving you and
15 Juan, among others, and your cousins in Guatemala
16 in February 2009?

17 A. Yes.

18 463 Q. And you attended at that settlement
19 conference?

20 A. I attended that one, yes.

21 464 Q. You signed a Nonaggression and
22 Confidentiality Agreement along with your brother?

23 A. Yes, I did sign that.

24 465 Q. Is that Exhibit B to

MR. LEON: Just let her look at it.

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1 MR. MANDERVILLE: Sure.

2 THE DEPONENT: The actual one, yes. Yes, I
3 remember signing this.

4 BY MR. MANDERVILLE:

5 466 Q. And that is your signature on the
6 Spanish version of the document?

7 A. Yes.

8 467 Q. And your brother goes on to state that
9 the original Nonaggression and Confidentiality
10 Agreement was signed by Margarita, your father and
11 Juan and was exchanged with the cousins on March
12 11, 2009, the date of the second settlement
13 meeting.

14 Are you aware of a second settlement meeting?

15 A. I was not present at a second meeting
16 but I know that I knew that it was going to
17 happen.

18 468 Q. And it did happen?

19 A. For what I was told by Juan, yes.

20 469 Q. In paragraph 10 of his affidavit, your
21 brother makes known, you told me about it, that you
22 encountered your cousin Felipe Bosch at a music
23 concert Christmas, New Year '08, '09?

24 A. Yes.

Q. He indicates that he was advised of

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1 this meeting through using a security team and that
2 you did not disclose it?

3 A. That's not accurate.

4 471 Q. Okay.

5 A. They learned about that meeting because
6 I told my dad that I saw my cousin in that concert.

7 472 Q. When would you have told your dad that?

8 A. That I don't recall, when I told him.

9 473 Q. Was it before the settlement discussion
10 that you participated in in February 2009?

11 A. I don't remember the exact date.

12 474 Q. When you attended the settlement
13 conference in February 2009, were you personally
14 hopeful they would be successful?

15 A. Oh, yes, I was very hopeful that we
16 would be successful.

17 475 Q. Did you take steps to prepare for the
18 meeting?

19 A. What do you mean by that?

20 476 Q. Review any documents, discussing with
21 your brother and your father and anyone else at
22 Xela who was involved the issues you wanted to
23 raise at the settlement meeting?

24 A. Well, I knew some of the issues and

besides I was told by my dad that I was just a

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1 support system there, so I wasn't provided any
2 documents to bring or to carry or to talk about.

3 477 Q. Did that upset you?

4 A. No, I understood that my position was
5 to be the if you want to say the family aspect
6 of the meetings because it was business but it's
7 also family.

8 478 Q. In paragraph 11 of this affidavit, your
9 brother states halfway down:

10 "Despite the importance of this first
11 settlement meeting, Margarita declined
12 to meet with our team that morning and
13 she showed up to our office literally
14 half an hour before we were to leave for
15 the settlement meeting."

16 Is that accurate?

17 A. I don't think I would say declined to
18 be there. I asked if it was necessary for me to be
19 there, and if I wasn't there, it was because I was
20 told that it wasn't necessary for me to be there
21 and I was told to be there at a certain time and
22 that's what I did.

23 479 Q. He goes on to state that:

24 "We were subsequently informed by a

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1 meet with us and our lawyers that
2 morning, Margarita spent the morning
3 meeting with her nephew, Roberto
4 Barillas Castillo, at the home of
5 her motherinlaw."

6 Is that accurate?

7 A. Well, I met with him, yes. He lived in
8 that house and I was with my motherinlaw and he
9 was in the house. But it wasn't instead of. It
10 was you said "rather than meeting." No, it
11 wasn't rather than meeting. It was I was told that
12 it wasn't necessary, my presence, at the
13 preparation meeting, and that's why I didn't go.

14 480 Q. Following the initial meeting, your
15 brother states that:

16 "After the initial settlement meeting,
17 we reconvened at our offices in order
18 to debrief our lawyers, who were not
19 allowed to participate in the
20 negotiations. We also had to debrief
21 my father, who was in Jupiter, Florida."

22 Do you recall that that's accurate?

23 A. Yes, and I we actually talked to my
24 father over the phone while we were riding from the

meeting place back to the office.

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1 481 Q. In a car?

2 A. In the car, yes.

3 482 Q. Goes on to state:

4 "Before we could begin our debriefing

5 sessions, however, Margarita excused

6 herself in order to visit her

7 motherinlaw, who was elderly. We

8 were subsequently informed by our

9 security personnel that she again

10 met with her nephew, Roberto Barillas

11 Castillo."

12 Is that accurate?

13 A. That's not how I remember. I was there

14 for the debriefing and everybody was going to go to

15 someone's birthday party, and I excused myself from

16 that birthday party in order to go spend time with

17 my motherinlaw. And like I said before, Roberto

18 lived in the house. He was there too.

19 483 Q. So Roberto lived in the same house as

20 your motherinlaw?

21 A. Yes.

22 484 Q. I'd ask you to turn, Ms. Castillo, to

23 your third affidavit, which is in the Second Reply

24 Application Record, Exhibit 3.

A. Page, you said? I'm sorry.

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1 MR. LEON: He didn't say.

2 THE DEPONENT: Oh, you didn't say.

3 BY MR. MANDERVILLE:

4 485 Q. I'm keeping you in suspense.

5 A. I thought you said.

6 486 Q. I'd ask you to turn to page 13, please.

7 A. 13. I'm there.

8 487 Q. Could you read paragraph 41, please?

9 A. I have read it.

10 488 Q. Okay. You say that you met with your

11 cousins in Guatemala in the fall of 2009. What was

12 the purpose of that meeting?

13 A. To get reacquainted with them.

14 489 Q. Who arranged that meeting?

15 A. It was arranged. I'm not exactly sure

16 how it happened.

17 490 Q. And where was this meeting held?

18 A. You already asked me about it and

19 stated before it was at the InterContinental Hotel.

20 491 Q. I believe that was the meeting that was

21 in March 2010.

22 MR. LEON: Do you want to check on that?

23 THE DEPONENT: No, I know. I know. Where

24 did you think it's

client's affidavit is wrong.

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- 1 BY MR. MANDERVILLE:
- 2 496 Q. So, when Juan Guillermo recounts Mr.
- 3 Porras saying that you met with your cousins in
- 4 February 2010 at the InterContinental Hotel, that's
- 5 mistaken in your view and it occurred in the fall
- 6 of 2009?
- 7 A. Yes, that's mistaken there.
- 8 497 Q. And who attended at that meeting?
- 9 A. It was Ricardo, myself, Juan Jose,
- 10 Felipe and Roberto.
- 11 498 Q. Just the five of you?
- 12 A. Yes.
- 13 499 Q. And who suggested scheduling the
- 14 meeting?
- 15 A. That I'm not sure. I could not say.
- 16 500 Q. Did you ask for it to be scheduled?
- 17 A. No, I didn't.
- 18 501 Q. Did you ask Mr. Barillas to arrange it?
- 19 A. No, I didn't.
- 20 502 Q. How were you contacted about having a
- 21 meeting?
- 22 A. Ricardo told me.
- 23 503 Q. Did Ricardo say who had contacted him?
- 24 A. I did not ask him at the time.

Q. What was discussed at this meeting?

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1 A. I don't remember exactly what it was
2 discussed, but it was, like I said, to get
3 acquainted, a friendly meeting. We ask about each
4 other's families and as far as I remember that was
5 all that was discussed.

6 505 Q. Did you talk about possibly obtaining
7 financing with them at that time?

8 A. I don't recall about the specifics we
9 talked about that day.

10 506 Q. Did you talk about your professed
11 dissatisfaction with Xela?

12 A. That's a possibility. They were
13 surprised that I did not attend any other meetings.
14 They if I recall correctly, they expressed their
15 surprise that I did not attend any other meetings
16 in the settlement agreements because it was their
17 understanding I was going to be there. And when I
18 was asked by my father not to assist to the to
19 go to the next one, they specifically told them
20 that I was some medical, some that I had
21 something medical or I was sick or something that
22 was an excuse that was not accurate.

23 507 Q. Who is "they"? You said "they" told
24 them. Who is "they"?

A. Okay, "they" would be Juan is the

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1 one writing the emails and "them" would be the
2 cousins.

3 508 Q. So it's your evidence that Juan told
4 your cousins that you couldn't attend because

5 A. I read that I'm sorry.

6 509 Q. Because you had a health issue?

7 A. Don't exactly remember if it's a health
8 issue or I was sick or something with that in
9 that respect. That's what they what Juan told
10 them. And I know that because I read the email
11 that was sent.

12 510 Q. And this meeting takes place relatively
13 shortly before your meetings at Bennett Jones in
14 Toronto in December of 2009?

15 A. At what meeting you are referring to?

16 511 Q. This meeting in the fall of 2009 at the
17 InterContinental Hotel in Guatemala City takes
18 place weeks or a month before your meeting at
19 Bennett Jones' offices in December 2009?

20 A. Yes.

21 512 Q. So do you recall whether or not you
22 expressed to your cousins any dissatisfaction with
23 your involvement at Xela at the meeting of the fall
24 of 2009?

A. I don't remember exactly what I said or

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1 didn't say.

2 513 Q. Do you recall in general what you said?

3 A. No, I don't.

4 514 Q. Is it your evidence it was nothing more

5 than a getacquainted discussion?

6 A. As far as I remember, that's what it

7 was.

8 515 Q. Did you keep any notes of the meeting?

9 A. No, I did not.

10 516 Q. Did Ricardo?

11 A. No, he didn't.

12 517 Q. Did anyone else?

13 A. No. It was an informal meeting. There

14 was no reason to keep notes on it.

15 518 Q. Was it in a hotel room?

16 A. Yes.

17 519 Q. Whose room?

18 A. I don't know. I...

19 520 Q. Well, was it your room?

20 A. No, I wasn't staying there.

21 521 Q. Was it Ricardo's room?

22 A. Obviously if I wasn't staying there, he

23 wasn't staying there either.

24 522 Q. What prompted you to be in Guatemala in

25600

the fall of 2009?

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1 A. We would go occasionally to go visit my
2 motherinlaw.

3 523 Q. What was the purpose of this particular
4 visit to Guatemala?

5 A. Her birthday is at the end of October,
6 so that's why we chose that date.

7 524 Q. Had this meeting been arranged before
8 you went down?

9 A. No, not that I know of.

10 525 Q. You were a director of Xela at that
11 time; correct?

12 A. Yes, I was.

13 526 Q. Did you disclose to your cousins at
14 this meeting any information about Xela?

15 A. I have never disclosed any information
16 about Xela to them.

17 527 Q. So you did not at this meeting?

18 A. No.

19 528 Q. Did you disclose any information about
20 Xela to Roberto Barillas?

21 A. No, I didn't.

22 529 Q. We know you were in Guatemala for the
23 settlement meeting in February 2009?

24 A. Yes.

Q. Were you there again at any time

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1 between February '09 and this meeting in, you

2 think, the latter part of October 2009?

3 A. Not in 2009, no.

4 531 Q. Go to paragraph 41 of this affidavit.

5 Ms. Castillo, you go on to state at the first

6 sentence of paragraph 41 that you met with your

7 cousins again a second time in the winter of 2010?

8 A. Yes.

9 532 Q. When did that meeting take place?

10 A. Excuse me?

11 533 Q. When did that meeting take place?

12 A. At the end of February, beginning of
13 March. I don't remember exactly. I know I was in
14 that time in Guatemala, but I don't know exactly
15 the date.

16 534 Q. Where did that meeting take place?

17 A. That's the meeting that took place at
18 the Pepsi building.

19 535 Q. So if I can summarize correctly, you
20 had a meeting with your cousins in the fall of 2009
21 and then again in late February, early March 2010?

22 A. Yes.

23 536 Q. And prior to your departure as a

24 director of Xela in April 2010, did you have any

other meetings with your cousins during that time

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1 frame?

2 A. No, I didn't.

3 537 Q. Did you have any other conversations
4 with your cousins or their representatives during
5 that time frame?

6 A. No.

7 538 Q. Could you turn to paragraph 48 of that
8 same affidavit please, Ms. Castillo. When did you
9 ask your cousins if they could assist in arranging
10 financing for the litigation?

11 A. I'm not sure. I don't remember exactly
12 the date.

13 539 Q. Was it by way of a phone call? Was it
14 by way of a meeting?

15 A. I don't remember that.

16 540 Q. Would there be an email to your
17 cousins asking for assistance in financing?

18 A. I haven't exchanged any emails with
19 them.

20 541 Q. At any time?

21 A. No.

22 542 Q. Would you have sent them a letter
23 requesting this?

24 A. No.

Q. So your evidence is it was a verbal

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1 request?

2 A. Don't remember doing it myself, so I
3 don't know exactly how, when it was, but it was
4 verbal if it wasn't written.

5 544 Q. Well, it says, "I" you swear, "I
6 asked my cousins in Guatemala if they could assist
7 in arranging financing." That's you asking;
8 correct?

9 A. Well, that's what I said there, yes,
10 I but I don't remember actually asking myself,
11 even though I said that here.

12 545 Q. If it was not you, who would it have
13 been, Mr. Barillas on your behalf?

14 A. No, it would have been Ricardo.

15 546 Q. So is it your evidence you did not
16 personally ask or that you may have and you can't
17 recall?

18 A. I don't my evidence, I don't
19 remember exactly.

20 547 Q. And according to your affidavit, you're
21 asking your cousins to assist in providing you with
22 money; correct?

23 A. No, I wasn't asking them for the money,
24 if that's what you're asking me.

Q. No, I'm saying according to your

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1 affidavit which says, "I asked my cousins in
2 Guatemala if they could assist in arranging
3 financing" according to that you're approaching
4 your cousins, either directly or through Ricardo,
5 and asking if they can assist in providing you with
6 a source of money; correct?

7 A. Yes, that's what it says here.

8 549 Q. And that's not something that you can
9 remember how it came about?

10 A. No, I don't remember how it came about.

11 550 Q. What response did you or Ricardo get to
12 that request?

13 A. I don't remember exactly what was the
14 response.

15 MR. LEON: Well, if she doesn't remember
16 exactly making it, I'm not sure how she'd remember
17 the response but...

18 BY MR. MANDERVILLE:

19 551 Q. Well, was it a negative response?

20 A. No.

21 552 Q. It was a positive response; correct?

22 A. Yes.

23 553 Q. They were willing to help?

24 A. Yes, they were willing to help.

Q. Now, you've told me that you arranged

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1 for the loan from the Guatemalan bank yourself.

2 Did you go down to Guatemala and prepare the loan

3 documentation, fill in the loan documentation?

4 A. I don't remember saying that I arranged

5 the loan myself. I filled out the forms and I

6 signed the forms and I gave them to Jorge Porras

7 when he came to Miami

8 Reporter Appeals.

9 A. When I signed my the power attorney.

10 555 Q. So you prepared the documents either in

11 Ontario or Florida?

12 A. I don't remember exactly how much I

13 filled it out at home and how much I filled out

14 when he was there. He assisted me to fill out the

15 remaining information. I don't recall exactly how

16 that came about.

17 556 Q. Can you explain to me why you decided

18 to do this by way of a power of attorney rather

19 than applying yourself?

20 A. Because I'm not physically in the

21 country all the time, Guatemala, so it makes sense

22 to do it like that.

23 557 Q. And is the loan or the line of credit

24 exclusively in your name or is it in other people's

25612

names as well?

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1 A. It's in my name.

2 558 Q. Only?

3 A. As far as I know, it's in my name. The
4 application was in my name.

5 559 Q. Does Mr. Barillas not have access to it
6 as well?

7 A. Well, he has access to it to make
8 transfers to me. With the power attorney he can go
9 to the bank and ask for the transfer.

10 560 Q. That's right. So the bank must know he
11 has that authority; correct?

12 A. Yes, I assume it is that the case.

13 561 Q. I'm going to ask your counsel for some
14 undertakings, and, with respect, I may get a curt
15 response.

16 MR. LEON: Never curt.

17 BY MR. MANDERVILLE:

18 562 Q. In the circumstances, Mr. Leon, I'm
19 going to ask for the loan documentation in Ms.
20 Castillo's or Mr. Barillas' possession concerning
21 this particular loan agreement?

22 MR. LEON: Didn't you already ask for that?

23 MR. MANDERVILLE: I asked for the
24 application form.

MR. LEON: I'll refuse on the same basis.

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1 REFUSAL

2 BY MR. MANDERVILLE:

3 563 Q. I'd ask in addition for the actual loan
4 agreement?

5 MR. LEON: Same answer.

6 REFUSAL

7 BY MR. MANDERVILLE:

8 564 Q. Ask for a copy of the current loan
9 statement indicating any transfers in or out of the
10 account?

11 MR. LEON: Same answer, only with more
12 vigor.

13 REFUSAL

14 MR. MANDERVILLE: Off the record.

15 OfftheRecord Discussion.

16 MR. LEON: Based on any questions that you
17 asked, I do not understand any basis for relevance
18 of any of this, but, in particular, why you should
19 be entitled to know what payments have been made.

20 MR. MANDERVILLE: I believe I've already
21 asked for any statements of the net worth that were
22 provided to the bank.

23 MR. LEON: I believe you did and

24 MR. MANDERVILLE: And I believe you said

25 616

no.

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1 MR. LEON: I refused.

2 BY MR. MANDERVILLE:

3 565 Q. Now, I want to change topics a little
4 bit, Ms. Castillo. There was, as I understand it,
5 a bit of a controversy concerning Mr. Barillas in
6 the fall of 2009 over monies owing by BPA to Xela;
7 correct?

8 A. I believe it was the contrary, the
9 other way around, Xela owed BPA for some services
10 rendered.

11 566 Q. Was there also not an issue about
12 \$100,000 owing to Xela by Barillas?

13 A. It is not he the one that owes Xela,
14 from what I understand.

15 567 Q. What is your understanding?

16 A. It is a different company. It's
17 Boucheron, a company called Boucheron.

18 568 Q. Boucheron is a Xela subsidiary;
19 correct?

20 A. It's not under Xela. I don't believe
21 it's a Xela subsidiary.

22 569 Q. What is your understanding of what
23 Boucheron is?

24 A. It's a company that provide services.

25 **618** 570

Q. What services does it provide?

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1 A. Don't know exactly the matter, but as
2 far as I understood at the moment, it was to pay
3 some of the salaries for the employees in
4 Guatemala, executives in Guatemala.

5 571 Q. Executives for who, for Xela?

6 A. I don't know. I told you I don't know
7 what the purposes was.

8 572 Q. Your understanding was a company set up
9 to pay salaries of executives?

10 A. Yes.

11 573 Q. Executives in whose employ?

12 A. Well, yes, Xela employees.

13 574 Q. So you did not understand that it was a
14 Xela company?

15 A. I don't think it was ever viewed as a
16 Xela subsidiary.

17 575 Q. Can I ask you to take a look at
18 Mr. Korol's affidavit. It is in the Responding
19 Application Record, Volume 1.

20 MR. LEON: Sorry, which?

21 BY MR. MANDERVILLE:

22 576 Q. Responding Application Record, Volume
23 1, Exhibit A1. Tab 1 is the first affidavit of
24 Mark Korol, sworn June 15th, 2011. You know

Mr. Korol to be the chief financial officer of
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1 Xela?

2 A. Yes.

3 577 Q. At paragraph 10 of his affidavit, page
4 7, Mr. Korol discusses the incorporation of
5 Boucheron?

6 A. No.

7 578 Q. I would ask you to read paragraph 10,
8 please.

9 A. Okay.

10 MR. LEON: Now, again, this appears to be
11 information not within his, Mr. Korol's, personal
12 knowledge, so I take the same position on that.
13 This is prior to his employment.

14 BY MR. MANDERVILLE:

15 579 Q. Can you also turn to Exhibit B, which
16 Mr. Korol refers to in paragraph 10. First turn to
17 Exhibit B. It's a wire transfer request dated
18 November 12th, 2002. Is that your signature
19 approving the wire transfer request?

20 A. Yes, I was the second signature there.

21 580 Q. If you continue on, two pages later,
22 after the wire transfer requisition, there's an
23 invoice under the letterhead of
24 PriceWaterhouseCoopers?

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1 581 Q. Do you have that in front of you?

2 A. Yes, I have it in front.

3 582 Q. It appears to be an invoice in

4 connection with the incorporation of Boucheron and

5 another company, but Boucheron Universal Corp. on

6 behalf of Xela; correct?

7 A. That's what the invoice appears to be.

8 583 Q. And I acknowledge your counsel's

9 caution, but do you have any reason to question the

10 accuracy of that document?

11 A. That, the invoice?

12 584 Q. Yes?

13 A. No.

14 585 Q. Any reason to question the accuracy of

15 Mr. Korol's statement that Boucheron was

16 incorporated on behalf of Xela?

17 A. I don't know exactly how it was

18 incorporated, so I cannot say "yes" or "no" to that

19 statement.

20 586 Q. Is it fair to say that's not something

21 that is controversial?

22 MR. LEON: If you look sorry.

23 THE DEPONENT: You asked me what? I'm

24 sorry.

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1 587 Q. Is it fair to say that the issue of
2 Boucheron being incorporated on behalf of Xela is
3 not something that is controversial?

4 A. Oh, I don't know why it would be if
5 that's the way it was that's how it is expressed
6 here.

7 588 Q. And I take it you don't have any
8 evidence on that issue to contradict that of
9 Mr. Korol?

10 A. No, I wasn't involved in any of those
11 administrative matters at the time.

12 589 Q. I mean, I take it it was pure
13 coincidence that you signed the wire transfer?

14 A. I was the second signature because they
15 always needed two signatures in there and I am
16 always I am mostly always in Toronto so I was
17 asked to be a second signature, so I accepted to be
18 second signature.

19 MR. LEON: That supplements her answer
20 before in terms of things that she did for Xela
21 that you asked her about.

22 MR. MANDERVILLE: Okay.

23 BY MR. MANDERVILLE:

24 590 Q. I was asking you about an issue between

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1 concerning BPA and monies that Mr. Barillas alleged
2 were owed to him and monies that Xela alleged were
3 owed to it by Mr. Barillas; correct?

4 A. I'm sorry, can you repeat it?

5 591 Q. I should because it was awkwardly
6 phrased. I was asking you about an issue that
7 arose in the fall of 2009 between Mr. Barillas and
8 Xela, and I want your recollection, as best you
9 can, and you can disagree with what I am about to
10 suggest.

11 As I understand it, the controversy, if you
12 will, concerned some monies which Mr. Barillas
13 claimed he was owed by Xela for auditing services,
14 and it also concerned some money that Xela contended
15 were owed to it by Mr. Barillas for other services;
16 correct?

17 A. I recall the services towards BPA. I
18 don't recall the other way around.

19 592 Q. Do you recall there was \$100,000 in
20 issue which Xela was of the view Mr. Barillas
21 should be refunding to Xela?

22 A. I recall hearing that amount of money,
23 but I don't know exactly owed to whom.

24 593 Q. You don't recall what the issue was on

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1 A. Something to do with the bank account,
2 I believe.

3 594 Q. The amounts owing to Mr. Barillas by
4 Xela was in the order of about \$32,000, you said;
5 correct?

6 A. Don't remember the exact amount, but I
7 think that's the amount that is being talked about.

8 595 Q. And you agreed in the fall of 2009 to
9 mediate to some extent the dispute?

10 A. Yes, I was approached to talk to
11 Roberto to come and talk to my father, and I
12 facilitated that meeting.

13 596 Q. What's your understanding of what
14 transpired as a result of your efforts and the
15 meetings?

16 A. Roberto and my father met and they
17 discussed what they wanted from each other, which
18 basically my they had decided to finish their
19 involvement with BPA, so they were asking for the
20 accounting documents and papers and books and
21 things that BPA had from Xela subsidiaries, and I
22 believe Roberto mentioned to him that there were
23 some outstanding invoices for services rendered.

24 597 Q. What role did you play?

A. I was just sitting at the table

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1 listening.

2 598 Q. Were you not aware at the time that
3 Xela was of the view that Mr. Barillas had
4 misappropriated or embezzled approximately \$100,000
5 U.S. of Xela's funds in Boucheron?

6 A. I was aware of that, but to my
7 understanding that was not the reason of the
8 meeting was not to discuss that matter.

9 599 Q. Did Mr. Barillas, to your
10 understanding, satisfy all the conditions that were
11 asked of him before you released the funds to him?

12 A. When I asked Juan if it was okay to
13 release the funds as he I told him for what I
14 if I remember correctly the words, for what I
15 understand, Roberto already BPA finalized all
16 the things that they had to do, so he said okay to
17 pay them.

18 600 Q. I'd ask you to read paragraph 14 of
19 Mr. Korol's affidavit.

20 A. 14, you said?

21 601 Q. Yes, I did. That's at page 9.

22 MR. LEON: Again, there's all sorts of
23 hearsay in there without saying even the source of
24 the hearsay.

THE DEPONENT: I've finished.

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1 BY MR. MANDERVILLE:

2 602 Q. See, at the very bottom of page 9, top
3 of page 10, Mr. Korol states:

4 "Barillas turned over the accounting
5 books and records in Guatemala but he
6 refused to cooperate with Grant
7 Thornton by providing backup support
8 or working papers for end of year
9 balances. This action directly
10 resulted in Grant Thornton issuing
11 a qualified audit opinion to the
12 detriment of Xela's best interests
13 and resulting in damage to the
14 respective companies."

15 Do you accept that statement as accurate?

16 A. I don't know exactly what transpired
17 when they were doing this, so I don't know if
18 that's accurate or not.

19 603 Q. Mr. Barillas turning over the
20 accounting books and records, that is something
21 that occurred during your tenure as a director?

22 A. Yes. But it should

23 MR. LEON: Sorry.

24 THE DEPONENT: I am not finished. It

should say "BPA", not "Barillas" because it was the

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1 company that was providing the service.

2 BY MR. MANDERVILLE:

3 604 Q. However, this would have occurred in
4 the fall of 2009 while you were still a director of
5 Xela; correct?

6 A. Yes.

7 MR. LEON: "This" being what?

8 MR. MANDERVILLE: Barillas turning over
9 accounting books and records in Guatemala.

10 BY MR. MANDERVILLE:

11 605 Q. Do you have any recollection, Ms.
12 Castillo, about discussion concerning Barillas'
13 alleged refusal to cooperate with Grant Thornton
14 by providing backup support of working papers?

15 A. No, I don't know anything about that.

16 606 Q. Was it ever suggested to you that you
17 should not have released the funds to Mr. Barillas
18 because he had not lived up to his end of the deal?

19 A. I did not release the funds until I was
20 told by Xela to that it was okay to release
21 them, and that's how it happened.

22 607 Q. And your evidence is that you were told
23 by Xela it's okay to release the funds to Mr.
24 Barillas?

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1 608 Q. All right. And is it also your
2 evidence that you were told by Xela that the
3 \$100,000, allegedly embezzled, was a separate issue
4 and would be dealt with separately?

5 A. I don't think I ever spoke to anyone in
6 Xela respecting in that respect, but what I know
7 it was it didn't have anything to do with the
8 BPA matter.

9 609 Q. How do you know that?

10 A. Because it wasn't discussed when my
11 father and Roberto were talking about resolving the
12 books and the invoices.

13 610 Q. Were you present for the discussion
14 with your father and Mr. Barillas?

15 A. Yes, I was there. Yes, I was there.

16 611 Q. Where did it take place?

17 A. At my house.

18 612 Q. Now, in February 2010 there was a board
19 meeting of Xela. That would be the sort of winter
20 quarters board meeting; correct?

21 A. Yes.

22 613 Q. And you attended that meeting?

23 A. I was at that meeting.

24 614 Q. And at that meeting, as you know, a

resolution was passed authorizing laying of a
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1 criminal complaint against Mr. Barillas?

2 A. I learned about that resolution when I
3 read the affidavits.

4 615 Q. You contend that you did not know about
5 it at the meeting?

6 A. No, I left the meeting before it
7 finished.

8 616 Q. And you left the meeting upset?

9 A. I left the meeting upset but it wasn't
10 anything to do with this resolution or that was
11 passed after I left. It wasn't because of that
12 that I left.

13 617 Q. And you got up and it's been
14 characterized that you stormed out of the meeting.

15 I take it you don't accept that
16 characterization, but you got up and left the meeting
17 upset because of another issue?

18 A. I got up, took my papers and left the
19 meeting.

20 618 Q. Did you say anything to the rest of the
21 board?

22 A. No, I just got up and left.

23 619 Q. What time of day would that have been?

24 A. Late in the afternoon. I wasn't

25**640**

looking at my watch.

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1 620 Q. According to your second affidavit,
2 paragraph 46, you got upset and left because there
3 was a typo in the list of the shareholder?

4 MR. LEON: No, no, that's not her evidence.

5 BY MR. MANDERVILLE:

6 621 Q. There was a PowerPoint presentation of
7 the list of shareholders and your name wasn't on
8 the list?

9 MR. LEON: Well...

10 THE DEPONENT: That's more than a typo.

11 BY MR. MANDERVILLE:

12 622 Q. Was there any doubt at that time that
13 you were a Xela shareholder?

14 A. Can you repeat the question?

15 623 Q. Was there any doubt at that time that
16 you were a Xela shareholder?

17 A. Not in my mind, but the presentation
18 that they were doing was the shareholders of Xela
19 moving forward and I was not in that list.

20 624 Q. Did you say to anyone, "How come I'm
21 not on that list?"

22 A. I did.

23 625 Q. To whom?

24 A. I said it in the board. Like I said it

like we are talking at this table right now, and I

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- 1 said, "How come I'm not in the list?"
- 2 626 Q. What was the answer you got?
- 3 A. "It's an honest mistake."
- 4 627 Q. Sorry?
- 5 A. I was told, "It's an honest mistake."
- 6 628 Q. Do you have any reason to believe
- 7 otherwise?
- 8 A. It really upset me that I was not in
- 9 that list and I have been I felt I was being
- 10 pushed out; so that upset me when I read it like
- 11 that, when I saw it like that.
- 12 629 Q. To your knowledge, who are the Xela
- 13 shareholders?
- 14 A. My father and Juan and myself through
- 15 Alberta companies and the Gutierrez family trust.
- 16 630 Q. And so the listing for you would be a
- 17 listing of your Alberta numbered company?
- 18 A. That would be the listing that would
- 19 probably be there.
- 20 631 Q. That would be sort of what would show
- 21 up? And your brother and your father, of course,
- 22 would know, okay, that particular Alberta company
- 23 is Margarita's; correct?
- 24 A. Yes, I know which one it is but they

that was the official. But we never did it. When

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1 we talked about who were the shareholders, I don't
2 recall it ever being said like the numbered
3 companies. It was said the names.

4 632 Q. So on this PowerPoint presentation how
5 did it appear, Alberta companies or personal names?

6 A. Personal names.

7 633 Q. And to your recollection your father's
8 name was there and your brother's name was there
9 and your name was not there?

10 A. That's correct.

11 634 Q. And that upset you so that you got up
12 and left the room?

13 A. Well, I asked and the answer was not
14 well, it was insulting to say that it's just "an
15 honest mistake." And then Juan proceeded to have a
16 temper tantrum that I did not appreciate, so I
17 decided I'm not going to keep stay here, and I
18 got up and left.

19 635 Q. Well, do you anywhere in your
20 affidavits speak of being told it was an honest
21 mistake or that your brother had a tantrum?

22 A. I don't recall if I ever specified that
23 matter.

24 636 Q. And when Mr. Korol and your brother

deposed that you were upset because the resolution

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1 was passed to authorize a criminal complaint
2 against your nephew, Mr. Barillas, they're
3 mistaken?

4 A. Yes, that's not accurate because that
5 wasn't spoken while I was at the meeting.

6 637 Q. Is there any indication in the minutes
7 that Director Margarita Castillo took issue with
8 the omission of her name on the shareholders' list?

9 A. I haven't seen the minutes of that
10 meeting, so I don't know if it's stated or not.

11 638 Q. I believe they're an exhibit to an
12 affidavit. I'll tell you there is no mention of
13 that.

14 MR. LEON: She didn't control the minutes.
15 She didn't receive a draft to approve them or
16 review them, so I don't think you can fault her for
17 that.

18 BY MR. MANDERVILLE:

19 639 Q. During your tenure as a director, Ms.
20 Castillo, you read the minutes when they would come
21 to you?

22 A. Yes, I did.

23 640 Q. Did you ever object to any of them?

24 A. No.

Q. Did you never point out to Mr. Korol to

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1 say, "Wait a second, you missed something here" or
2 "You should change something"?

3 A. When we would talk about the minutes,
4 it was at the time of the board meeting that the
5 minutes from the previous meeting was approved. I
6 recall that at one moment I reminded him that he
7 was probably doing too much copy and paste because
8 the list of the companies or the person at one
9 point it was he had more things listed that they
10 were actually in there. But that was just like a
11 pointing out like I think you are doing too much
12 cut and paste and should review that list there.

13 642 Q. So you recall doing that?

14 A. Yes, at one point I did that.

15 643 Q. And the February 2010 board meeting was
16 the last board meeting you attended?

17 A. That's correct.

18 644 Q. And by the time of that board meeting
19 you had already met with your cousins at least once
20 and counsel for the cousins and your legal counsel
21 to discuss litigation?

22 MR. LEON: Sorry, can you repeat that if
23 you are asking her about what she did with her
24 legal counsel?

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1 645 Q. At the time of this board meeting,
2 February 2010, you've told me you had already met
3 with your cousins and on at least one occasion and
4 their legal counsel and your legal counsel to
5 discuss, among other things, the possible
6 commencement of litigation?

7 MR. LEON: No, she didn't say that, to my
8 recollection. She acknowledged there was a
9 meeting.

10 BY MR. MANDERVILLE:

11 646 Q. Can you turn to your third affidavit,
12 in the Second Reply Application Record, Exhibit 3.

13 A. Second Reply?

14 647 Q. Yes. In particular, I would ask you to
15 turn to page 10 of your affidavit.

16 A. Yes, I'm there.

17 648 Q. Paragraph 32.

18 A. Yes.

19 649 Q. You swear that:

20 "On December 8th, 2009, Ricardo,

21 Roberto" would be Roberto Barillas

22 "Jorge" would be Mr. Porras

23 "and I met with my lawyers at Bennett

24 Jones. At this point I was seeking

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1 director of Xela with respect to
2 the Boucheron activity. This
3 included exploring whether I would
4 find it necessary to start a legal
5 proceeding against Xela or Juan."

6 Correct?

7 A. Yes, that's correct; that's what it
8 says there.

9 650 Q. My previous question to you was that at
10 the time of the meeting, directors' meeting in
11 February 2010, where you became upset and left, you
12 had at that point had meetings with your cousins,
13 had meetings a meeting at least with your
14 cousins' lawyer and a meeting with Bennett Jones to
15 discuss the possibility of commencing litigation;
16 correct?

17 A. I don't recall being the commencing
18 litigation prior to being part of that meeting or
19 the motivation for that meeting.

20 651 Q. So when you've sworn that it's true at
21 paragraph 32 of your affidavit that this meeting
22 I'm saying that parenthetically "included
23 exploring whether I would find it necessary to
24 start a legal proceeding against Xela or Juan"?

MR. LEON: I think you have to read the

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1 sentence before that too.

2 MR. MANDERVILLE: Well, and I did read that
3 into the record before, Mr. Leon.

4 MR. LEON: I know you did.

5 BY MR. MANDERVILLE:

6 652 Q. If I take your sworn evidence at face
7 value here, Ms. Castillo, is it not true that one
8 of the things that you were meeting Bennett Jones
9 about was possible commencement of litigation?

10 A. With emphasis on the word "possible"
11 because it wasn't for sure.

12 653 Q. Do you want to take 10 minutes?

13 MR. LEON: Sure.

14 Recess at 3:04 p.m.

15 Resuming at 3:18 p.m.

16 BY MR. MANDERVILLE:

17 654 Q. Ms. Castillo, we were talking a little
18 earlier about the Xela board meeting of February
19 2010, and I understand that shortly following that
20 board meeting and that board meeting was in Fort
21 Lauderdale; correct?

22 A. That's correct.

23 655 Q. I understand that shortly following
24 that board meeting you went to Guatemala?

A. I came back to Toronto and then at the

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1 end of the month I went to Guatemala.

2 656 Q. Was that when you met with your cousins
3 at the Pepsi offices?

4 A. Yes.

5 657 Q. Now, I want to talk to you a little bit
6 about what I'm going to call the Xela estate
7 freeze. Do you know the process I'm speaking of
8 when I use that term?

9 A. Yes, I do.

10 658 Q. As I understand it, in 1996 your father
11 arranged for you and Juan and he to have Alberta
12 holding companies?

13 A. Yes, it was in 1996.

14 659 Q. And you and Juan obtained independent
15 legal advice in connection with the arrangements
16 that your father wanted to put in place?

17 A. Yes, that's what I remember.

18 660 Q. Am I correct that the intention, your
19 father's intention, was to give you and Juan shares
20 in Xela through the companies but that you wouldn't
21 be able to redeem them until your father passed
22 away?

23 A. Yes, that was the way it was, as I
24 understand understood it at the time.

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1 about this is the intention of what these documents
2 are saying?

3 MR. LEON: I don't think you can ask that
4 question.

5 MR. MANDERVILLE: Fair enough.

6 BY MR. MANDERVILLE:

7 662 Q. Do you today have any issue with the
8 independent legal advice you obtained back then?

9 MR. LEON: No, you can't ask that either.
10 That's why

11 BY MR. MANDERVILLE:

12 663 Q. Why is that, Mr. Leon?

13 MR. LEON: It's legal advice. It's
14 privileged, isn't it?

15 BY MR. MANDERVILLE:

16 664 Q. I'm not asking what the advice was.

17 I'm asking if there was any assertion now that
18 there was an issue in connection with that advice.

19 MR. LEON: I think that's the same thing.

20 BY MR. MANDERVILLE:

21 665 Q. You've told me you understood your
22 father's intentions with the estate freeze?

23 A. In 1996, yes, I understood.

24 666 Q. And you understood that his intention

was that, among other things, you and Juan would

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1 not be able to redeem your shares in Xela until
2 your father passed away; correct?

3 A. Yes, that's what I understood at the
4 time.

5 667 Q. You understood that the various
6 documents that were prepared were done in an effort
7 to achieve that intention?

8 A. Yes, that's what I understood at the
9 time.

10 668 Q. And at the time you didn't have any
11 particular objection to that?

12 A. No, I didn't have any objections to
13 that at the time.

14 669 Q. Now, Ms. Castillo, at a certain point
15 in 2010 you, through Mr. Leon, let Xela know that
16 you were not happy with how things had unfolded
17 during your tenure with Xela?

18 A. I think that's how you can put it.
19 There some correspondence that was back and forth.

20 670 Q. If you feel I'm inaccurate in how I'm
21 putting it, by all means correct me.

22 A. I don't know exactly what context you
23 want.

24 671 Q. Well, I understand there was

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1 and then Xela's counsel attesting to your
2 dissatisfaction with how things were happening at
3 Xela?

4 A. Yes, I think that's how you can put it,
5 yes.

6 672 Q. And

7 MR. LEON: Sorry, just a small matter. I
8 don't recall actually writing to Xela. I recall
9 corresponding with Mr. Rodriguez.

10 MR. MANDERVILLE: And that's fine. I'm
11 not I'm certainly not suggesting an ex parte
12 conversation. I wondered if your initial letter
13 had gone to the company and then they involved a
14 lawyer.

15 MR. LEON: I don't recall.

16 BY MR. MANDERVILLE:

17 673 Q. And one of the issues which remains
18 live is the value of your shares in Tropic?

19 A. That's correct.

20 674 Q. And in connection with that, and after
21 the parties had entered into confidentiality
22 agreements, they agreed to share some documents?

23 A. Yes, that's what I remember.

24 675 Q. One of the document Xela provided to

your financial advisor was a valuation prepared by

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1 Mr. Badham?

2 A. I don't know exactly what documents
3 were provided to my advisor, but I've heard about
4 that valuation by Mr. Badham.

5 676 Q. Ms. Castillo, can you turn to the
6 Supplemental Application Record of my clients,
7 Exhibit B.

8 MR. LEON: Supplemental Application Record.
9 B?

10 BY MR. MANDERVILLE:

11 677 Q. It's Exhibit B, tab 2, which would be
12 the supplemental affidavit of Mark Korol.

13 Exhibit A to the document is to
14 Mr. Korol's supplementary affidavit is a valuation
15 prepared by Mr. Badham?

16 A. You said A?

17 678 Q. Tab 2, sub A.

18 A. Yes, that's what it says on the front
19 page.

20 679 Q. Michael Badham, FQ Valuations,
21 September 15, 2010?

22 A. Yes.

23 680 Q. Have you seen that document before?

24 MR. LEON: Before this affidavit or

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1 BY MR. MANDERVILLE:

2 681 Q. Before today? I presume you

3 A. Oh, sorry.

4 682 Q. Do you see that Mr. Korol deposes that
5 this was provided to Mr. Cohen, your financial
6 advisor, in October 2010?

7 MR. LEON: He says he believes it was
8 produced in October 2010.

9 BY MR. MANDERVILLE:

10 683 Q. Is there any dispute about that?

11 MR. LEON: I don't know of any. See, a
12 part of the thing was it was provided to Mr. Cohen,
13 not to me and not to my

14 MR. CRANE: The email dated October 26,
15 2010 at 10:34 a.m. from Mr. Cohen to Mr. Korol may
16 be of some assistance to Mr. Leon's

17 MR. LEON: And he says the (inaudible) is a
18 result of reviewing the draft valuation memorandum
19 prepared by Michael Badham. I don't think that's
20 any different than what's been produced here.

21 BY MR. MANDERVILLE:

22 684 Q. I apologize, Mr. Leon. Is it was it
23 not provided to your office?

24 MR. LEON: If I recall

MR. MANDERVILLE: Let's go off for a

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1 second.

2 OfftheRecord Discussion.

3 BY MR. MANDERVILLE:

4 685 Q. Ms. Castillo, you'd agree with me that
5 based on Mr. Korol's affidavit in Exhibit 2, it
6 would appear that the Badham valuation was provided
7 to your financial advisor in October 2010?

8 A. That's what it says there.

9 686 Q. And that would have been a couple of
10 months before you started your application?

11 A. Yes.

12 687 Q. In fact, it was your evidence that you
13 and perhaps your counsel did not actually see the
14 valuation until some time subsequent to the
15 commencement of the application?

16 A. That's accurate. I didn't see it
17 before I saw the actual affidavit that was attached
18 to it.

19 688 Q. Your financial advisor, Mr. Cohen, is,
20 among other things, considering or assessing the
21 accuracy of that valuation; correct?

22 A. That's what I understand that he is
23 doing, yes.

24 689 Q. I'd ask you to turn to Mr. Korol's

first affidavit, which is in the Responding
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1 Application Record, Volume 1. In particular, if
2 you open Mr. Korol's affidavit and turn to page 11
3 at the bottom, paragraph 17.

4 A. Yes, I've finished it.

5 690 Q. Mr. Korol states there that no funds
6 from Fresh Quest have been utilized to fund
7 political activities in Guatemala.

8 Do you take any issue with that statement
9 concerning Fresh Quest?

10 MR. LEON: Sorry, where are you reading
11 from?

12 THE DEPONENT: Here.

13 BY MR. MANDERVILLE:

14 691 Q. It starts, "Funds from Fresh Quest were
15 utilized to fund political activities in Guatemala.
16 This is untrue."

17 A. And your question was?

18 692 Q. Mr. Korol asserts that no funds from
19 Fresh Quest were utilized to fund political
20 activities in Guatemala. Do you accept the
21 accuracy of that or do you know one way or the
22 other?

23 A. I don't have any information regarding
24 specifics, so I don't agree or disagree.

Q. Ms. Castillo, I would like you to turn

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1 to your third affidavit, please. It's in your
2 Second Reply Application Record.

3 MR. LEON: Yes.

4 BY MR. MANDERVILLE:

5 694 Q. Paragraph 32, please, page 10.

6 A. Yes, I've

7 695 Q. Have you read it through?

8 A. Yes.

9 696 Q. The fourth sentence you state:

10 "With that in mind" that being

11 "exploring whether I would find it

12 necessary to start a legal proceeding

13 against Xela or Juan. With that in

14 mind, I had Roberto and Jorge explain

15 the Boucheron situation to my lawyers."

16 What was, to use your phraseology, the

17 "Boucheron situation"?

18 A. It is discrepancy for what I was

19 what I was being told by Roberto or whatever I was

20 told when I asked my father about that.

21 697 Q. I would like to you elaborate what was

22 the Boucheron situation? What were you being told

23 by Roberto, what were you being told by your

24 father?

A. Originally, Roberto told me that he was

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1 having some issues with the bank. They were asking
2 him questions because he was the legal
3 representative of the company and he didn't have
4 those answers.

5 So he asked Juan for the appropriate answers
6 and he never got an answer. That's what he told me.

7 So I asked my father and he said, "Oh, that's
8 already been resolved." That's what I got from him.

9 698 Q. Okay.

10 A. Meaning "him" meaning my father.

11 699 Q. So your father told you "that's already
12 been resolved," and am I correct then that all of
13 the other information you got about the so-called
14 Boucheron situation came from Mr. Barillas?

15 A. Yes, and directors told me that the
16 matter with the bank, to the directors' knowledge,
17 was not resolved. That's what he was told me that
18 time.

19 700 Q. So this is Mr. Barillas telling you all
20 this?

21 A. Yes.

22 701 Q. And was there anyone else besides Mr.
23 Barillas who was giving you information about
24 Boucheron?

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1 702 Q. What explanation did you ask Mr. Porras
2 to provide when you say, "I had Roberto and Jorge
3 explain the Boucheron situation to my lawyers"?

4 A. Just in general. I didn't know
5 specifically something.

6 703 Q. And was Mr. Barillas concerned that the
7 laws in Guatemala might be violated?

8 A. I don't know what his concerns were. I
9 don't I'm not in his head, so I don't know what
10 he was thinking.

11 704 Q. Who arranged for Mr. Barillas and Mr.
12 Porras to come to Toronto?

13 A. They talked to me about coming and I
14 did not say, "Don't come."

15 705 Q. So they flew up from Guatemala on their
16 own?

17 A. Yes. As I remember, yes.

18 706 Q. Who paid for them to come?

19 A. I don't know.

20 707 Q. You? Did you pay?

21 A. I don't recall paying for that.

22 708 Q. Is that something you would remember if
23 you did pay?

24 A. Roberto would come up anyway every year

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to visit us and I never we didn't pay for his

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1 trips.

2 709 Q. What about Mr. Porras, how often would
3 he come up to visit you?

4 A. No, he didn't come to visit me. He was
5 one time when they were still working at PwC and a
6 certain point they had to come for another matter
7 which related to another of the PwC clients, and it
8 was the end of summer, so they were here, they
9 stayed with us. Roberto stayed with us.

10 710 Q. And Mr. Porras stayed with you as well
11 in the summer months?

12 A. In that time, yes.

13 711 Q. And that was he was up here to do in
14 connection with his legal business for Xela; right?

15 A. No, it just had something to do when
16 they worked at PwC still. So I don't know. I
17 didn't question him what he was doing here.

18 712 Q. All right. In December 2009 was when
19 Mr. Porras comes up here. You don't know who paid
20 for him to come?

21 A. No, I don't know.

22 713 Q. Did Ricardo?

23 A. I don't know if he did. I don't think
24 so. I take care of the accounts.

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1 know that Ricardo didn't?

2 A. I don't recall Ricardo doing it but I
3 know I didn't.

4 715 Q. You take care of the accounts, so
5 that's something you would recall; correct?

6 A. Well, yes.

7 716 Q. Can you tell me why you would be
8 seeking Canadian legal advice about a Guatemalan
9 situation?

10 A. I don't know exactly what you are
11 asking me there. I don't understand the question.

12 717 Q. You say, "I had Roberto and Jorge
13 explain the Boucheron situation to my lawyers."
14 The lawyers in this instance being Bennett Jones.

15 I said can you tell me why you would have
16 Jorge and Roberto be explaining to Canadian lawyers a
17 Guatemalan situation?

18 A. That's due to the fact that I was a
19 director of Xela and I was looking for the best
20 interests of the company and wanted to know if
21 there was anything that could I cannot pronounce
22 that word. I can think of the word in Spanish but
23 not English, so give me a moment. I'll go about it
24 other way. That could be detrimental for anything

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to do with Xela.

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- 1 718 Q. So you were concerned that something
2 might be going on that was detrimental to Xela?
- 3 A. Yes.
- 4 719 Q. And in December 2009, you were a
5 director of Xela; correct?
- 6 A. I was.
- 7 720 Q. Did you raise this with members of the
8 board?
- 9 A. I would have raised anything about it
10 with my father privately.
- 11 721 Q. Did you?
- 12 A. Yes, I probably did. Most likely I
13 did.
- 14 722 Q. Did you or did you not?
- 15 A. I did.
- 16 723 Q. When would you have raised it with your
17 father?
- 18 A. I don't know the exact date.
- 19 724 Q. Would it have been before the meetings
20 with Bennett Jones?
- 21 A. Most likely.
- 22 725 Q. So sometime before December 8th, 2009
23 you raised with your father concerns about the
24 Boucheron situation?

A. Actually, I stayed away from the

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1 Boucheron situation because that didn't concern me
2 directly, but I always thought that if there was
3 anything that what could be detrimental for Xela, I
4 just wanted to find out. I was always dismissed
5 when my father went, "That's nothing that you need
6 to know. That's not your concern," so...

7 726 Q. How did you approach your father on
8 this particular issue?

9 A. I don't recall exactly the exact way I
10 would approach him about it.

11 727 Q. Was it an email, a phone call?

12 A. Could have been in person. Most likely
13 in person.

14 728 Q. What do you recall saying to him?

15 A. I don't recall what exactly we talked
16 about.

17 729 Q. Well, I appreciate you may not it's
18 been a few years. I appreciate you may not recall
19 exactly, but what do you recall?

20 A. Well, he asked, "What is the" what
21 was going on with that, like why was that an issue.

22 730 Q. Based upon the information you'd
23 received from Mr. Barillas?

24 A. Yes, because that was the only

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1 asked questions to my father, I was never given any
2 explanation.

3 731 Q. Was that the occasion when your father
4 said, "Don't worry, it's all resolved"?

5 A. That could be one of the situations,
6 yes.

7 732 Q. You're not sure?

8 A. Like I told you, I had different
9 conversations at different points in time, and we
10 talked about so many different things, that I don't
11 know exactly. I cannot pinpoint when and where.

12 733 Q. Did you tell your father, "I am
13 concerned about this situation. I'm going to go
14 speak to lawyers in Toronto about it"?

15 A. I don't recall exactly what I told him
16 but I

17 734 Q. Did you tell him that?

18 A. That I was concerned, yes, I did.

19 735 Q. Did you tell him, "I'm going to speak
20 to lawyers in Toronto about it"?

21 A. I don't recall telling him that.

22 736 Q. Did you tell him, "Mr. Barillas and Mr.
23 Porras are coming up here and we're going to
24 discuss the Boucheron situation with my lawyers"?

A. No, I didn't tell him that.

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1 737 Q. Any reason why?

2 A. Well, I didn't feel it was necessary
3 for me to tell him everything I was doing.

4 738 Q. Did you appreciate that when you met
5 with Bennett Jones in the company of Mr. Barillas
6 and Mr. Porras among others that you were, among
7 other things, discussing the company for which you
8 are a director?

9 A. I wasn't discussing anything. I was
10 getting information from them. I wasn't providing
11 any information.

12 739 Q. Off the record.

13 OfftheRecord Discussion.

14 BY MR. MANDERVILLE:

15 740 Q. So you never mentioned to your father
16 or I presume to your brother or anyone else at the
17 board, "I'm concerned about the Boucheron
18 situation. I'm going to have Mr. Barillas and Mr.
19 Porras come up here and we will meet with lawyers
20 in Toronto to discuss it"?

21 A. No, I did not mention that to my
22 father. He would be the only person I would have
23 mentioned something like that, but I didn't talk to
24 him about that.

25 690 741

Q. Did you talk with anyone else at Xela

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1 about that?

2 A. No, I didn't.

3 742 Q. And this meeting takes place very
4 shortly after your meeting with the cousins,
5 correct, in Guatemala?

6 A. Yes, in the same year.

7 743 Q. I think it was within two months?

8 A. Yes.

9 744 Q. You say in paragraph 32:

10 "At no point during this meeting was
11 any confidential privileged information
12 provided to Roberto or Jorge. Rather,
13 they were the ones providing information
14 to me and my lawyers."

15 Did you make notes of that meeting?

16 A. No, I did not take any notes.

17 745 Q. Did your lawyers make notes of that
18 meeting?

19 A. That I don't know. I assume they did.

20 746 Q. Given that you swear that there was no
21 confidential privileged information provided, I'd
22 like your lawyer's notes of that meeting, please.

23 MR. LEON: No.

24 REFUSAL

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1 747 Q. Why is that, Mr. Leon?

2 MR. LEON: They're privileged.

3 BY MR. MANDERVILLE:

4 748 Q. So, Ms. Castillo, when you say at no
5 point during this meeting was any confidential
6 privileged information provided, is that
7 inaccurate?

8 A. Provided by me. I didn't provide
9 anything.

10 749 Q. "At no to point during this meeting
11 was any confidential privileged information
12 provided to Roberto or Jorge. Rather, they
13 were the ones providing information to me
14 and my lawyers."

15 Are you inclined to sort of resile from what
16 you've said there and say there was, indeed,
17 privileged information exchanged?

18 MR. LEON: Well, you're asking her a legal
19 question as to what's privileged. You see

20 MR. MANDERVILLE: No, I realize that, Mr.
21 Leon, and I appreciate you giving me your position
22 on this because I wouldn't mind getting it.

23 MR. LEON: It's litigation privilege.
24 You'll see that it says, "I would find it

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1 start a legal proceeding against Xela or Juan." So
2 it was provided to the lawyers as part of

3 BY MR. MANDERVILLE:

4 750 Q. In contemplation of litigation or for
5 the substantial purpose of contemplating
6 litigation?

7 MR. LEON: We can argue about what the

8 BY MR. MANDERVILLE:

9 751 Q. No, but that's the position you're
10 going to take?

11 MR. LEON: The position I'm going to take
12 is that any notes that we have are privileged.

13 BY MR. MANDERVILLE:

14 752 Q. So, Ms. Castillo, two points then
15 arising from

16 MR. LEON: No, sorry, I don't mean to be
17 cute about it. The question is, when you say in
18 contemplation of litigation, in contemplation of
19 what? You can't assume what the litigation was
20 that it was in contemplation of, if I can put it
21 that way.

22 MR. MANDERVILLE: You don't think that's
23 too cute?

24 MR. LEON: No, I don't. That's not the way

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1 BY MR. MANDERVILLE:

2 753 Q. Well, two points I want to raise with
3 you, Ms. Castillo. You've told me before that when
4 I said you were speaking to your lawyers about
5 commencing a legal proceedings against Xela and
6 Juan, you told me that wasn't really what it was
7 about. I take it that is what it was really about;
8 correct?

9 A. I meant I was exploring that, if it
10 would be necessary at one point.

11 754 Q. The substantial purpose of the meeting
12 was the commencement of this litigation; correct?

13 A. Of that particular meeting?

14 755 Q. Yes.

15 A. It was more exploring and trying to
16 understand what everything was. That's what I
17 recall from the meeting at that moment.

18 756 Q. And when you say:

19 "At no point during this meeting was
20 any confidential privileged information
21 provided to Roberto or Jorge. Rather,
22 they were the ones providing information
23 to me and my lawyers," I take it you want
24 to change your sworn statement here now

and say, "Oh, yes, there was privileged

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1 information provided to my lawyers"?

2 MR. LEON: No, that's you're missing.

3 That's not what she said and that's not what that
4 says. She says, "They were providing information
5 to me and my lawyer."

6 BY MR. MANDERVILLE:

7 757 Q. None of which was confidential or
8 privileged?

9 MR. LEON: She says that she "...that no
10 confidential privileged information was provided to
11 Roberto or Jorge."

12 As I read that, she wasn't giving any
13 information that she had as a director of Xela or
14 otherwise. She was receiving information.

15 MR. MANDERVILLE: I see the point you're
16 making, Mr. Leon.

17 MR. LEON: Sorry, I don't mean to
18 interfere, but you whenever you crossexamine on
19 something when I was there, I know.

20 BY MR. MANDERVILLE:

21 758 Q. Ms. Castillo, is it your evidence that
22 it was merely one of the items discussed about
23 considering the possibility of commencing
24 litigation, or was a substantial purpose of this

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meeting the commencement of litigation?

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1 A. No, it was not about commencement of
2 litigation. It was one of the items.

3 759 Q. I will renew my request for notes, and
4 I accept that they may be subject to redaction.

5 MR. LEON: Well, I'll maintain my refusal,
6 but I will take a look at them. If I change my
7 position, I'll let you know.

8 REFUSAL

9 BY MR. MANDERVILLE:

10 760 Q. And in addition to Mr. Leon's notes, I
11 would also request Mr. Woycheshyn's notes.

12 MR. LEON: I'm pretty sure I don't have any
13 notes.

14 MR. MANDERVILLE: I had assumed that was
15 going to be the answer.

16 MR. LEON: And if I did, you wouldn't want
17 them anyway. I understand your request from
18 Bennett Jones.

19 MR. MANDERVILLE: Yes.

20 MR. LEON: Okay.

21 BY MR. MANDERVILLE:

22 761 Q. Now, Ms. Castillo, your nephew, Roberto
23 Barillas, is not a lawyer, is he?

24 A. No, he's not.

Q. So there'd be no privilege attached to

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1 information provided to him; correct?

2 MR. LEON: She said she didn't provide him
3 with any information.

4 BY MR. MANDERVILLE:

5 763 Q. Did Mr. Barillas take any notes at this
6 meeting, bring any papers?

7 A. That I don't remember.

8 764 Q. Are you still in contact with Mr.
9 Barillas?

10 A. Yes.

11 765 Q. I'd like an undertaking for you to
12 obtain all notes and papers of his arising from
13 this meeting, please?

14 MR. LEON: No, I don't think she's her
15 obligation extends that far in the context of a
16 crossexamination on an affidavit.

17 REFUSAL

18 BY MR. MANDERVILLE:

19 766 Q. Turning to paragraphs 33 and 34 of your
20 affidavit, I would ask you to read through it,
21 please.

22 A. Sorry, 33 and 34?

23 767 Q. Yes.

24 A. I have reviewed that.

Q. And in 33 and 34 of this affidavit you

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1 are deposing to some of what occurred at a second
2 meeting at Bennett Jones' offices?

3 A. Yes.

4 769 Q. This one was held on December 10, 2009?

5 A. Yes, that's what I remember.

6 770 Q. At that time you are still a director
7 of Xela?

8 A. Yes, I was.

9 771 Q. And in addition to your husband
10 Ricardo, Roberto Barillas, Jorge Porras and
11 yourself, presumably Mr. Leon and Mr. Woycheshyn, a
12 lawyer by the name of Katherine Kay from Stikeman
13 Elliott was present at that meeting; correct?

14 MR. LEON: She was there for part of the
15 meeting.

16 THE DEPONENT: Yes.

17 BY MR. MANDERVILLE:

18 772 Q. And during the first part of the
19 meeting, Ms. Kay advised that she could not act for
20 Roberto Barillas or Jorge Porras because she was
21 retained by your cousins?

22 A. That's the way I understand, but more
23 that it's separate, two separate statements.
24 First, I say I understand that she was present

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there because they had approached her and she said

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1 that they she could not represent them in
2 Canada. Don't know exactly the reason for that,
3 but then after she mentioned that she was in the
4 past had been retained by my cousins.

5 773 Q. Where does it say here it was in the
6 past?

7 A. Well, I added "in the past" right now.
8 But she had been retained by my cousins. I don't
9 know when.

10 774 Q. And this is where Ms. Kay advises you
11 and those present in the room that your cousins
12 understood you were becoming frustrated with Xela
13 and were willing to be supportive of your attempts
14 to resolve your concerns whether through litigation
15 or otherwise; correct?

16 A. Yes, that's what it says there.

17 775 Q. Ms. Castillo, do you have any
18 knowledge, information or belief about why Mr.
19 Barillas and Mr. Porras felt they should obtain
20 separate legal representation in Canada?

21 A. No, I don't know.

22 776 Q. Were Mr. Barillas' concerns that you
23 were meeting about, did they go anywhere beyond the
24 socalled Boucheron situation in Guatemala?

A. I don't know what his can you repeat

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April 17th, 2012

Margarita Castillo

1 the question actually?

2 777 Q. Sure. Mr. Barillas' concerns that he
3 was meeting with you and your lawyers about, did
4 they, to your knowledge, go anywhere beyond the
5 so-called Boucheron situation that you referenced?

6 MR. LEON: Sorry, I don't understand your
7 question either, whether you are asking about
8 are you asking does she know sorry, are you
9 asking whether Mr. Barillas disclosed concerns
10 beyond Boucheron or are you I'm just not sure
11 what you're getting at.

12 MR. MANDERVILLE: Fair enough. Those are
13 the best sorts of questions.

14 BY MR. MANDERVILLE:

15 778 Q. You've told me previously that Mr.
16 Barillas and Mr. Porras had attended in Toronto, at
17 whose behest you don't know, to explain the
18 Boucheron situation to your lawyers; correct?

19 A. I have said that; correct.

20 779 Q. And to your knowledge, did Mr.
21 Barillas' attendance in Toronto go to any reason
22 beyond explaining the Boucheron situation?

23 A. No idea. I don't know that.

24 780 Q. You don't know whether or not that is

25710

the case?

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April 17th, 2012

Margarita Castillo

1 A. Well, besides coming to talk to us
2 about this, he came to visit my family, my cousins.

3 781 Q. Other than a social visit, the only
4 business reason that you know of was the Boucheron
5 situation?

6 A. Yes, that's what I remember knowing at
7 the time.

8 782 Q. And, similarly, Mr. Porras attended for
9 the express purpose of discussing the Boucheron
10 situation?

11 A. That's what I remember.

12 783 Q. You're not aware of any other business
13 reason, legal reason for Mr. Barillas or Mr. Porras
14 to be attending in Toronto?

15 A. No, I don't know exactly if they had
16 any other reasons besides those.

17 784 Q. How long was Ms. Kay at this meeting?

18 A. I don't remember the exact time but it
19 was very short. If I remember correctly, it was
20 short.

21 785 Q. How long did the meeting last?

22 A. I don't know. I think you have asked
23 me about the meetings, and I don't have a
24 recollection of time.

Q. Well, you've been actually very

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April 17th, 2012

Margarita Castillo

1 informative in telling me the board of directors
2 meeting of Xela typically lasted all day long.

3 A. No, those were scheduled that way.
4 Other things are just depending how it goes. I
5 don't know exactly how long in minutes or hours it
6 lasted.

7 787 Q. Well, this December 10th meeting which
8 involved a number of people and you deposed that
9 after Ms. Kay left you had two consultants from
10 Navigant join the meeting. Did the meeting last
11 all day, half day? What do you recall?

12 A. I already answered you that I don't
13 recall how long it took, the meeting.

14 788 Q. You stated at the end of paragraph 34
15 of your affidavit:

16 "To my knowledge, Jorge wanted to be
17 present at the meeting so that he could
18 disclose what he and Roberto thought
19 was illegal activity of Xela."

20 That's what you swore to?

21 A. Yes, that's what I said in my
22 affidavit.

23 789 Q. And this suggestion of illegal activity
24 would be illegal activity concerning the Boucheron

25714

situation?

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April 17th, 2012

Margarita Castillo

1 A. I don't remember exactly the time, but
2 it was a lot about Boucheron.

3 790 Q. Was there anything else you recall?

4 A. I don't remember.

5 791 Q. Did Ms. Kay take any notes of the
6 meeting?

7 A. That I don't remember.

8 792 Q. Were any notes of the meeting made
9 while Ms. Kay was in attendance at the meeting?

10 A. That I don't remember.

11 793 Q. Counsel, again I'd ask you to produce
12 your notes made of the meeting during the time that
13 Kay was in attendance. There would be no privilege
14 during the time that she was there.

15 MR. LEON: No, I'm going to refuse, but as
16 I told you, I will take a look and let you know my
17 answer.

18 REFUSAL

19 BY MR. MANDERVILLE:

20 794 Q. At the moment, your refusal is based on
21 what assertion?

22 MR. LEON: I'll make it based on relevance.

23 MR. MANDERVILLE: And just so there's
24 not

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MR. LEON: Sorry, relevance and privilege.

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April 17th, 2012

Margarita Castillo

1 I don't know what's in those notes, and so to the
2 extent that there may be material in those notes
3 that I consider privileged, then I'm not going to
4 produce them.

5 And part of the problem may be figuring out
6 what whether she was in the room, but without
7 looking at the notes, I don't know that. So without
8 looking at them, I can't properly answer your
9 question.

10 BY MR. MANDERVILLE:

11 795 Q. Will you undertake to ask Ms. Kay to
12 forward you her notes of that meeting?

13 MR. LEON: No.

14 REFUSAL

15 MR. MANDERVILLE: That would at least
16 enable you to look at them.

17 MR. LEON: I'm not going to give that
18 undertaking.

19 BY MR. MANDERVILLE:

20 796 Q. And your refusal is based on what?

21 MR. LEON: I don't think in a
22 crossexamination I have the obligation to go to
23 somebody who I have no control over to ask them to
24 produce notes. I don't think even on a discovery I

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have that obligation, but not on a

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April 17th, 2012

Margarita Castillo

1 crossexamination.

2 BY MR. MANDERVILLE:

3 797 Q. Now, Ms. Castillo, you swear here

4 that

5 MR. LEON: I mean well, I don't want to

6 get into giving evidence, so I'll just leave it.

7 BY MR. MANDERVILLE:

8 798 Q. Sorry, Mr. Leon?

9 MR. LEON: Sorry, I was going to say

10 something, but I don't want to be seen as giving

11 evidence, so I'll just stay out of it and let you

12 ask your questions.

13 BY MR. MANDERVILLE:

14 799 Q. You state in the last sentence of

15 paragraph 34, to your knowledge "Jorge wanted to be

16 present at the meetings so that he could disclose

17 what he and Roberto thought was illegal activity of

18 Xela"? Correct?

19 A. Yes, that's what I wrote in my

20 affidavit.

21 800 Q. This concern you never brought to the

22 attention of the board?

23 A. Not that I recall it.

24 801 Q. You never brought it to the attention

25720

of your father?

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April 17th, 2012

Margarita Castillo

1 A. Not that I remember that I can
2 remember.

3 802 Q. Did you ever bring it to the attention
4 of your brother Juan?

5 A. No, I did not talk to Juan about it.

6 803 Q. I propose we stop for the day, Mr.
7 Leon.

8 MR. LEON: Yes.

9 Whereupon the Examination was adjourned at 4:04 p.m.

10

11 I hereby certify that the foregoing
12 is a true and accurate transcription of
13 my notes to the best of my skill and ability.

14

15

16 Mary Jane Corcoran, C.S.R.

17 ComputerAided Transcription

18

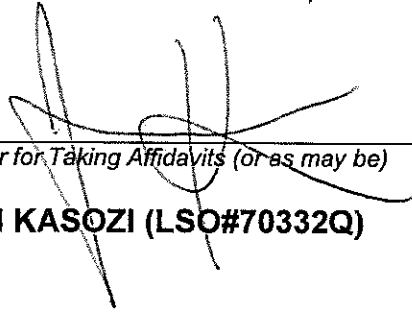
19

20 Reproductions of this transcript are in direct
21 violation of O.R. 587/91 Administration of Justice Act

22 January 1, 1990 and are not certified without the
23 original signature of the Court Reporter

24

This is Exhibit "F" referred to in the Affidavit of JUAN
GUILLERMO GUTIERREZ sworn March 22, 2020.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

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

BETWEEN:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents

SECOND REPLY APPLICATION RECORD

Date: September 9, 2011

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Juan Guillermo Gutierrez, and Juan Arturo Guterrez

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

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

BETWEEN:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents

SECOND REPLY AFFIDAVIT OF MARGARITA CASTILLO
(Sworn September 9, 2011)

I, Margarita Castillo, of the City of Toronto, in the Province of Ontario, MAKE OATH
AND SAY:

Introduction

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

2. I swear this affidavit in support of my application, which seeks to have my shares in Tropic and Alberta Co. bought out. I swore my principal affidavit on this application on

January 17, 2011 (my "January Affidavit") and a reply affidavit on July 29, 2011 (my "Reply Affidavit").

3. I swear this further affidavit in reply to the supplemental affidavits of:

- (a) Mark Korol ("Korol"), Chief Financial Officer of Xela, sworn August 11, 2011;
- (b) My father, Juan Arturo Gutiérrez ("Arturo"), sworn August 11, 2011; and
- (c) My brother, Juan Guillermo Gutiérrez ("Juan"), sworn August 12, 2011 (collectively, the "Supplemental Affidavits").

4. The core of my evidence on this application is set out in my January Affidavit and my Reply Affidavit. I will not repeat that evidence here. I have not attempted to respond to every point raised in the Supplemental Affidavits. Rather, I have only responded to specific matters. As such, where I do not respond to a particular matter, any non-response should not be interpreted as my agreement with evidence in the Supplemental Affidavits.

The value of my Tropic Shares

5. Korol's supplemental affidavit attaches a copy of a valuation with respect to the "Fresh Quest/Tropic Inc. companies", which Xela obtained from Michael Badham on September 15, 2010 (the "Badham Valuation"). I do not know why this valuation report was not previously put into evidence in this proceeding. While I understand that a copy had been produced to Farley Cohen of Cohen Hamilton Steger LLP ("Mr. Cohen"), I had not previously received a copy. In fact, Xela's consistent position as shown in letters from their lawyers (see Exhibit "Q" of my January Affidavit) was that this valuation information was "proprietary to Xela".

6. I note that the Badham Valuation states that, "[s]hareholders should perform their own due diligence review of the business and should not rely on these calculations as evidence of a thorough business review". This is precisely what I have been trying to do since 2010, and the reason why I retained Mr. Cohen to provide an independent valuation of my Tropic shares. For almost a year, Juan and Arturo had access to the Badham Valuation and I did not.

7. As of the date of this affidavit, Mr. Cohen's valuation is not yet complete.

8. I note that paragraphs 2 and 3 of Korol's supplemental affidavit refer to the Badham Valuation being with respect to the "Fresh Quest/Tropic Inc. companies". The specific companies are not identified.

9. In paragraph 8 of Juan's supplemental affidavit, with respect to our personal financial statements, Juan states that we "must have been using the rough approximate values of the Fresh Quest Group of companies which we estimated and would have been at the time in the approximate range of \$20,000,000 to \$25,000,000 range based upon Fyffe's approach in 2008". I do not know what difference, if any, there is between the "Fresh Quest/Tropic Inc. companies" used in the Badham Valuation and the "Fresh Quest Group of companies" used in Fyffe's approach. I note that Fyffe's approach from 2008 would not explain the values given to my Tropic shares in the 2007 personal financial statements (included in Exhibit "D" to my Reply Affidavit).

10. Further, if Juan's statement at paragraph 8 of his supplemental affidavit that the "family collectively looked at the group for the purposes of banking" is correct, this means that both of us were misrepresenting the value of our Tropic shares to the International Finance Bank. In my case, I did not know about this misrepresentation because, as stated in my January Affidavit and

Reply Affidavit, I relied on Xela management in determining what the value of my Tropic shares were when I prepared my personal financial statements.

11. In terms of the preparation of my personal financial statements, I note that Korol's supplementary affidavit does not respond to the specific points in my Reply Affidavit, including Exhibits "B", "C" and "D", which show that Xela management (specifically Jim O'Connell) prepared the valuation data in my personal financial statements. Juan's supplemental affidavit at paragraph 8 states that "far too much is being made of this issue" and that he does not have a copy of his personal financial statement "handy". Juan does not indicate what efforts, if any, he made to try and locate copies of his personal financial statements.

February 2010 Board Meeting

12. At paragraphs 2 to 4 of his supplemental affidavit, Arturo gives evidence with respect to the February 2010 Xela Board meeting. During the time that I was present at the meeting, there was no mention whatsoever of Roberto Barillas ("Roberto") and Xela proceeding with a criminal complaint against him. In reviewing the Minutes of that Board meeting (attached as Exhibit "B" to Arturo's supplemental affidavit), I note that Roberto's company, BPA, is not mentioned until the end of the document. This suggests that the topic was not raised until the end of the meeting. As indicated in my prior affidavits, I was not present for the entire Board meeting.

13. In response to paragraph 3 of Arturo's supplemental affidavit, when I had discussions with my father regarding my resignation from the Xela Board of Directors, there was never any mention that it was due to "the conflict with Barillas". Rather, the focus of our discussions, as described in my January Affidavit, was on my requests for information regarding the value of my Tropic shares and the proposed sale of those shares to Xela. Arturo told me that he was not

going to provide me with any information on the valuation of Tropic or provide me with any of Tropic's financial statements (both of which I requested). He then said it would be "more elegant" for me to resign from the Board.

14. In response to paragraph 4 of Arturo's supplemental affidavit, it is true that I spoke with my father on the telephone approximately one day before the April 29th Board Meeting. It is also true that my father asked if I was going to resign. When I told him that I was not going to resign, Arturo demanded that I not attend the April 29th Board meeting. I had no prior notice of this meeting. As the Minutes of the February Board meeting (Exhibit "B" to Arturo's supplemental affidavit) indicate, the date for the next Board meeting was not discussed until the end of meeting. Again, I was not present for the entire February Board meeting.

My Removal as a Director of Tropic

15. Paragraph 5 of Arturo's supplemental affidavit refers to a Special Meeting of Shareholders of Tropic dated April 29, 2010. I had no notice of this meeting. In fact, I did not even know such a meeting happened until I read Arturo's supplemental affidavit. The Minutes of this "Special Shareholder Meeting" (attached as Exhibit "C" to Arturo's supplemental affidavit) indicate that I did not attend the meeting, but do not state whether I was provided notice of the meeting.

16. I note that Arturo's supplemental affidavit does not state when these Minutes were drafted, nor does he attach any shareholders' resolution. Further, Arturo does not explain why, as of July 29, 2011, I was still listed as a Tropic director according to the Provincial Corporate Registry. I note that the Corporate Registry does show that I was removed as an officer of

Tropic on or about May 18, 2010. A copy of these corporate searches was included at Exhibit "M" to my January Affidavit.

The payments I received from Xela

17. At paragraphs 6 to 7 of Arturo's supplemental affidavit (dated August 11, 2011), he appears to be responding to paragraph 28 of my January Affidavit (despite the fact that he was ordered by the court to provide any such reply evidence by June 20, 2011). Arturo's statement at paragraph 6 that "my children never loaned anything to the company" ignores the fact that in November 2004 my husband and I took out a mortgage on our Muskoka cottage with Scotiabank for \$1,275,000. Attached as **Exhibit "A"** is a copy of the Charge/Mortgage of Land. Ricardo and I gave the mortgaged funds to Xela. At the time, Arturo promised Ricardo and me that Xela would repay the entire mortgage.

18. Attached to this affidavit as **Exhibit "B"** is a copy of our annual mortgage statement dated December 31, 2010. It shows that the amount owing on this mortgage as of that date was \$546,628.09. Up until late April 2011, Xela had been making payments on this mortgage. It has since stopped making any payments. Attached as **Exhibit "C"** is a copy of our monthly account statement dated May 20, 2011, which shows that Xela's last payment on this mortgage was made on April 28, 2011.

19. In addition to the mortgage on our cottage, approximately 7 years ago, my husband and I both took out loans against our life insurance policies for more than \$100,000 and paid those funds to Xela.

20. At paragraph 7 of Arturo's supplemental affidavit, he states that before Xela stopped making monthly payments to me, Ricardo and I were receiving "about twice as much" as Juan.

In making this statement, Arturo includes the amounts Ricardo received from Digalta. Since 2008, Digalta has not been affiliated with Xela. I have no idea how my father would know how much money Ricardo was receiving from Digalta during this period. Further, I note that Arturo's evidence is inconsistent with evidence of Xela's Chief Financial Officer. Paragraph 26 of Korol's affidavit dated June 15, 2011, states that "coincidentally the amount paid to Juan Guillermo Gutierrez...is roughly equivalent to the amounts received by the Castillos for the same time period when the net income of Digalta of Ricardo and the director's fees of Margarita are considered".

21. Despite these inconsistencies and inaccuracies, given that Digalta was a company that Ricardo was running on his own, I do not understand why any salary he received from Digalta is relevant to my application.

My Alleged Involvement in an Arrangement between Xela Management and Roberto

22. As described in more detail at paragraphs 39 to 48 of my Reply Affidavit, after Xela and Roberto had negotiated an arrangement for the payment of BPA's account and the return of certain accounting papers, Arturo asked me to get involved to help transfer the monies to Roberto.

23. Juan's supplementary affidavit attaches selected versions of email exchanges between us in September and October 2009. I note that these do not appear to be official translations. Attached to my affidavit as Exhibits "D", "E", "F" and "G" are copies of email exchanges between Juan and me from October 5, 2009 to October 9, 2009. All of these emails have been translated by All Languages Ltd.

24. I note that the emails that are attached as Exhibits "A" and "B" to Juan's supplemental affidavit pre-date the email from October 26, 2009, in which Juan informed me that Roberto had substantially complied with his obligations and I was to give the funds to Roberto. This email was attached as Exhibit "E" to my Reply Affidavit.

25. Contrary to paragraph 6 of Juan's supplemental affidavit, I never ensured that the \$100,000 would be returned to Xela. Whenever I spoke to Juan about this issue, I told him what Roberto had told me – that Juan should speak directly with Roberto about the issue. This is consistent with my email to Juan dated January 29, 2010, which was attached as Exhibit "C" to Juan's supplemental affidavit. At no point did I provide an "undertaking", a "commitment" or any other type of promise to get this money back for Xela. I was what my father had asked me to be – a mediator.

Power of Attorney

26. At paragraphs 9 and 10 of Arturo's supplemental affidavit, he refers to a power of attorney that I signed on April 22, 2010 in favour of my nephew, Roberto. I did grant Roberto this Power of Attorney so that he could assist me with obtaining a private loan from a Guatemalan bank. Contrary to Arturo's statement that this confirms his suspicions that my cousins in Guatemala have been paying me to bring this application, this is not true. Arturo's nephews (my cousins) have never "paid me" anything to bring this application. Rather, I was forced to bring this application to protect my financial interests and the financial security of my children.

December 2009 meeting with BPA

27. The supplemental affidavits of Juan and Arturo refer to meetings that occurred in December 2009. The source of this information is my former lawyer and Roberto's former business partner, Jorge Porras ("Jorge"). I note that Jorge, who is a resident of Guatemala, has not sworn an affidavit in this application.

28. By December 2009, I had become increasingly frustrated with:

- (a) Juan's management of Xela's business (as described at paragraph 56 of my January Affidavit);
- (b) Juan and his family receiving a disproportionate amount of monies from Xela (as described at paragraph 60 of my January Affidavit);
- (c) Juan increasing his focus and attention on running for president in Guatemala (as described at paragraph 63 of my January Affidavit);
- (d) Xela's money being redirected to various political causes in Guatemala (as described in paragraphs 65 to 78 of my January Affidavit); and
- (e) Juan and Arturo refusing to provide me with information that I (and my advisors) needed in order to value my Tropic shares (as described in paragraph 84 of my January Affidavit).

29. Further, as discussed in both my Reply Affidavit and Juan's supplemental affidavit, in the Fall of 2009 there was an ongoing dispute between Xela and BPA. During the time that I was attempting to mediate this dispute, Roberto indicated to me that the amount of money that Xela

was using for political contributions was substantial (much more than I had understood to be the case).

30. It is in this context that I wanted Roberto to meet with me and my lawyer to explain the Boucheron situation. Given the fact that Arturo and Juan were denying me access to information, I felt it was important for me to independently investigate the allegations Roberto was making with respect to Boucheron. It was my obligation as a director of Xela to determine whether the company was involved in any illegal activity or other misconduct. Because I was not in a position to independently confirm Roberto's allegations, I retained the services of Peter McFarlane and Navigant Consulting Inc. to investigate the matter.

31. There were two meetings that took place in December 2009; one on December 8 and the other on December 10. Below is a summary of those meetings. In providing this summary, it is not my intention to waive any solicitor and client privilege.

32. On December 8, 2009, Ricardo, Roberto, Jorge and I met with my lawyers at Bennett Jones. At this point, I was seeking advice on my obligations as a director of Xela with respect to the Boucheron activity. This included exploring whether I would find it necessary to start a legal proceeding against Xela or Juan. With that in mind, I had Roberto and Jorge explain the Boucheron situation to my lawyers. Contrary to the allegation at paragraph 11 of Arturo's supplemental affidavit, at no point during this meeting was any confidential privileged information provided to Roberto or Jorge. Rather, they were the ones providing information to me and my lawyers. Based on that information, my lawyers made certain recommendations of forensic accounting firms that would be able to investigate the Boucheron allegations that Roberto and Jorge were making.

33. This led to a second meeting on December 10, 2009. At the beginning of the meeting Ricardo, Roberto, Jorge, myself, my lawyers from Bennett Jones and Katherine Kay were present. My understanding was that Ms. Kay was present at the initial part of the meeting because Roberto and Jorge had approached her to represent them in Canada.

34. During the first part of this December 10th meeting, Ms. Kay indicated that she was not in a position to act for Roberto or Jorge. Ms. Kay also indicated that she had been retained by my cousins in Guatemala. My cousins understood I was becoming frustrated with Xela and were willing to be supportive of my attempts to resolve my concerns whether through litigation or otherwise. After providing this information, Ms. Kay left the meeting and Peter McFarlane and Anthony Long (both from Navigant Consulting Inc.) joined the meeting. For the remainder of the meeting, Roberto and Jorge explained the Boucheron background and allegations to Mr. McFarlane and Mr. Long. Both Roberto and Jorge were anxious to explain the Boucheron activity. To my knowledge Jorge wanted to be present at the meeting so that he could disclose what he and Roberto thought was illegal activity of Xela.

35. As with the December 8th meeting, at no point during the December 10th meeting did I disclose any confidential or privileged information about Xela. The sole sources of information were Roberto and Jorge.

36. At no point during either December meeting did Jorge ever suggest that he was "Xela's lawyer". To the contrary, given the work that BPA had done for me and Ricardo, I understood that Jorge was present strictly as a business partner of BPA who was providing information to me in my capacity as a director of Xela and Tropic.

37. Contrary to paragraph 11(a) of Juan's supplemental affidavit, no decision about any sort of "financial aid" was made at the December 2009 meetings. As stated, at that point my focus was trying to determine whether Xela and any of its officers or directors were engaged in any unlawful actions (including any actions that I was not aware of that may be oppressive to me as a director or shareholder).

The Financing Required to Protect My Interests

38. In early 2010, around the same time that Arturo removed me from the Board of Xela and stopped my monthly draws (all of which is described in my January Affidavit), I was seriously considering taking legal action against Xela, Juan and Arturo. However, I knew I was not in a financial position to personally pay the professional fees necessary to pursue a legal action. I asked my cousins in Guatemala if they could assist in arranging financing. They did so by arranging for me to obtain a line of credit to finance my application. I am fully obligated to repay all amounts I draw down from this line of credit. This financial arrangement has nothing to do with the ongoing litigation between my cousins and the Xela subsidiary, Lisa.

39. Even after I had the financing in place, I had not decided whether I was prepared to start a lawsuit against Xela, Arturo or Juan. I still believed that we could resolve our issues without litigation. This is why I participated in a without prejudice process with Xela in the Fall of 2010. Unfortunately, that process failed. It was not until January 6, 2011, when Xela's U.S. lawyer wrote to my lawyers and falsely accused me of disclosing confidential information to Roberto (as described in paragraphs 125 to 132 of my January Affidavit) that I knew I had no choice but to start my application. I note that this was approximately eight months after I had the financing in place, which ultimately enabled me to start the application.

40. Contrary to the allegation at paragraph 12 of Arturo's supplemental affidavit and paragraph 11(b) of Juan's supplemental affidavit, my cousins have not paid me \$2,500,000, or any amount, to bring this application. As indicated, I draw down on the line of credit to the extent necessary to finance the fees associated with this application and to replace the income that I no longer receive from Xela (which my family had received every month for over 25 years).

41. Since 2009, I have met with my cousins in Guatemala on two occasions: once, in the fall of 2009 and a second time in the winter of 2010. My cousins have had no input whatsoever into the conduct of my application. This is a matter that is solely determined by me and my lawyers. I have not disclosed any confidential information with respect to Xela or Tropic either while I served as a director or since my removal. At all times, I have been aware of and complied with the obligations I owed to Xela and Tropic.

42. I have no knowledge whether Jorge was a "paid informant" of my cousins as alleged at paragraph 11(e) of Juan's supplemental affidavit. There is no reason why I would have any knowledge of this.

Disputed Facts and Issues

43. The Supplemental Affidavits attempt to raise a number of allegations, all of which have nothing to do with my application. These include the December 2009 meetings with my lawyers and BPA and the financing of my application. These allegations are being raised solely in an artificial attempt to tie together my application with the Respondents' Action and make it appear as though there are significant facts in dispute between me and the Respondents, when there are not.

44. My application remains focused on four areas:

- (a) My ownership of Tropic shares;
- (b) The fair value of my Tropic shares;
- (c) My ability to receive the fair value of my Tropic shares; and
- (d) My ability to receive the fixed value of my beneficial interest in Xela, which is held through Alberta Co.

45. These issues continue to be unrelated to the issues raised in the Respondents' Action and my cousins in Guatemala. I have never been part of any conspiracy, nor have I ever attempted to prejudice Xela's position in the Avicola litigation with my cousins. All I have attempted to do is to protect my shareholder interests in Tropic and Xela.

46. I swear this affidavit in further support of my application.

SWORN before me, at the City of Toronto,)
in the Province of Ontario this 9th day of)
September, 2011.)



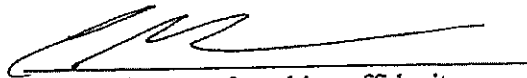
Christopher McKenna
Commissioner for Taking Affidavits in and
for the Province of Ontario



MARGARITA CASTILLO

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THIS IS EXHIBIT "A" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

A commissioner for taking affidavits
in and for the Province of Ontario



Province of Ontario

Charge/Mortgage of Land

Form 2 - Land Registration Reform Act

DMSL 03/97

B

FOR OFFICE USE ONLY	(1) Registry <input checked="" type="checkbox"/> Land Titles <input type="checkbox"/>		(2) Page 1 of 2 pages	
	(3) Property Identifier(s)		Block	Property
	Additional: See Schedule <input type="checkbox"/>			
	(4) Principal Amount Up to a maximum of ONE MILLION TWO HUNDRED SEVENTY-FIVE THOUSAND AND XX / 100 Dollars \$ 1,275,000.00			
	(5) Description Part of Lot 5, Concession 14, being Part 1, Plan 35R-15054, Township of Medora, now Township of Muskoka Lakes, in the District Municipality of Muskoka As in Deed No. 262945			
New Property Identifiers		Additional: See Schedule <input type="checkbox"/>		
Executions		Additional: See Schedule <input type="checkbox"/>		
(6) This Document Contains:		(a) Redescription New Easement Plan/Sketch <input type="checkbox"/>		(b) Schedule for Description <input checked="" type="checkbox"/> Additional Parties <input type="checkbox"/> Other <input type="checkbox"/>
(7) Interest/Estate Charged Fee Simple				
(8) Standard Charge Terms - The parties agree to be bound by the provisions in Standard Charge Terms filed as number 9816 and the Chargor(s) hereby acknowledge(s) receipt of a copy of these terms.				
(9) Payment Provisions				
(a) Principal Amount \$ 1,275,000.00		(b) Interest Rate ***** % per annum.		(c) Calculation Period *****
(d) Interest Adjustment Date	Y M D *****	(e) Payment Date and Period	On Demand	
(f) First Payment Date	Y M D *****	(g) Last Payment Date	(h) Amount of Each Payment *****	Dollars \$ *****
(i) Balance Due Date	Y M D *****	(j) Insurance	see Standard Charge Terms - 9816 Dollars \$ *****	
(10) Additional Provisions				
Continued on Schedule <input type="checkbox"/>				
(11) Chargor(s) The chargor hereby charges the land to the chargee and certifies that the chargor is at least eighteen years old and that We Roberto Ricardo Castillo and Margarita Castillo are spouses of one another.				
The chargor(s) acknowledge(s) receipt of this copy of this charge.		Signature(s)		Date of Signature
Name(s)		CASTILLO, Roberto Ricardo		Y M D 2004 11 09
CASTILLO, Margarita		X <i>Margarita Castillo</i>		Y M D 2004 11 09 inc
(12) Spouse(s) of Chargor(s) I hereby consent to this transaction.				
Name(s)		Signature(s)		Date of Signature
(13) Chargor(s) Address for Service				
1086 Murphy Rd., Muskoka, Ontario				
(14) Chargee(s)				
THE BANK OF NOVA SCOTIA				
(15) Chargee(s) Address for Service				
10 Wright Blvd., Stratford, Ontario, NSA 7X9				

Vertical line of text or artifacts on the left margin.

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BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011



A commissioner for taking affidavits
in and for the Province of Ontario



Scotia Total Equity® Plan

THE BANK OF NOVA SCOTIA 47852
7600 WESTON ROAD, UNIT #3
WOODBRIDGE, ONTARIO L4L 8B7 905-850-1805

6BHA312100_2971679_019 E 0 47852 10563

MR R. RICARDO CASTILLO
MRS MARGARITA CASTILLO
135 GORDON ROAD
TORONTO, ON M2P 1E6

Your **Scotia Total Equity**
Plan number: 304473433
Property Address:
PRTL5CON14PRT1PLAN35R-150-54
1086 MURPHY ROAD
MUSKOKA LAKES TOWNSHIP ON
Questions about your Scotia Total
Equity Plan statement?
Call us at 1-877-268-4228

Your STEP Credit Limit is the total amount of credit available within your plan that can be allocated to different borrowing solutions. If you have available credit, you can save money by converting higher cost borrowing into your STEP.

The Amounts You Owe reported on this statement only include transactions that have been applied to your accounts at December 31st. It is possible that you have made transactions that do not yet appear and have not been deducted from your Available Credit.

The Scotiabank Group Privacy Agreement has been revised. Please refer to the Scotiabank website at www.scbank.com.

Please turn over for your mortgage statement

Your annual statement
on December 31, 2010

Overview of your Scotia Total Equity® Plan

Your overall STEP credit limit	\$840,000.00
<i>Minus amounts you owe:</i>	
Mortgages (see over)	\$546,628.09
Loans	\$0.00
Lines of credit	\$183,950.91
Credit cards	\$0.00
Overdraft Protection	\$0.00
Total Amount you've borrowed	\$730,579.00
Total credit available to you on December 31, 2010	\$109,421.00

How you're using your Scotia Total Equity Plan

Account type and number	Account credit limit (\$)	Amount you owe (\$)	Available credit (\$)
Mortgages			
Scotia Mortgage 1364106		\$546,628.09	
Loans			
You do not hold this account type in your STEP			
Lines of credit			
ScotiaLine® Personal Line of Credit *0955	\$204,000.00	\$183,950.91	\$20,049.09
Credit cards			
You do not hold this account type in your STEP			
Overdraft Protection			
You do not hold this account type in your STEP			
Total	\$730,579.00		\$20,049.09
Plus additional credit available by contacting your branch			\$89,371.91
Total credit available to you on December 31, 2010			\$109,421.00

Simple tips that can help you pay off your mortgage faster.

1. Choose the shortest amortization period and the largest payment amount you can afford.
2. Take advantage of Scotiabank's 15% + 15%[®] prepayment privileges.
3. Match-a-Payment[®].

Visit your nearest branch or www.scotiabank.com for more information.

Your mortgage number: 136410-6
 Type of Mortgage: Variable Rate*
 Term: 5 years
 Renewal date: May 1, 2012
 Your annual interest rates on:
 January 1, 2010 1.50000%
 December 31, 2010 2.25000%

Property Address:
 PT LT 5 CON 14 PT 1
 1086 MURPHY RD
 MUSKOKA LAKES TOWNSHIP, ON
 Questions about your mortgage?
 Call us at 1-877-268-4228.

MR R RICARDO CASTILLO, MRS MARGARITA CASTILLO

Your annual mortgage statement

from January 1 to December 31, 2010.

Your mortgage balance

Principal balance on January 1, 2010	\$575,167.08
Minus Regular principal payments you made	\$28,538.99
Principal balance on December 31, 2010	\$546,628.09

Mortgage payments you made in 2010

Total principal you paid	\$28,538.99
Total interest you paid	\$9,659.58
Total amount you paid in 2010	\$38,198.57

Your regular mortgage payments

Your payment frequency	Monthly
Principal and interest payment	\$3,316.18
Property tax payment	\$0.00
Your total regular mortgage payment	\$3,316.18

Your property tax balance

Our records indicate you pay your property taxes directly to the taxing authority. If you wish us to administer your property taxes, your Servicing Branch will be pleased to make the necessary arrangements.

Save thousands on your mortgage.

Simply switch from monthly payments to weekly or bi-weekly payments and you could save thousands of dollars in interest costs plus pay your mortgage off sooner. For details, visit www.scotiabank.com/mortgages

Protect your family and your mortgage.

A Protection Plan from Scotiabank FinancialSM helps pay your family's mortgage in the event of an illness, disability or the unexpected. Contact your branch.

Important Information


Please keep this statement if needed, for income tax purposes. Please review your statement carefully and call us if you have any questions.

The Scotiabank Group Privacy Agreement has been revised. Please refer to the Scotiabank website at www.scotiabank.com

All borrowing parties with retail borrowing products may now elect to receive separate cost of borrowing disclosure documents such as monthly or annual statements. For further information, please contact your branch.

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AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

A commissioner for taking affidavits
in and for the Province of Ontario


Scotiabank®

 47852
 7609 WESTON ROAD, UNIT #9
 WOODBRIDGE ONTARIO L4L 8B7

Day-to-Day Banking

SDBAV10300_5640625_002 E D 47852 06058

MR R. RICARDO CASTILLO
 135 GORDON ROAD
 TORONTO ON
 M2P 1E6

 Your account number:
 91132 01696 84

 Questions?
 Call 1 800.4-SCOTIA
 (1 800 472-6842)

 For online account access:
www.scotiabank.com

Your Powerchequing account summary

Opening Balance on April 21, 2011	\$31,572.09
Minus total withdrawals	\$3,327.18
Plus total deposits	\$4,000.25
Closing Balance on May 20, 2011	\$32,245.16

Important

Please review your statement promptly to check and verify the entries. If there are any errors or omissions, you must tell us in writing within 30 days of your statement date.

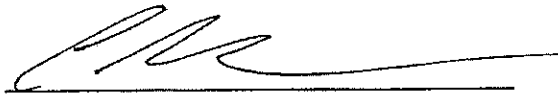
Here's what happened in your account this statement period

Date	Transactions	Amounts withdrawn (\$)	Amounts deposited (\$)	Balance (\$)
Apr 21	Opening Balance			31,572.09
Apr 28	Credit memo Wire Payment Xela Enterprises Ltd.		4,000.00	35,572.09
Apr 28	Service charge	10.00		35,562.09
May 2	Mortgage payment #136410-6	3,316.18		32,245.91
May 20	Interest		0.25	32,246.16
May 20	Service charge Record Keeping Fees	1.00		32,245.16
May 20	Closing Balance			\$32,245.16

Accelerate your savings with the *Scotia Power Savings Account (SPSA)*. Open an SPSA today, get a high interest rate, and put more savings in your pocket. For more information, please visit www.scotiabank.com/spsa. Minimum balance required.


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A commissioner for taking affidavits
in and for the Province of Ontario

Print

Page 1 of 1

Subject: Re: Xela - BPA issue
From: Juan Gutierrez (Jgutierrez@xela.com)
To: marcas@rogers.com
Date: Monday, October 5, 2009 11:56:44 AM

Hi Margarita,

Given daddy's health situation, I haven't brought up the subject. He gets very agitated about these things, so I'll be sending you a reply on the subject during the day.

Regards

>>> Margarita Castillo <marcas@rogers.com 05/10/2009 11:06 am>>>
Hi dad, hi Juan,

I haven't received any reply from you regarding my last two emails.

On my part, I had a conversation with Roberto, and BPA will carry on with its cooperation with Grant T... this week. In the message I sent you last week there are other points which I think it's convenient to discuss in order to reach the best agreement for both parties.

I await your reply,

Regards,
Margarita

Subject: Re: Asunto Xela - BPA
From: Juan Gutierrez (Jgutierrez@xela.com)
To: marcas@rogers.com;
Date: Monday, October 5, 2009 11:55:44 AM

Hola Margarita,

Por la situacion con la salud del papi no le he tocado el tema. El se altera mucho con estos temas. Por esto, yo te estare respondiendo sobre esto durante el dia de hoy.

Saludos

>>> Margarita Castillo <marcas@rogers.com> 05/10/2009 11:06 am >>>
Hola Papi y Juan,

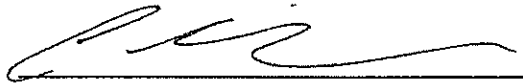
No he recibido ningun comentario de parte de ustedes referente a mi ultimo dos email.

Yo por mi parte tuve una conversacion con Roberto y BPA procedera con la colaboracion con Grant T... esta semana. En lo que les envie la semana pasada se mencionan otros puntos, los cuales creo que sera bueno hablar de ellos para llegar al mejor acuerdo para ambas partes.

Que a la espera de respuesta de parte de ustedes.

Saludos
Margarita

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AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011



A commissioner for taking affidavits
in and for the Province of Ontario

Print

Page 1 of 3

Subject: RE: Fw: Account Statements and Agreement with Xela
From: Juan Rodriguez (Jrodriguez@crgplaw.com)
To: jgutierrez@xela.com, marcas@rogers.com, Arturo@xela.com
Date: Thursday, October 8, 2009 2:52:29 PM

[content of the e-mail in English]

-----Original Message-----

From: Juan Gutierrez [mailto:jgutierrez@xela.com]
Sent: Thursday, October 08, 2009 1:52 PM
To: Margarita Castillo; Arturo Gutierrez
Subject: Re: Fw: Account Statements and Agreement with Xela
Importance: High

****High Priority****

Hi,

See my reply in the attached letter.

Regards,

Juan G

[e-mail browser link]

31/08/2011

Print

Page 2 of 3

>>> Margarita Castillo <marcas@rogers.com> 9/30/2009 11:41 AM >>>

Daddy, Juan,

Here is what I got from Roberto yesterday. I await your comments and hope that this matter can be concluded in the best and fastest way possible.

Regards,

Margarita

-----Forwarded Message-----

From: Roberto Barillas <rbarillas@bpa.com.gt>
To: Margarita Castillo <marcas@rogers.com>
Cc: R Castillo <rcastillo@rogers.com>; Anibal Arellano <aarellano@bpa.com.gt>; jporras jporras <jporras@bpa.com.gt>
Sent: Tuesday, September 29, 2009 6:19:06 PM
Subject: Account Statements and Agreement with Xela

Auntie,

In order to confirm what we talked about today, we are 95% ready to receive Grant Thornton's auditors as soon as you confirm that Xela/J.A. Gutierrez-J.G. Gutierrez have fulfilled the requirement of delivering the cashier/certified cheques for pending fees, based on the updated account statement that I send in the file named "General Status of the BPA Relationship", attached. I'm also sending you the UNSIGNED letters of Jorge and Ricardo Weber regarding the subject of commissions arising from the promotion and sale of shares in Marco Polo. In a separate e-mail, I'll forward you the messages that Jorge and Ricardo sent me, to confirm the origin of their letters.

I then look forward to hearing from you in order to coordinate all the review process. In the case of our fees for audit review, they should give you an amount equal to 50% of what we estimate. Once you confirm the delivery of the respective cheques, we will get in touch with Sergio Pineda in order to confirm the meeting at our offices.

Sincerely,

Roberto Barillas
Partner - Director

Tel.: (502) 2360-9265 - 75
Fax: (502) 2360-9285

[confidentiality message in Spanish and English]
[e-mail browser link]

31/08/2011

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Subject: RE: Fw: Status de Cuentas y Acuerdo con Xela
From: Juan Rodriguez (jrodriguez@crgplaw.com)
To: jgutierrez@xela.com; marcas@rogers.com; Arturo@xela.com;
Date: Thursday, October 8, 2009 2:52:29 PM

I approve of the letter. JJR

Juan J. Rodriguez, Esq.
jrodriguez@crgplaw.com

1395 Brickell Avenue Suite 700
Miami, FL 33131
Phone (305) 372-7474
Fax (305) 372-7475
<http://www.crgplaw.com>

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-----Original Message-----

From: Juan Gutierrez [mailto:jgutierrez@xela.com]
Sent: Thursday, October 08, 2009 1:52 PM
To: Margarita Castillo; Arturo Gutierrez
Subject: Re: Fw: Status de Cuentas y Acuerdo con Xela
Importance: High

**** High Priority ****

Hola,

Te respondo mediate carta attached.

Saludos,

Juan G

<http://ca.mg206.mail.yahoo.com/neo/launch?.partner=rogers-ac&.rand=1cppl1ollo3od>

31/08/2011

>>> Margarita Castillo <marcas@rogers.com> 9/30/2009 11:41 AM >>>

Papi y Juan,

aquí les estoy enviando lo que recibí de Roberto ayer. Espero sus comentarios y que esto termine de la mejor forma y lo más pronto posible.

Saludos

Margarita

----- Forwarded Message -----

From: roberto Barillas <rbarillas@bpa.com.gt>

To: Margarita Castillo <marcas@rogers.com>

Cc: R Castillo <rcastillo@rogers.com>; Anibal Arellano <aarellano@bpa.com.gt>; jporras jporras <jporras@bpa.com.gt>

Sent: Tuesday, September 29, 2009 6:19:06 PM

Subject: Status de Cuentas y Acuerdo con Xela

Tía,

Para confirmar lo platicado el día de hoy, estamos al 95% listos para atender a los auditores de Grant Thornton al momento que se confirme de tu parte que Xela/ J.A. Gutierrez-J.G. Gutierrez han cumplido con entregarte los cheques de caja/certificados de los honorarios pendientes, con base en el estado de cuenta actualizado que te hago llegar en el documento denominado "Status General de la Relación BPA, adjunto. Así también estoy enviando las cartas NO firmadas de Jorge y Ricardo Wever con relación al tema de la comisión, por la promoción y venta de acciones de Marco Polo. En otro e-mail aparte a este te haré llegar los forwards de los e-mails de Jorge y Ricardo enviados a mi, para confirmar el origen de sus cartas.

Quedo entonces a la espera de tus noticias para coordinar todo el proceso de revisión. En el caso de nuestros honorarios para la revisión de los auditores, deberían de entregarte el monto equivalente al 50% de lo estimado por nosotros. una vez sea confirmado por ti, la entrega de los cheques respectivos, nos comunicaremos con el Lic. Sergio Pineda, para confirmar la reunión en nuestras oficinas.

Saludos cordiales,

Roberto Barillas

Socio - Director

Tel: (502) 2360-9265 - 75

Fax: (502) 2360-9285

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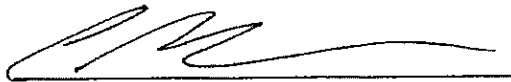
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<http://ca.mg206.mail.yahoo.com/neo/launch?.partner=rogers-ac&.rand=1cpr1ollo3od>

31/08/2011

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BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

A commissioner for taking affidavits
in and for the Province of Ontario

October 7, 2009

Dear Margarita,

As you know, the following was agreed at the September 9, 2009 meeting in Toronto:

- a) That Roberto Barillas, of the BPA - Soluciones Integrales de Negocios S.A. accounting and auditing firm would give us back the accounting books and supporting documentation for the following companies, the accounting of which had been assigned to them:

1. PAHULA, S.A

- a. Accounting books updated as at December 31st, 2008:
 - i. General ledger
 - ii. Daily ledger
 - iii. General accounts book
 - iv. Inventory book
 - v. Purchase and sale book
- b. Returns for all taxes paid to SAT during 2008
- c. Book of SAT-approved invoices

2. SERVICIOS MARFIL, S.A

- a. Accounting books updated as at to December 31st, 2008:
 - i. General ledger
 - ii. Daily ledger
 - iii. General accounts book
 - iv. Inventory book
 - v. Purchase and sale book
- b. Returns for all taxes paid to SAT during 2008

3. FRUTA MUNDIAL, S.A. & AGROEXPORTADORA NOBLEZA, S.A.

- a. Unlimited access to the auditor's working papers granted to Grant Thornton's auditors, as well as the willingness to cooperate fully with Grant Thornton so that it may successfully audit Fruta Mundial and Nobleza.
- b. Certified deeds of land purchase-sale agreements signed by Fruta Mundial, bearing the corresponding revenue stamps.

4. MAYACROPS, S.A. & LA FLORESTA, S.A.

- a. Unlimited access to the auditor's working papers granted to Grant Thornton's auditors, as well as the willingness to cooperate fully with Grant Thornton so that it may successfully audit Mayacrops and La Floresta.

5. METROBOWL

- a. Final auditor's report as at December 31st, 2008. To date, only a draft has been submitted.

- b) You would be given a cheque for \$23,386.00, to guard until it is given to Mr. Barillas as payment to BPA for its professional services, at the time he delivers the abovementioned information. The receipt for all surrendered documents would be signed by the following persons: Anibal Arellano, Jorge Porras, Eduardo San Juan and Claudio Riedel. Said cheque was handed to you on September 15, 2005, as previously agreed.

The thing is that, contrary to what Roberto himself agreed at the September 9, 2009 meeting, to this date he has refused to submit the agreed documents. Independent of the agreement, he now asks for the payment of fees arising from the organization of said information prior to its submission. He was asked to indicate his cost per hour for said service (fees which we were willing to pay in good faith although they were not included in our previous agreement).

In any case, Roberto made no submission until last Wednesday, September 30, 2008. During our meeting of September 9, 2009, and in other messages, we stated that it was urgent that we receive the documents Roberto and BPA agreed to submit due to the close timing. During the September 9 meeting I clearly explained to them the consequences that not having the requested information as soon as possible would have for Fruta Mundial's business, given that the audit process must be completed before the end of September.

The time for that process has gone and Roberto and BPA's fees proposal has been delivered too late.

Regarding the two BPA invoices attached to your e-mail of September 30, 2009, these invoices belong to the 2009 accounting services. They are not acceptable given that the services they refer to were completed as at December 31st, 2008, so Roberto is sending invoices for services that were not requested nor provided.

In your e-mail of September 30, 2009, Roberto asks for the payment of a commission for the sale of Marco Polo S.A. Neither BPA nor Roberto Barillas were hired at any time to sell that company. At the September 9, 2009 meeting, we clearly challenged the statements that Roberto made regarding that negotiation. I remind you that the agreement we reached on September 9, 2009, did not include said subject or the sum of \$100,000.00 owned by our company that Roberto has improperly retained since the end of 2008.

In view of Mr. Barillas' refusal to act as agreed, we kindly ask you to return the abovementioned cheque. We appreciate the help you provided as custodian of that cheque as well as the part that your husband Ricardo played so that this negotiation was carried out. Sadly, in view of Roberto's failure to comply, it is impossible to uphold that agreement.

We will see how to solve the issue of the undue withholding of the companies' books. The worst consequence of said withholding is our incapacity to file audited statements

at the banks so we can maintain our line of credit. We could be looking at million-dollar damages.

Regards,

Juan Guillermo

7 de octubre de 2009

Querida Margarita,

Como es de tu conocimiento, en reunión de fecha 9 de septiembre 2009 en Toronto, se acordó:

- a) Que el Lic. Roberto Barillas, de la firma de contadores y Auditores BPA – Soluciones Integrales de Negocios S.A., nos entregaría de vuelta los libros contables y documentación de soporte de las siguientes entidades, cuya contabilidad se había encargado a dicha firma:
 1. PAHULA, S.A.
 - a. Libros contables – actualizados al 31 de diciembre 2008:
 - i. Libro Mayor
 - ii. Libro Diario
 - iii. Libro de Balances Generales
 - iv. Libro de Inventarios
 - v. Libro de Compras y Ventas.
 - b. Declaraciones de todos los impuestos presentados ante la SAT durante el año 2008.
 - c. Tefonario de facturas autorizadas por la SAT.
 2. SERVICIOS MARFIL, S.A.
 - a. Libros contables – actualizados al 31 de diciembre 2008:
 - i. Libro Mayor
 - ii. Libro Diario
 - iii. Libro de Balances Generales
 - iv. Libro de Inventarios
 - v. Libro de Compras y Ventas.
 - b. Declaraciones de todos los impuestos presentados ante la SAT durante el año 2008.
 3. FRUTA MUNDIAL, S.A. & AGROEXPORTADORA NOBLEZA, S.A.
 - a. Acceso sin restricciones a los papeles de trabajo del auditor a favor de los auditores representantes de Grant Thornton, así como disposición de cooperar con Grant Thornton en lo necesario para que estos puedan concluir satisfactoriamente la auditoría de Fruta Mundial, así como de Nobleza.
 - b. Testimonios de las escrituras de compra venta de terrenos por parte de Fruta Mundial con los timbres correspondientes.
 4. MAYACROPS, S.A. & LA FLORESTA, S.A.
 - a. Acceso sin restricciones a los papeles de trabajo del auditor a favor de los auditores representantes de Grant Thornton, así como disposición de cooperar con Grant Thornton en lo

necesario para que estos puedan concluir satisfactoriamente la auditoría de Mayacrops, así como de La Floresta.

5. METROBOWL

- a. Informe final de auditoría al 31 de diciembre 2008. Hasta el momento solo ha sido entregado en borrador.

- b) Se te entregaría a tí un cheque por la suma de \$23,386.00 en custodia, a ser entregado al Lic. Barillas como pago a BPA por sus servicios profesionales, en el momento que él te hiciera entrega de la documentación relacionada anteriormente. El recibo de la documentación entregada sería firmado por las siguientes personas: Lic. Anibal Arellano, Lic. Jorge Porras, Sr. Eduardo San Juan y Sr. Claudio Riedel. Dicho cheque te fue entregado con fecha 15 de septiembre 2009 en cumplimiento de lo acordado.

Es el caso que contrario a lo acordado por el mismo Roberto en la reunión de fecha 9 de septiembre 2009 él hasta ahora se ha negado a entregar la documentación acordada. Fuera del acuerdo, ahora ha solicitado se le pague un honorario por organizar dicha información para hacer entrega de la misma. Se le solicitó que nos diera un costo por hora por dicho servicio (lo cual nosotros en buena fe estábamos dispuestos a aceptar pagar esos honorarios, a pesar de estar fuero de lo ya convenido).

En todo caso, Roberto no presentó sino hasta el pasado miércoles 30 de septiembre 2008. Durante nuestra reunión del 9 de septiembre 2009, así como en otras comunicaciones, expresamos la urgencia de la entrega de los documentos acordados por Roberto y BPA debido a la sensibilidad de las fechas. Claramente les expliqué durante la reunión del 9 de septiembre las consecuencias para el negocio de Fruta Mundial de no recibir la información a la brevedad debido a que la auditoría debe estar completa antes del fin de septiembre.

El tiempo para esto ya ha concluido y la propuesta de honorarios de Roberto y BPA ha sido entregada demasiado tarde.

En cuanto a las dos facturas de BPA adjuntas a tu email de 30 de septiembre 2009, corresponden a servicios contables durante el año 2009. Estas facturas no son aceptables debido a que los servicios en cuestión fueron concluidos al 31 de diciembre 2008, por lo que Roberto esta enviando facturas por servicios que no fueron requeridos y provistos.

En tu email de 30 septiembre 2009, Roberto reclama una comisión por la venta de Marco Polo S.A., en ningún momento BPA o Roberto Barillas fueron contratados para vender esa empresa. En la reunión del 9 de septiembre 2009 claramente rechazamos las aseveraciones de Roberto respecto a esta negociación. Te recuerdo que el acuerdo al que llegamos el 9 de septiembre 2009 dejó fuera tanto este tema

como los \$100,000.00 propiedad de nuestra empresa que Roberto tiene indebidamente retenidos desde fines del 2008.

Ante la negativa del Lic. Barillas de cumplir con su palabra, te rogamos nos devuelvas el cheque en cuestión. Te agradecemos tu apoyo en servir como custodio de ese cheque, así como la intervención de tu esposo Ricardo para que ésta negociación se llevara a cabo. Desafortunadamente, ante el incumplimiento de Roberto, es imposible continuar con dicho acuerdo.

Veremos como solventar la situación de ésta retención indebida de los libros de las empresas cuya principal consecuencia negativa es la imposibilidad de presentar estados auditados a los bancos para continuar con nuestra línea de crédito. Los daños pueden ser millonarios.

Un abrazo,

Juan Guillermo

THIS IS EXHIBIT "G" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

A commissioner for taking affidavits
in and for the Province of Ontario

Print

Page 1 of 1

Subject: Xela - BPA issue
From: Margarita Castillo (marcas@rogers.com)
To: jgutierrez@xela.com;
Bcc: Arturo @xela.com;
Date: Friday, October 9, 2009 10:50:05 AM

October 8, 2009

Dear Juan,

This afternoon I received your October 7 letter in which you refer to several items of the agreement reached with BPA.

The e-mail I sent you on September 30 included an e-mail that Roberto had sent me previously, but I had not sent it to you because I was giving BPA the time to prepare the paperwork for our cooperation with Grant Thornton's people.

BPA's people are ready to receive them next week. If there was a misunderstanding, let's leave it behind and conclude this as best and as fast we can, without pointing fingers at each other.

Regarding the money, we will settle that issue later. I'll fix it.

So, please let our people in Guatemala know, so that they can tell Grant Thornton to get in touch with BPA.

Regards,

Margarita

P.S.: In another message I will answer your letter point by point so that everything is in order.

[e-mail browser link]

31/08/2011

Subject: - Asunto XELA - BPA
From: Margarita Castillo (marcas@rogers.com)
To: jgutierrez@xela.com;
Bcc: arturo@xela.com;
Date: Friday, October 9, 2009 10:50:05 AM

8 de octubre de 2009

Querido Juan,

Hoy por la tarde recibí tu carta del 7 de octubre, en donde haces referencia de varios puntos del acuerdo con BPA.

- El email que te envié el 30 de septiembre contenía un email que Roberto me había enviado anteriormente, pero yo no se los había echo llegar ya que le estaba dando tiempo a BPA para que prepararan los papeles para la colaboración con los señores de Grant Thornton.

En BPA ya estan listos para recibirlos la próxima semana. Si hubo un mal entendido pues dejémolo atrás y terminemos esto de la mejor forma lo más rapido possible, sin estar señalando a la otra parte.

Referente al dinero lo arreglaremos después, yo me encargare de arreglarlo.

Asi es que por favor avísale a nuestra gente en Guatemala para que le den la orden a Grant Thornton de ponerse en contacto con BPA.

Un abrazo,

Margarita

PD En otra carta te aclararé punto por punto de tu carta para que quede todo en orden.

MARGARITA CASTILLO
Applicant

- and -

XELA ENTERPRISES LTD. et al.
Respondents

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

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

Proceeding commenced at Toronto

**SECOND REPLY AFFIDAVIT OF
MARGARITA CASTILLO**
(Sworn on September 9, 2011)

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

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

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

Lawyers for the Applicant, Margarita Castillo

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. ET AL.
Respondents

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

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

Proceeding commenced at Toronto

SECOND REPLY APPLICATION RECORD

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

Jeffrey S. Leon
Jason W. J. Woycheshyn
Tel: (416) 777-7472/4662
Fax: (416) 863-1716

Lawyers for the Applicant,
Margarita Castillo

TAB 2

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF HARALD JOHANNESSEN HALS

(Sworn March 22, 2020)

I, Harald Johannessen Hals, resident of Guatemala City, Guatemala, Central America, **MAKE**

OATH AND SAY:

1. I am the President of Lisa, S.A., a Panama corporation ("**LISA**"). I make this Affidavit in support of the Debtor's Opposition to the Motion of the Receiver (returnable March 24, 2020) (the "**Motion**").
2. Beginning in 2005, **LISA**'s efforts to collect unpaid dividends owed by the Avicola Group, including litigating the Leamington action in Bermuda, were funded by BDT Investments Ltd., a Barbados corporation ("**BDT**"), which at the time was wholly owned by Xela Enterprises Ltd. ("**Xela**"). On January 5, 2009, **LISA** and **BDT** documented **LISA**'s then-

cumulative debt to BDT with a promissory note for US\$16,910,000, secured by LISA's 1/3 stake in Villamorey. BDT eventually sued LISA in Panama on the promissory note, and in December 2012, it obtained a judgment against LISA in the amount of US\$19,184,680, together with a lien against all of LISA's assets (collectively the "**BDT Judgment**"). A true and correct copy of the BDT Judgment is attached hereto as Exhibit A.

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

4. Since the earliest days of his appointment, the Receiver has adopted a confrontational approach toward BDT, challenging both the validity of Arturo's transfer of BDT into the Trust, as well as the genuineness of the BDT Claim itself. Regarding the first issue, I understand that any challenge to the transfer of BDT to the Trust in April 2016 is now time-barred under Barbados law.

5. As for the validity of the BDT Claim itself, the U.S. District Court for the Southern District of Florida has now examined the relationship between BDT and LISA and rejected the argument advanced by Villamorey (and seemingly adopted by the Receiver) that LISA's debt to BDT was a sham. In BDT's lawsuit to garnish approximately US\$13 million of LISA's Unpaid Dividends held in an account at Banco Santander International ("**BSI**") in Miami (the "**Garnishment Proceedings**"), Villamorey moved to set aside the BDT Judgment, arguing that LISA's purported underlying litigation financing debt to BDT was fictitious and a fraud. However, on February 7, 2020, U.S. District Judge Marcia G. Cooke adopted in full the recommendation of Magistrate Judge Goodman that she deny Villamorey's motion,

concluding that “. . . the record does not establish by clear and convincing evidence that a fraud on the court (as that theory is defined in Florida law) occurred. As a result, the Undersigned respectfully recommends that Judge Cooke deny the motion.” A true and correct copy of the Magistrate Judge’s October 18, 2019 Report and Recommendation, which was adopted by the District Court, is attached hereto as Exhibit B.

6. After several rounds of discovery (including documentary evidence of BDT’s disbursements for LISA’s benefit), briefing and oral argument surrounding the relationship between BDT and LISA, the U.S. District Court rejected Villamorey’s argument that BDT had defrauded the Court by asserting its rights under the BDT Judgment. The underlying BDT Debt is valid and not subject to further challenge in these receivership proceedings.

7. As of The amount of Unpaid Dividends owed to LISA is estimated to approach \$400 million, including interest. LISA’s efforts to collect those dividends have been focused primarily in Panama (the “**Panama Proceedings**”), where LISA has an Order for disgorgement of Unpaid Dividends against Villamorey (the “**December 5, 2018 Payment Order**”), and in Miami, where the Garnishment Proceedings are pending.

The Panama Proceedings

8. LISA commenced the Panama Proceedings as part of its attempt to recover Unpaid Dividends. In September 2008, Villamorey brought a Counterclaim (the “**Counterclaim**”) against LISA, alleging damages of approximately \$200,000. Villamorey was granted a freezing order (*embargo*) and a seizure order (the “**Seizure Order**”), allowing it to suspend dividend payments to LISA and to seize and hold (*secuestro*) any Unpaid Dividends during the course of the Panama Proceedings (the “**Seized Dividends**”). Villamorey financial statements for 2011 and 2016 reflect Seized Dividends amounting to least \$14,465,062.

9. As a condition for the Seizure Order, Villamorey should have been required to deposit the Seized Dividends with the Court, but it was not. Instead, the Court granted Juan Luis Bosch – one of the Nephews and a stakeholder and long-time President of Villamorey – the status of trustee (*depositario judicial*) over the Seized Dividends, pursuant to which he agreed to make them available should the Court request them. Additionally, the Court

imposed a reporting requirement on Juan Luis Bosch that included ongoing disclosure of the location and any movement of the Seized Dividends (which LISA understands were initially on deposit at a bank in Panama), any additional dividends declared by Villamorey, and any other facts material to Juan Luis Bosch's status as a trustee of the Seized Dividends. Additionally, Villamorey was required to post three insurance bonds through ASSA Compañía de Seguros, S.A., a Panama corporation to guarantee payment of any damages suffered by LISA as a consequence of the Seizure Order.

10. LISA has alleged that – without LISA's knowledge or consent – Villamorey subsequently moved the Seized Dividends from their location on deposit in Panama into an account at Santander Bank in Miami, Florida, where Villamorey placed them into the stream of commerce by pledging them as collateral for a loan from Santander to a company owned by the Nephews for the acquisition of a telecommunications company in Guatemala, to the exclusion of LISA. LISA also understands that Juan Luis Bosch resigned as President and Director of Villamorey, eliminating all links between Juan Luis Bosch and Panama. Additionally, Villamorey financial statements obtained by LISA for 2016 and 2017 reflect further declared dividends in LISA's favor of \$4,748,054 and \$5,317,000 respectively.

11. Further, LISA understands that, without LISA's knowledge or consent, the Nephews caused a trust to be created in Guatemala in September 2018 – while LISA's demand for offset of the Counterclaim and release of the Seized Dividends in the Panama Proceedings (*i.e.*, the court filing that led to the Castillo Judgment) was pending – to which the Nephews purported to transfer all Villamorey assets, including the Seized Dividends. LISA believes that Juan Luis has failed to disclose these facts to the Court in the Panama Proceedings, notwithstanding the reporting obligations imposed on him.

12. Meanwhile, during the course of the Panama Proceedings, Villamorey sought an additional award of costs, which had the eventual effect of increasing the alleged value of the Counterclaim to \$894,718. Additionally, Villamorey requested that LISA's shares in Villamorey be auctioned in satisfaction of the Counterclaim. In response, although it had disputed them, LISA voluntarily conceded the alleged damages in the Counterclaim and requested that the Counterclaim be satisfied with a portion of the Seized Dividends and that

the remainder of the Seized Dividends be delivered to LISA. The Court in the Panama Proceedings agreed with LISA and, on December 5, 2018, issued the December 5, 2018 Payment Order as follows: (a) denying Villamorey's application to auction LISA's shares in Villamorey to satisfy the Counterclaim; (b) declaring Villamorey's damages under the Counterclaim satisfied in full through a reduction of the Seized Dividends by \$894,718; and (c) ordering Villamorey to release to LISA the balance of the Seized Dividends, wherever they may be located. A true and correct copy of the December 5, 2018 Payment Order is attached hereto as Exhibit C.

13. Villamorey appealed the December 5, 2018 Payment Order, which was rejected on July 12, 2019. Villamorey subsequently filed a constitutional appeal (*amparo*), which was and summarily rejected on September 27, 2019.

14. In November 2019, LISA filed a constitutional appeal (*amparo*) of its own to compel the Court to specify the amount of Seized Dividends to be disgorged by Villamorey to LISA under the December 5, 2018 Payment Order. That *amparo* was accepted and resolved in LISA's favor, whereupon LISA submitted Villamorey's financial statements and other documents demonstrating that the amount Villamorey is required to pay LISA under the December 5, 2018 Payment Order is \$23,635,398. The Panama Court's ruling on that evidence is imminent.

The Garnishment Proceedings

15. The Garnishment Proceedings were recently dismissed on a finding by the U.S. District Court for the Southern District of Florida that the writ of garnishment had expired. BDT's options include appellate proceedings and/or a new garnishment action. I understand that BDT has placed Banco Santander International on notice that any movement of the previously-garnished funds would be treated as a fraudulent transfer.

16. After the Receiver was appointed, LISA began to inquire into potential third-party loans sufficient to satisfy, among other things, the Judgment and the expenses of the Receivership. In December 2019, LISA received a verbal commitment for such a third-party

loan on terms acceptable to LISA (the "Loan"). All of the Loan details were managed and approved by LISA's Board of Directors, Xela's instigation, involvement or approval.

17. Upon learning of the lender's commitment to make the Loan, LISA informed the Receiver, stating specifically that the Loan was adequate to satisfy the Castillo Judgment and all reasonable expenses of the Receivership. LISA asked the Receiver to provide a payoff for the Castillo Judgment, together with an estimate of the receivership expenses, which the Receiver supplied. When the Receiver demanded to be told the Loan details, LISA declined out of fear that the Receiver's involvement would jeopardize Loan, and on the grounds that the Receiver's interest in the Loan did not extended beyond knowing that it would be adequate to satisfy the Castillo Judgment and the expenses of the receivership. Because LISA had not told Xela any of the details about the loan, Xela was unable to provide any further information about it to the Receiver

18. Dissatisfied with this response, and seemingly unreceptive to the Loan, the Receiver hired counsel in Panama and apparently instructed him: (1) to amend LISA's Articles of Incorporation to increase the maximum number of Directors from five to six; and (b) to add three new LISA Directors designated by the Receiver to the three Directors already in place. I understand that the Receiver's Panama counsel proceeded to try to execute those instructions without first obtaining a power of attorney to act for the Receiver, and without taking the threshold step of domesticating the Court's Appointment Order in Panama. Further, neither the Receiver nor his Panama counsel informed Xela or LISA in advance of their plans.

19. Consequently, when LISA's counsel in Panama observed that an unidentified person was trying to alter LISA's corporate structure, LISA quickly contested the changes, which were officially rejected by the Corporate Registrar for failure to comply with applicable procedures.

20. Meanwhile, the Loan has not funded. Although the lender has not articulated its reasons in writing, I was told that the lender became alarmed at the Receiver's attempt to insert himself into the Loan transaction.

Assignment of LISA's Claims to BDT

21. As LISA's debt to BDT has continued to mount, BDT has grown increasingly concerned about repayment, with particular concern about adequate collateral for what is now approximately US\$50 million in debt. This concern explains the reasoning behind the 2018 document entitled *Assignment of Causative Action*, and it further explains why BDT proposed in 2020 to extinguish LISA's debt in its entirety in exchange for LISA's full 1/3 stake in the Avicola Group, including its claims for Unpaid Dividends. The proposal was accepted by LISA's Board of Directors in February 2020. Consequently, BDT now owns all of LISA's 1/3 stake in the Avicola Group, along with LISA's claims for Unpaid Dividends. The decision to assign its remaining assets to BDT in exchange for cancellation of the debt was made solely and entirely by LISA, without the consent or approval of Gabinvest, S.A. or Xela.

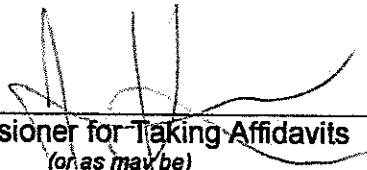
22. In connection with that transfer, BDT provided LISA with assurances that in the event BDT is able to recover LISA's Unpaid Dividends, it will – as before – consider subordinating those monies to the reasonable requirements of the receivership.

LISA's Interaction with the Receiver

23. LISA's Panama counsel has met on several occasions with counsel for the Receiver in Panama. During each meeting, LISA explained how Margarita's conduct in Canada entitles Xela to a judgment that would more than offset the Castillo judgment and the expenses of the receivership. LISA lawyers repeatedly asked the Receiver's lawyers for a face-to-face meeting with the Receiver to discuss the issue and how it might impact the receivership. Recently, the Receiver has suggested through his Panama lawyer that a meeting might be

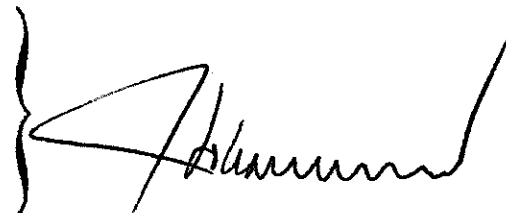
possible, but only on the condition that LISA first voluntarily consent to the Receiver's proposed changes to the LISA Board of Directors.

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



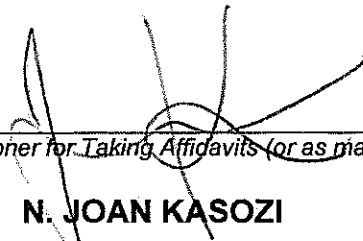
Commissioner for Taking Affidavits
(or as may be)

**N. Joan Kasozi
(LSO# 70332Q)**



HARALD JOHANNESSEN HALS

This is Exhibit "A" referred to in the Affidavit of HARALD JOHANNESSEN HALS sworn March 22, 2020.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI

(LSO# 70332Q)

AUTO No. 1838

(Exp. 31638)

JUZGADO DUODÉCIMO DEL CIRCUITO DE LO CIVIL DEL PRIMER CIRCUITO
 JUDICIAL DE PANAMÁ. Panamá, doce (12) de diciembre de dos mil doce (2012).



VISTOS:

En atención a lo solicitado por el demandante, se procede a resolver en la forma prevista en nuestro Código Judicial.

En consecuencia, el suscrito JUEZ DUODÉCIMO DEL CIRCUITO DE LO CIVIL DEL PRIMER CIRCUITO JUDICIAL DE PANAMÁ, DECRETA EMBARGO a favor de BDT INVESTMENTS INC. y en contra de LISA, S.A., hasta la concurrencia de DIECINUEVE MILLONES CIENTO OCHENTA Y CUATRO MIL SEISCIENTOS OCHENTA BALBOAS CON 00/100 (B/. 19,184,680.00) sobre lo siguiente:

1. Las acciones emitidas a favor de la sociedad LISA, S.A., inscrita a ficha 117512, rollo 11750, imagen 0186, cuyo presidente y representante legal es el señor CALVIN KENNETH SHIELDS, varon, estadounidense, casado mayor de edad, ingeniero, portador del pasaporte N° 158157083, con domicilio en N° 1176, Carolina Circle SW, Vero Beach, Florida, Estados Unidos de América en las siguientes sociedades:
 - a. ALIMENTOS PARA ANIMALES, S.A., sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 572, folio 81, libro 3 de Sociedades Mercantiles, cuyo Gerente General y representante legal lo es el señor JULIO CESAR RIVERA PELAEZ, ambos con oficina en 42, calle 20-91, Zona 12, ciudad de Guatemala. De esta sociedad LISA, S.A., es la propietaria de 45,000 acciones, según consta en el Certificado de Acciones N° 1.
 - b. AVICOLA LAS MARAGARITAS, S.A., sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 24735, folio 435, libro 103 de sociedades Mercantiles, cuyo Gerente General y representante legal lo es el señor GUILLERMO ANTONIO RAMIREZ MORALES; ambos con oficinas en Calz. Aguilar Batres 50-52, Colonia Castañas, Zona 11, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 375 acciones, según consta en el Certifiado de Acciones N°3.
 - c. ADMINISTRADORA DE RESTAURANTES, S.A. sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 27794, folio 242, libro 112 de sociedades mercantiles, cuyo Gerente General y Repersentante Legal lo es el señor CARLOS RENE GUZMAN, ambos con oficinas en 24 avenida, 34-05, zona 12, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 12 acciones según consta en el Certificado de Acciones N° 3.
 - d. COMPAÑIA ALIMENTICIA DE CENTROAMERICA, S.A., sociedad constituida de acuerdo a las leyes de Guatemala en inscrita a número 34068, folio 198, libro 121 de Sociedades Mercantiles, cuyo Gerente General y representante legal lo es el

señor MARCO ANTONIO SANCHEZ CASTAÑEDAS, ambos con oficinas en 46, calle 21-89, zona 12, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 12 acciones, según consta en el Certificado de Acciones N° 8.

e. IMPORTADORA DE ALIMENTOS DE GUATEMALA, S.A. sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 34065, folio 195, libro 121 de sociedades Mercantiles, cuyo Gerente General y Representante Legal lo es el señor CARLOS RENE GUZMAN, ambos con oficinas en 24 avenida, 34-05, zona 12, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 12 acciones según consta en el Certificado N° 3.

f. INDUSTRIA FORRAJERA DE MAZATENANGO, S.A., sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 13585, folio 460, libro 69 de Sociedades Mercantiles, cuyo Gerente General y Representante Legal lo es el señor SERGIO BOSCO PIO SEVILLA NOGUERA, ambos con domicilio en Calz. Aguilar Batres 50-52, Colonia Castañas, zona 11. De esta sociedad LISA, S.A., es propietaria de 125 acciones según consta en el Certificado N° 3.

g. INVERSIONES EMPRESARIALES, S.A. sociedad constituida de acuerdo a las leyes de Guatemala e incrita a número 10772, folio 30, libro 59 de sociedades Mercantiles, cuyo Gerente General y Representante legal lo es el señor GUILLERMO ANTONIO RAMIREZ MORALES, ambos con domicilio en 42, calle 20-91, zona 12, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 125 acciones según consta en el Certificado N° 3.

h. VILLAMOREY, S.A., sociedad constituida de acuerdo a las leyes de la República de Panamá, inscrita a ficha 9142, rollo 367, imagen 303 de la Sección de Micropelículas Mercantil del Registro Público, cuyo presidente y representante legal lo es el señor JUAN LUIS BOSCH GUTIERREZ, ambos con oficinas ubicadas en el Edificio Empresarial Torre I, quinta avenida, 15-45, zona 10, de la Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 3,333 acciones según consta en el Certificado N° 1

2. Sobre las sumas de dinero que en concepto de dividendos declarados tenga derecho a recibir la sociedad LISA, S.A., incluyendo los que a la fecha se hayan generado y no han sido entregados y los que se sigan generando hasta la concurrencia de lo adeudado, en su condición de accionista en las mencionadas sociedades.
3. Cualquier suma de dinero, derechos o créditos que resulten a favor de la sociedad LISA, S.A., dentro del proceso Ordinario de mayor cuantía con acción de secuestro que promueve LISA, S.A., contra VILLAMOREY, S.A., el cual se lleva a cabo ante los estrados del Juzgado Undécimo de Circuito Civil del Primer Circuito Judicial de Panamá, registrado bajo el número de demanda 556-99 y acción de secuestro número 7081-08.

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4. Los dineros de propiedad LISA, S.A. que mantiene la sociedad VILLAMOREY, S.A., en depósito en sus cuentas de banco GTC BANK INC.
5. Las sumas de dinero propiedad de LISA, S.A., que mantiene la sociedad VILLAMOREY, S.A., y que son objeto de medida de secuestro decretado mediante Auto N° 1624-08 del 27 de octubre de 2008, dictado dentro de la demanda de reconvencción del Proceso Ordinario de Mayor Cuantía con Acción de Secuestro que promueve LISA, S.A., contra VILLAMOREY, S.A., el cual se lleva a cabo ante los estrados del Juzgado Undécimo de Circuito Civil, del Primer Circuito Judicial de Panamá, registrado bajo el número de demanda 556-99 y acción de secuestro número 7081-08.
6. Las sumas de dinero que mantenga la sociedad LISA, S.A., en los bancos de la localidad.

Comuníquese lo resuelto a quien corresponda para los fines legales correspondientes.

Fundamento de Derecho: Artículo 1643 del Código Judicial.

NOTIFIQUESE,
EL JUEZ,


LICDO. JUAN CARLOS TATIS


LICDA. ANA M. GALLARDO H.
SECRETARIA



CERTIFICO: QUE PARA NOTIFICAR A LAS PARTES LA RESOLUCION QUE PRECEDE, SE HA FIJADO EDICTO N° 1687

EN LUGAR PUBLICO DE LA SECRETARIA HOY... 13...

DE DICIEMBRE DEL AÑO 2012

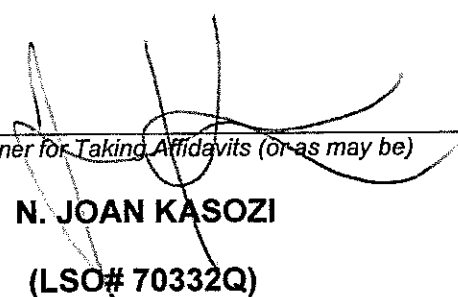
A LAS 4:00 DE LA TARDE

[Handwritten signature]
El Secretario

CERTIFICO: QUE ES FIEL COPIA DE SU ORIGINAL.

[Handwritten signature]
El Secretario

This is Exhibit "B" referred to in the Affidavit of HARALD JOHANNESSEN HALS sworn March 22, 2020.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI

(LSO# 70332Q)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 18-22005-CIV-COOKE/GOODMAN

BDT INVESTMENTS, INC.,

Judgment Creditor,

v.

LISA, S.A.,

Judgment Debtor,

v.

BANCO SANTANDER INTERNATIONAL,

Garnishee.

_____ /

**REPORT AND RECOMMENDATIONS RECOMMENDING THAT THE DISTRICT
COURT *DENY* INTERESTED PARTY'S MOTION
TO SET ASIDE FOREIGN JUDGMENT FOR FRAUD ON THE COURT**

In William Shakespeare's play *Hamlet*, Marcellus, a guard, says, "Something is rotten in the state of Denmark." WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 4. If that famous phrase were to be modified and updated to the motion at issue here, concerning a default judgment obtained in Panama, then it might be: "Something *might* be foul in Panama." The difference between something which **is** rotten and something which **might** be foul is the difference on which this ruling turns.

In this garnishment action, the "latest installment in a global intra-family brawl

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now in litigation for over 20 years,” [ECF No. 217, p. 1], Interested Party Villamorey, S.A. filed a motion entitled as one to set aside “a foreign judgment for fraud on the court.”¹ [ECF No. 217]. BDT Investments, Inc., the judgment creditor who initiated the garnishment action, filed an opposition memorandum [ECF. No. 235] and Villamorey filed a reply [ECF No. 275]. Although the Garnishee, Banco Santander International (“BSI”), did not technically join Villamorey’s motion, it supports Villamorey’s position and has filed submissions urging the fraud-on-the-court theory. For example, in its opposition [ECF No. 260-1] to BDT’s Amended Final Summary Judgment Motion [ECF No. 215], BSI included a section entitled “BDT is not entitled to summary judgment because it obtained the Panama judgment through fraud.” [ECF No. 260-1, p. 25].

United States District Judge Marcia G. Cooke referred Villamorey’s motion to set aside the foreign judgment to the Undersigned. [ECF No. 242].

Although there are several atypical circumstances surrounding BDT’s Panamanian judgement against the debtor, Lisa S.A. (“Lisa”), and although some of those odd factors might also be deemed suspicious and could be evidence of actual fraud, Villamorey has not met its burden. Specifically, it has not demonstrated by clear and convincing evidence that the judgment it wishes to vacate is based on “the most

¹ Villamorey’s initial motion was filed in a redacted format, with many words and phrases blocked out. In response to an Order [ECF No. 257] from the Undersigned, Villamorey later submitted an unredacted version of its motion under seal. [ECF Nos. 268; 269]. This Report and Recommendations does not, however, discuss the under-seal information unless it was publicly disclosed elsewhere, in a filing or during a hearing.

egregious misconduct” -- the standard which Villamorey conceded at a hearing² is the applicable one. [ECF No. 320, p. 222]. Given this assessment, the Undersigned **respectfully recommends** that Judge Cooke **deny** Villamorey’s motion to set aside the foreign judgment.³

I. Factual Background

A. *The State Court Action*

In February 2017, BDT filed an action in Florida state court to domesticate and enforce a \$19 million judgment that it had obtained against Lisa in Panama. Lisa did not

² The Undersigned held hearings on the motion to set aside the foreign judgment (and several other substantive motions) on September 18 and October 2, 2019. The total hearing time for all motions was almost 13 hours. [ECF Nos. 298; 307]. A significant portion of those hearings concerned Villamorey’s motion to set aside the foreign judgment.

³ As outlined below, Villamorey’s motion concerns both the underlying judgment (which BDT obtained in Panama against Lisa) and the domestication of that judgment in Miami-Dade Circuit Court (before the garnishment was removed to federal court). BDT argued that Villamorey could not challenge the judgment here, contending that it needed to mount a challenge in Panama or perhaps Miami-Dade Circuit Court, where the judgment was domesticated.

By issuing a substantive recommendation on the motion, the Undersigned is not concluding that Villamorey was not required to pursue the challenge in Panama, nor am I finding that it did not need to challenge the domestication in Miami-Dade Circuit Court. I am not issuing a ruling or recommendation on those related legal challenges. Instead, the ruling is based on the view that Villamorey did not meet the difficult burden to set aside the foreign judgment for fraud **if** it were able to mount that challenge here. Phrased differently, this ruling assumes, for the sake of discussion only, that Villamorey is permitted to pursue the challenge in this garnishment action as an interested party in this now-removed federal action.

oppose the domestication -- to the contrary, it filed an affidavit saying that it did not object. BDT then served BSI with a writ of garnishment, claiming that the bank was holding \$13.6 million in unpaid dividends that Villamorey owes to Lisa, who owns a third of Villamorey's shares.

BSI opposed the writ. BSI claims to have a perfected security interest in those funds based on a pledge from Villamorey to secure a BSI loan to another company. Villamorey also appeared in the state court action to assert its interest. BDT, BSI and Villamorey all appeared in this federal court lawsuit and have vigorously litigated many substantive motions. Lisa has not filed any submissions, but its counsel appeared at the first of the two hearings and also appeared at earlier discovery hearings in this case.

B. *The Circumstances Supposedly Generating the Purported Fraud*

Villamorey's motion to set aside the foreign judgment was publicly filed on CM/ECF, but with redactions. The Undersigned is providing only the unredacted factual background from the motion (and, when appropriate, from the unredacted portions of BDT's response, Villamorey's reply, and statements made during an open-to-the-public court hearing).

On February 27, 2017, BDT commenced the state court proceeding (which has since been removed to this Court) in order to obtain recognition of a purported judgment and writ of attachment (together, the "Panamanian Judgment") that it had

obtained against Lisa in Panama. Specifically, the Panamanian Judgment is comprised of what appears to be a Panamanian writ of execution against Lisa, dated May 31, 2012, allegedly in BDT's favor and against Lisa in the amount of US \$19,184,680 (the "Writ of Execution"), and a Panamanian writ of attachment in BDT's favor and against Lisa for the same amount, dated as of December 12, 2012 (the "Writ of Attachment").

On March 2, 2017, three days after BDT's commencement of the state court proceeding and before any mail service of the Purported Judgment, Calvin K. Shields, in his capacity as President of Lisa (the claimed judgment debtor and "Defendant" in this proceeding), filed a sworn Declaration of Non-Objection (the "Shields Declaration") in the state court proceeding stating that (i) he was aware of the Panamanian Judgment; (ii) he was aware of BDT's effort to domesticate the Panamanian Judgment in Florida; (iii) Lisa would not object to the recognition or enforceability of the Panamanian Judgment; and (iv) the amounts set forth in the Panamanian Judgment "are legitimately owed by Lisa, S.A. to BDT Investments, Inc." [ECF No. 268-1, p. 4]. At the time that the Shields Declaration was filed, Lisa and BDT and Xela Enterprises, Ltd. (which owns Lisa) were all represented by the same Miami law firm.

On March 10, 2017, three business days following the filing of the Shields Declaration, and well before the thirty-day statutory period for the filing of objections to recognition under Florida law [*see* Fla. Stat. §§ 55.604(2) and (4), including for fraud; *see* Fla. Stat. § 55.605(2)(b)], the Clerk of the Court (in apparent response to the Shields

Declaration) filed the Certificate of No Objection, which allowed BDT to seek immediate enforcement of the Panamanian Judgment against Lisa (an entity that was affiliated with BDT through common ownership at the time of the Judgment).

On March 14, 2017, BDT filed a Motion for Post Judgment Writ of Garnishment (the “Motion for Writ of Garnishment”), which sought the issuance of a writ of garnishment against BSI and claimed, among other things, that BDT did not believe that Lisa (its undisclosed affiliate) had “in its possession visible property on which a levy can be made sufficient to satisfy the judgment” [ECF No. 1-4, p. 3].

On March 17, 2017, the Clerk of the Court issued a Writ of Garnishment (the “Writ”) to BSI, as Garnishee, which BDT immediately served on BSI on that same date. When BDT served the Writ, it also provided correspondence to BSI contending that Lisa was allegedly owed money by Villamorey.

On April 5, 2017, BSI filed its Answer to the Writ (the “Answer”), stating that “[a]t the time of service of the Writ, through and including the time of this Answer, BSI (a) was not and is not in possession or control of any tangible or intangible personal property of Lisa, S.A. (the “Judgment Debtor”) and (b) did not and does not owe any debts to the Judgment Debtor,” and that it had a perfected security interest on those funds. [ECF No. 1-8, pp. 2-3].

On May 1, 2017, BSI filed its Motion to Dissolve Writ of Garnishment in the state court proceeding, which sought dissolution of the Writ, including on the grounds that

the Certificate of No Objection entered by the Clerk of the Court was improperly entered in direct contravention of the 30-day objection period that applies to the recognition of foreign judgments in Florida under Fla. Stat. § 55.604(1). [ECF No. 1-10, pp. 120-75]. Also on May 1, 2017, Villamorey filed a separate Motion to Dissolve Writs of Garnishment and Garnishment on Account at Banco Santander International. [ECF No. 1-10, pp. 176-287]. No court has ever ruled on these Motions.

On May 18, 2018, BSI removed the above-captioned proceeding to this Court. [ECF No. 1].

BDT and Lisa objected to BSI's discovery requests, and the Undersigned ultimately entered an Omnibus Order authorizing BSI to "seek discovery designed to collaterally attack the garnishment action on the basis of fraud, particularly given the unique circumstances underlying the garnishment action." [ECF No. 158].

After that ruling (which overruled their objections), BDT and Lisa produced documents and provided information.

Although counsel for BDT advised this Court that "BDT and Lisa are not commonly owned, and BDT is not Lisa's 'affiliate'" [see ECF Nos. 123, p. 5, n. 3; 158, p. 12 (citing representations made by counsel)], documents produced after the entry of the Omnibus Discovery Order reflect that BDT and Lisa were affiliated entities with the same corporate parent, Xela Enterprises Ltd., both (i) at the time that Lisa executed the Promissory Note and Stock Pledge Agreement ("Note") on which the Panamanian

Judgment is purportedly based, and (ii) at the time that BDT obtained the uncontested Panamanian Judgment.

At all times relevant to the transactions at issue, Lisa had no office, no employees, no bank account, and no financial books or records. Further, all of Lisa's decisions, including its financial decisions, were made by Xela's President, Juan Guillermo Gutierrez. Xela, not Lisa, decided that Lisa would not defend BDT's lawsuit in Panama.

Instead of immediately seizing all of Lisa's pledged collateral (including its shares in Villamorey) upon default without judicial process, BDT filed a civil lawsuit against Lisa in Panama.

Lisa did not defend against BDT's lawsuit. Although Lisa's president acknowledged his awareness of the lawsuit which BDT filed against Lisa in Panama and further recognized the materiality of the millions of damages sought in the lawsuit, he was unable to explain who made the decision to not defend the lawsuit.

After obtaining its default judgment in Panama against Lisa for \$19,184,680, which includes the \$16,685,000 in principal provided for in the promissory note as well as an award of unspecified costs and expenses of \$2,499,680⁴ relating to the uncontested action, BDT obtained a writ of attachment in the Panamanian proceeding, entitling it to seize Lisa's shares in eight separate companies, including Villamorey.

Nevertheless, despite this entitlement, BDT took no action to seize Lisa's assets or

⁴ BDT has not explained how it incurred approximately \$2.5 million in costs and expenses in an uncontested lawsuit which yielded a default judgment.

shares.

Moreover, instead of acting against Lisa or its assets, BDT has apparently taken on more purported Lisa debt (or at a minimum, continued to make transfers which are being booked as debts to Lisa, a non-operating holding company).

On the other hand, BDT's opposition memorandum points to evidence which it deems to be support for the legitimacy of the debt (and which undermines Villamorey's fraud-on-the-Court theory). For example, BDT's 2012 Panamanian Judgment against Lisa was supported by what appears to be a duly executed 2009 promissory note between the parties (the "2009 Promissory Note"). The 2009 Promissory Note, in turn, was fully funded by BDT. The entry of the 2009 Promissory Note also predates BDT's Panamanian Judgment by nearly four years and predates BDT's discovery of Lisa's executable assets at BSI in 2016 by more than six years.

According to BDT, it learned of accrued dividends which Villamorey owed to Lisa and which were being supposedly held in Villamorey's BSI account during a November 2016 Villamorey shareholder's meeting in Panama. BDT attended as a secured creditor of Lisa. At that meeting, Villamorey's external auditor circulated an independent audit report of Villamorey which indicated that Villamorey had created a fund equal to the dividends it owed to Lisa.

In addition, BDT points to evidence that Villamorey's auditor confirmed during a restroom conversation that three time deposits representing the separate fund for

“dividends payable to Lisa, S.A.” were being held by BSI in Miami. [ECF No. 266-1, p. 5]. The auditor also confirmed that Lisa was the only shareholder who had not received the dividends declared by Villamorey.

Armed with the information about the purported retention of the dividends owed to Lisa in Villamorey’s account at BSI, BDT filed the Panamanian judgment with the clerk for the state court in Miami-Dade County. A few days later, on March 1, 2017, Shields signed a declaration of non-objection, providing Lisa’s consent to BDT’s domestication of its Panamanian judgment against Lisa. The declaration attested to the alleged fact that the amounts in the Panamanian judgment were “legitimately owed.” [ECF No. 266-1, p. 8].

On March 6, 2017, the Clerk of the Court filed a Notice of Recording of Out of Country Foreign Money Judgment to the Judgment Debtor. [See ECF No. 1-3, p. 18]. On March 10, 2017, the Panamanian Judgment was domesticated in the State of Florida pursuant to a Certificate of No Objection (the “Florida Judgment”).

During discovery in this federal action, BDT submitted documents which it says support the underlying debt resulting in the Panamanian judgment. At bottom, BDT explains that Lisa is the entity which participated in myriad lawsuits all over the world, with BDT funding the litigation with loans (because Lisa did not have a bank account). BDT provided documents showing the transfer of funds and emails purporting to classify certain transfers as part of BDT’s loans for Lisa to use for the litigation.

Because Lisa did not have a bank account, however, the money for the purported loans were not transferred directly to Lisa. Instead, the loan funds were transferred to another entity (Xela) which was affiliated with both BDT and Lisa. However, the financial documents (e.g., the wire transfer instructions), as opposed to the emails, do not account for approximately \$7.5 million of the funds which BDT says it provided to Xela (for use by Lisa) in a series of loans to fund worldwide litigation.

C. *The Parties' Contentions*

In its initial motion to set aside the foreign judgment, Villamorey's initial paragraph asked for this Court to set aside the **state court's** recognition of the Panamanian foreign judgment based on "fraud on the court." [ECF No. 268-1, p. 1]. In its final paragraph, however, it asked for an Order setting aside the **foreign judgment** (from Panama) and the related Certificate of No Objection. It did not ask that the state court's recognition of the judgment be set aside. It also asked for sanctions against BDT and Lisa.

Villamorey's motion and reply did not pinpoint a specific act of fraud, such as bribery of a judge, the manufacturing of bogus evidence, witness intimidation, bribing witnesses, kidnapping witnesses or otherwise making them unavailable or other extreme misconduct. Instead, Villamorey's challenge is that BDT and Lisa were involved in a "complicated scheme" to "use this Court and the tools of judgment enforcement (in this case, garnishment), not to pursue collection against Lisa, but to

pursue illegitimate claims against third parties.” [ECF No. 217, p. 1].

Phrased differently, Villamorey alleges that “the Panamanian Judgment (which was not opposed by Lisa in Panama or in this proceeding) was obtained by **fraud and collusion** between BDT and Lisa and, now, has resulted in fraud on the court in this proceeding, which has been commenced to subvert the integrity of the judicial process for the improper purpose of collecting on an illegitimate debt.” [ECF No. 217, p. 3 (emphasis supplied)]. More specifically, Villamorey alleges that BDT and Lisa “engaged in a scheme to obtain a fraudulent judgment based on a **fraudulent debt**, and, subsequently, to record and enforce that judgment in this Court.” [ECF No. 217, p. 14 (emphasis added)].

Thus, at bottom, Villamorey’s overarching argument is that there is no actual, legitimate debt owed by Lisa to BDT, that this phantom debt was manufactured and used to obtain a default judgment in Panama, and that the improperly-obtained judgment was registered in the United States so that a garnishment could be used against Villamorey and BSI.

Villamorey emphasizes the following factors:

First, the vigorous opposition which BDT and Lisa mounted against efforts to obtain discovery about the circumstances underlying the Panamanian default judgment suggests that BDT and Lisa were trying to cover up the purportedly improper, collusive scheme.

Second, none of the money at issue in the promissory note underlying the Panamanian default judgment was ever transferred to *Lisa* (which, despite being involved in myriad lawsuits all over the world, never had a bank account during any of the years at issue).

Third, BDT did not explain in its opposition (and never explained at either of the two hearings) why *Lisa* never had a bank account and never took steps to obtain one (in order to directly receive the millions of dollars it would need to fund worldwide litigation).

Fourth, there is approximately \$7.5 million in alleged transfers from BDT to the *Lisa* affiliate which are not supported by financial documents such as wire transfer instructions. Instead, the \$7.5 million is evidenced only by emails and entries on a spreadsheet as “loans” to *Lisa*.

Fifth, although BDT says that the loans booked to *Lisa* were used to fund litigation on *Lisa*’s behalf, Shields testified that he was unable to answer basic questions about the funding and invoicing (and whether *Lisa* was the entity who directly engaged attorneys to represent it).

Sixth, *Lisa*’s counsel, who was at the first of the two hearings, was unaware of any engagement agreement or retainer agreement which *Lisa* entered into with any lawyer or law firm in connection with more than 200 lawsuits throughout the world.

Seventh, there is no documentary evidence that BDT simultaneously booked the

wire transfers as “loans to Lisa.” [ECF No. 266-1, p. 8]. Instead, it was an employee of an affiliate in common (i.e., Xela) who provided that classification.

Eighth, Lisa and BDT (debtor and creditor) were simultaneously represented by the same law firm when the Panamanian judgment was filed in Miami-Dade circuit court.

Ninth, there is no consideration for BDT’s purported series of loans to Lisa.

Tenth, Lisa’s president testified that he never independently confirmed that the funds transferred by BDT were actually received or used by Lisa.

Eleventh, it is illogical for Lisa to have agreed, in a \$16.68 million promissory note, to repay the principal, plus interest, in 15 monthly installments of \$1.25 million when it had no assets, no employees, no operations and no bank accounts.

Twelfth, there is no evidence to suggest that Lisa was involved in the negotiation of the note it ultimately signed. Instead, the evidence demonstrates that Xela, the other entity related to both Lisa and BDT, negotiated the note and controlled the financial transactions.

Thirteenth, BDT has not behaved like a typical creditor. It never seized Lisa’s pledged collateral and it never seized Lisa’s shares in Villamorey.

Fourteenth, Lisa did not defend against BDT’s lawsuit and, to the contrary, *facilitated* BDT’s collection efforts in the United States by arranging for its president, Shields, to sign the statement of no objection.

Fifteenth, the immediate entry of the Certificate of No Objection prevented parties from intervening and objecting to the recognition of the Panamanian judgment under Florida law. This immediately gave BDT the right to enforce the default judgment it obtained in Panama, which, in turn, led to the writ of garnishment at the heart of the litigation here.

Sixteenth, and finally, although BDT has branded the motion to set aside the foreign judgment as another attempt to “relitigate” the bona fides of the judgment [ECF No. 266-1, p. 2], Villamorey notes that there have not been any judicial decisions about the legitimacy of the promissory note or the judgment -- because Lisa did not contest the lawsuit, a scenario which led to a **default** judgment. Thus, Villamorey contends, there never was any earlier litigation about the judgment’s propriety.

Initially, BDT’s opposition describes Villamorey’s motion as one which “concocted a fantastical scenario whereby BDT and Lisa engaged in a convoluted scheme to obtain a fraudulent judgment in Panama in 2012, so that it could then be domesticated by BDT in Florida in 2017, for the sole purpose of being used to garnish Lisa’s assets at BSI [in 2018].” [ECF No. 235, p. 2 (emphasis added)]. BDT emphasizes that the note predates the Panamanian judgment by four years and predates BSI’s discovery of Lisa’s alleged assets in the Villamorey account at BSI by more than six years. It also notes that Villamorey did not open the challenged account at BSI until 2014. Given these circumstances, BDT says it is “at best, ridiculous” to suggest these

historical developments are part of a “collusive tool to garnish Lisa’s dividends in the Villamorey account at BSI.” [ECF No. 235, p. 2].

Second, BDT contends that Villamorey overstated its position in a discovery hearing, when it argued the following to the Court:

And so what we are saying that the underlying basis for this, we contend, is that **they will never be able to** -- well, I suggest to you that this is being resisted, we think, in part because this promissory note does not have the underlying **financial activity** to support that **any** debt was ever actually created.

[ECF No. 235-1, p. 57 (emphasis added)].

Although it did not produce wire transfer instruction documents for *all* the financial activity at issue in the promissory note, BDT provided documents for approximately \$9 million of the transfers. Of course, Villamorey contends that this is unpersuasive because the transfers are not **to Lisa**.

Third, BDT contends that there is nothing nefarious about its arrangement with Lisa, comparing itself to a third-party litigation funder (of Lisa’s lawsuits and legal proceedings throughout the world).

Fourth, BDT highlights its production of documentary evidence concerning its loans (made indirectly to Lisa through Xela, the affiliated entity) and points out that the \$7.5 million for which it could not locate wire transfer instructions were supported by both corresponding emails and a master spreadsheet. Given these documents, BDT contends that Villamorey’s fraud-on-the-court argument is inherently illogical:

Therefore, to accept Villamorey's fantastical theory of fraud, one would have to believe that BDT and Lisa set this whole "scheme" in motion before all of those emails and wire instructions were sent in 2005, and that each email, wire instruction, note, spreadsheet, and judgment were all pretextually used to garnish Lisa's property at BSI in an account that was not even created until 2014, and for funds BDT did not even discover were at BSI until 2016.

[ECF No. 235, p. 9].

Fifth, BDT argues that the mere fact that Lisa did not oppose BDT's Panamanian judgment is not evidence of fraud. According to BDT, Lisa's actions (or failure to act) is "simply evidence of a judgment debtor that has recognized an unsatisfied judgment and chosen not to oppose the rightful collection of a debt that is truly owed." [ECF No. 235, p. 10]. Thus, BDT says, Villamorey has taken an "Olympian leap" and concluded that the lack of opposition is evidence of fraud. [ECF No. 235, p. 9].

Sixth, BDT notes that Villamorey has not pinpointed any actual fraud underlying the judgment. Instead, BDT says that Villamorey has substituted "blanket, inflammatory allegations" in lieu of actual testimony and evidence that the debt underlying the judgment is a fraud. [ECF No. 235, p. 10].

Finally, BDT advances several legal arguments, discussed below, about its view that Villamorey failed to clear the requisite, substantial legal hurdles to set aside a judgment for *fraud*.

II. Applicable Legal Standards and Analysis

At the latest of the two hearings concerning this motion, the parties expressly advised me of their position that it is for **the Court** to resolve the motion, even if there are disputed issues of fact, and that the motion is not one which is appropriate for jury assessment. The parties acknowledged on the record that the Undersigned could weigh the evidence in determining what recommendation to make to Judge Cooke.

Specifically, the following exchange [ECF No. 320, pp. 198-99] evidences the consensus that the motion is to be resolved only by a judge, **without submission to a jury, even if factual disputes are present:**

MS. ESCOBAR⁵: Your Honor, you would have to find by clear and convincing evidence that there has been a fraud perpetrated on the Court, which, as you indicated -- and we state in our motion is fully satisfied in the context of this case, you **would not have to find that there's no issue of material fact.** That is the summary judgment standard. This is under Rule 60, which **doesn't require you to make a finding as to the existence or absence of material fact.**

THE COURT: So, phrased differently, your position is that I can still grant your motion and set aside the foreign judgment as fraudulent, assuming it met the other standards of the type of fraud involved, **even if I find the presence of disputed material issues of fact?**

MS. ESCOBAR: **Yes**, your Honor.

THE COURT: And what is your position?

MR. LEVINE⁶: That the motion is directed to the Court under Rule 60 D 3.

⁵ Ms. Escobar is one of Villamorey's attorneys. She participated in both hearings.

⁶ Mr. Levine is BDT's attorney.

I'm aware of – **I'm not aware, rather, of any case where a fraud on the court argument is presented to the jury.** I think that they have to meet clear and convincing evidence to the Court that perpetrated -- a fraud was perpetrated on the Court. If they can't do so, that fraud on the Court argument fails and the judgment stands and the jury isn't faced with whether or not there was a fraud. **That's not appropriate for the jury.** But I haven't seen any case law allowing that to get to the jury.

[ECF No. 320, pp. 198-99 (emphasis added)].

“Only the most egregious misconduct,⁷ such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court.” *Gupta v. Walt Disney World Co.*, No. 6:05-cv-1432, 2011 WL 13136612, at *3 (M.D. Fla. Aug. 19, 2011) (internal citations omitted) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)).

Moreover, “where relief from a judgment is sought for fraud on the court, the movant must establish by **clear and convincing evidence** the adverse party obtained the verdict through fraud.” *Leon v. M.L. Quality Lawn Maint., Inc.*, No. 10-20506, 2018 WL 6250529, at *13 (S.D. Fla. Nov. 29, 2018) (citing *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007)) (emphasis added). Phrased slightly differently, “conclusory averments of the existence of fraud made on information and belief and

⁷ Villamorey's counsel conceded, at the hearing, that the “most egregious misconduct” standard applies to its motion to set aside the foreign judgment. [ECF No. 320, p. 222 (“I agree it's egregious forms of fraud.”)]. Moreover, its own motion represents that “perjury and fabricated evidence do not constitute fraud upon the court, because they ‘are evils that can and should be exposed at trial,’” and “fraud upon the court is therefore limited to the more egregious form of subversion of the legal process . . . those we cannot necessarily expect to be exposed by the normal adversary process.” [ECF No. 217, p. 14].

unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud.” *Booker v. Dugger*, 825 F.2d 281, 283-84 (11th Cir. 1987) (citations, internal quotations marks, and alterations omitted).

Framed by this rigorous standard, less-egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. *Gupta*, 2011 WL 13136612, at *3. In other words, to warrant setting aside a judgment pursuant to the savings clause, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision. *Id.*

The Eleventh Circuit has defined “fraud on the court” as “that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.” *Brown v. S.E.C.*, 644 F. App’x 957, 959 (11th Cir. 2016) (quoting *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985)).

The mere nondisclosure of allegedly pertinent facts also does not ordinarily rise to the level of fraud on the court. *See Gupta v. U.S. Atty. Gen.*, 556 F. App’x 838, 840-41 (11th Cir. 2014). “Instead, ‘it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision’ to set aside a

judgment under Rule 60(d)(3)." *Id.* at 841 (internal citations omitted).

Finally, even "[f]raud inter parties, without more, should not be fraud upon the court." *Brown*, 644 F. App'x at 959 (internal citations omitted).

The core of Villamorey's motion is that there is no actual debt owed by Lisa to BDT. But Shields testified, in his declaration, that the debt was legitimately owed.

Moreover, and perhaps most significantly, Villamorey is well aware that Lisa was, in fact, involved in approximately 200 or more lawsuits throughout the world. Villamorey conceded at the hearing that Lisa would have been obligated to pay its attorneys but that Lisa did not have a bank account.

To be sure, Lisa's lack of a bank account could be deemed strange and atypical, especially for an entity embroiled in a substantial amount of litigation requiring the payment of attorney's fees and costs. But that fact does not in and of itself necessarily mean that there was no debt or that Shields committed perjury when he testified that the debt was legitimate.

Villamorey is not, for all practical purposes, challenging the fact that Lisa was actively involved in litigation and that the lawyers had to be paid (unless they were involved on a contingency basis in all lawsuits throughout the world, a possibility on which Villamorey says it has no evidence). [*See* Hearing Transcript, ECF No. 320, pp. 4-8].

Likewise, Villamorey's theory is that none of the debt is legitimate. Under that

perspective, Lisa and BDT would not have been able to introduce *any* evidence surrounding the non-existent debt. But they did produce a promissory note and the Panamanian judgment based on the note. And they produced wire transfer instructions for more than half of the total amount of the funds they deemed as loans to Lisa (by payment to Xela, a related entity). They also produced emails and a spreadsheet to account for the remainder of the money transferred to fund the Lisa litigation.

But Villamorey argues that transfers from BDT to the other entity does not prove that the money was used by Lisa to fund the litigation. Villamorey contends that the litigation funding explanation provided by BDT “allows for gamesmanship” concerning “how transactions are characterized.” [ECF No. 320, pp. 10-11]. It argues that the arrangement, even if it happened as BDT portrays it, puts BDT and Lisa “in a posture to act in a manner that’s adversarial when they’re all – clearly the facts, we would suggest, support our in-common enterprise run by a common individual who’s making the direction with respect to both the transfers, how they’re allocated and who receives them.” [ECF No. 320, pp. 11-12].

Pressed to pinpoint a specific type of fraud which led to the garnishment, Villamorey’s counsel contended that the Shields Declaration -- i.e., the one saying the Lisa debt to BDT was legitimate -- was false. But, as noted, this theory is contradicted, at least in part, by the promissory note, wire transfer instructions and other documents. But this theory would be insufficient to justify an Order setting aside the judgment or

domestication of the judgment as fraudulent because “perjury is not fraud on the court.” *Burns v. Fox*, No. 1:10-CV-3667-WSD, 2016 WL 3226429, at *2 (N.D. Ga. June 13, 2016) (quoting *Forsberg v. Pefanis*, 634 F. App’x 676, 681 (11th Cir. 2015)); see *Rodriguez v. Honigman Miller Schwartz & Cohn LLP*, 465 F. App’x 504, 509-10 (6th Cir. 2012) (“Plaintiff’s allegation that [a witness] made false statements in his affidavit is . . . insufficient to demonstrate deception of the court sufficient to sustain an action for fraud on the court because alleged perjury of a witness is not a ground for such an action.”); see also *id.* at 508 (stating that fraud on the court requires misconduct “(1) On the part of an officer of the court; (2) That is directed to the ‘judicial machinery’ itself”); *Gupta*, 556 F. App’x at 841 (affirming denial of rule 60(d)(3) motion to set aside judgment when “Gupta’s allegation that the government presented a perjured affidavit is at best tenuously supported by the documents Gupta presented to the district court, and the remainder of the allegedly fraudulent conduct amounts to mere nondisclosure”).

The Undersigned fully appreciates that Shields’ inability to provide meaningful and substantive answers at his deposition undermines BDT’s position that the debt is legitimate (and simultaneously supports Villamorey’s position that the debt is not legitimately owed by Lisa to BDT). But his unfamiliarity with the specifics and Lisa’s failure to have a bank account or ongoing operations may also be consistent with the theory that Lisa exists merely to litigate and that BDT is a funder akin to a litigation

financier.

Villamorey highlights the cooperation of Lisa, a debtor, with its creditor, BDT, as a badge of fraud. Villamorey suggests that Lisa's failure to contest the lawsuit in Panama, its willingness to have a default judgment entered against it in Panama and its assistance in domesticating the judgment and enabling the issuance of a writ of garnishment (by filing the non-opposition declaration) are evidence of fraud and improper collusion.

The Undersigned does not agree. Those factors are odd, to be sure. And they might be some evidence of some type of impropriety. They might even be evidence of fraud against Villamorey or BSI -- which is separate and distinct from a fraud on the **Court** (which is what is necessary to set aside the judgment under Rule 60(d)(3)). The case *Leon v. M.I. Quality Lawn Maintenance, Inc.*, 10-20506-CIV, 2018 WL 6250529 (S.D. Fla. Nov. 29, 2018) illustrates this point.

In *Leon*, Defendants contended that Plaintiff Leon's perjury resulted in the entry of a fraudulent final judgment. They contended that Leon, with the assistance of another, orchestrated his firing so that he could advance a fraudulent claim of retaliatory termination under the federal Fair Labor Standards Act. The Court was not persuaded.

However, Defendants' claim is conclusory in nature, does not provide clear and convincing probative facts, and is not supported by any direct evidence. Moreover, this type of allegation, even if true, does not demonstrate that a fraud was perpetrated **against the Court, rather than a**

litigant. See *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985) (stating “the ‘fraud on the court’ necessary to support either an independent action or to invoke the inherent power of a court is ‘fraud which is directed to the judicial machinery itself ... not fraud between the parties or fraudulent documents, false statements or perjury.”). Rather, in order to prevail on a fraud upon the court claim, a moving party must show that the opposing party’s fraud subverted the integrity of the court to the extent that the fraud prevented the court from exercising impartial judgment. *R.C. ex rel. Alabama Disabilities Advocacy Program v. Nachman*, 969 F. Supp. 682, 690 (M.D. Ala. 1997), *aff’d sub nom., R.C. v. Nachman*, 145 F.3d 363 (11th Cir. 1998); 11 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2870 (3d ed. 2017).

Leon, 2018 WL 6250529, at *13 (emphasis supplied).

The Undersigned finds that the record here (1) demonstrates by clear and convincing evidence that the circumstances surrounding the Panamanian judgment and BDT’s recognition of it through domestication in a Florida state circuit court are atypical, mighty odd and sometimes inconsistent with the documents; (2) demonstrates by clear and convincing evidence that some of the circumstances underlying the judgment and the Florida domestication are arguably suspicious; (3) establishes by a preponderance of the evidence that some of these circumstances *are* indeed suspicious; and (4) establishes by a preponderance of the evidence that some factors could be viewed as badges of fraud.

What the record does *not* establish, though, is clear and convincing evidence of the “most egregious misconduct” necessary to prove a fraud on the Court. Moreover, the record does not establish by clear and convincing evidence that a fraud on the court (as that theory is defined in Florida law) occurred. As a result, the Undersigned

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respectfully recommends that Judge Cooke **deny** the motion.

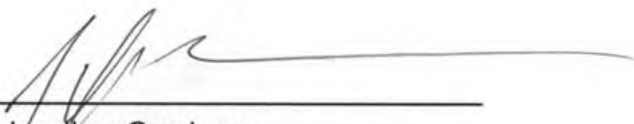
III. Conclusion

For the foregoing reasons, the Undersigned **respectfully recommends** that Judge Cooke **deny** Villamorey's motion to set aside the foreign judgment for fraud on the Court.

IV. Objections

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with the District Judge. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on October 18, 2019.

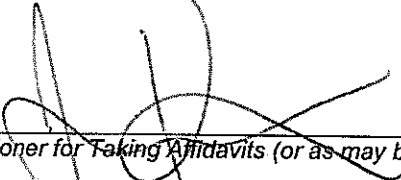


Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

The Honorable Marcia G. Cooke
All counsel of record

This is Exhibit "C" referred to in the Affidavit of HARALD JOHANNESSEN HALS sworn March 22, 2020.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI

(LSO# 70332Q)



JUZGADO UNDECIMO DEL CIRCUITO DE LO CIVIL DEL PRIMER CIRCUITO JUDICIAL DE PANAMA. Panamá, cinco (05) de diciembre de dos mil dieciocho (2018).

AUTO N°. 2277-2018

VISTOS:

En la demanda de reconvencción con acción de secuestro propuesta por VILLAMOREY, S.A., contra LISA, S.A., que cursó todo su trámite legal dentro del proceso ordinario de mayor cuantía con acción de secuestro interpuesto por LISA, S.A., contra VILLAMOREY S.A., este Tribunal mediante Sentencia N°. 42-08 de 11 de julio de 2008, modificada por el Primer Tribunal Superior de Justicia mediante Sentencia de 28 de agosto de 2012, declaró probada la pretensión ejercida en reconvencción por VILLAMOREY, S.A., contra LISA, S.A., donde esta última resultó finalmente condenada al pago de la suma de **DOSCIENTOS MIL BALBOAS con 00/100 (B/200,000.00) de capital demandado en reconvencción, más SEISCIENTOS SESENTA Y NUEVE MIL DOSCIENTOS BALBOAS (B/669,200.00)** en concepto de costas por negada la pretensión que ejerció contra VILLAMOREY, S.A., y gastos por la suma de **CIENTO DIECIOCHO BALBOAS con 00/100, (B/118.00),** generando un monto ejecutable que por petición de la favorecida con la sentencia modificada (Villamorey, S.A.) se dictó ejecución mediante Auto N°. 1723-16 de 7 de septiembre de 2016, (ver fojas 2561-2563 Tomo VII) por razón de la Sentencia condenatoria de primera instancia tal como quedó modificada, (Ver fs. 1954-1974 VII) que para el caso de la conderia con relación a la demanda de reconvencción se ejecuta a LISA, S.A. al pago de la suma líquida de la suma de **OCHOCIENTOS NOVENTA Y CUATRO MIL SETECIENTOS DIECIOCHO BALBOAS (B/.894.718.00),** elevándose a la categoría de embargo el secuestro previo decretado mediante Auto N°. 1624-08 de 27 de octubre de 2008, que garantizaba en primer orden de prelación, las resultas de la demanda de reconvencción sobre bienes muebles de Lisa, S.A. para ser ejecutados en el caso de no honrar el pago de la sentencia

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modificada a la que hemos hecho alusión.

Bajo el monto ejecutable antes citado y con motivo de la ejecución de sentencia modificada, VILLAMOREY, S.A., formula petición pendiente de pronunciamiento, que reposa a foja 2883-2893, donde solicita el remate de las acciones pertenecientes a Lisa, S.A., en las distintas sociedades enlistadas en la resolución que elevó el secuestro a la categoría de embargo en la demanda de reconvencción.

La ejecutada en reconvencción LISA, S.A., en memorial que reposa a foja 2861-2863, memorial que reitera a foja 2910, nos solicita que para el pago de la ejecución de la sentencia, dictada en su contra en reconvencción, que VILLAMOREY, S.A., se cobre el monto ejecutable del embargo que pesa sobre los dividendos que debe percibir y que fue secuestrado previamente para satisfacer en primer orden de prelación que el ejecutante satisfaga su crédito, y de esta manera finalizar con los trámites del proceso de ejecución de sentencia con motivo de la pretensión reconocida en la demanda de reconvencción.

Ahora bien, la suscrita Juzgadora al ponderar las encontradas posiciones de las partes dentro de la ejecución de la sentencia que se surte con motivo de la demanda de reconvencción a la que se hace deferencia en este proceso ordinario de mayor cuantía, toma en cuenta que en el expediente pesan anotaciones con relación a los bienes de la ejecutada, provenientes del proceso ejecutivo promovido por la sociedad BDT INVESTMENT INC., contra LISA, S.A., que cursa trámite en el Juzgado Duodécimo Civil del Primer Circuito Judicial Panamá, donde nos informaron sobre embargo decretado hasta la concurrencia de la suma de DIECINUEVE MILLONES CIENTO OCHENTA Y CUATRO MIL SEISCIENTOS OCHENTA BALBOAS CON 00/100 (B/.19,184,680,00) que al parecer tornan en inútil las peticiones de las partes en esta fase de ejecución del proceso que cursa por su fase final en este proceso.

Bajo esta óptica, no podemos perder de vista que independientemente que Lisa, S.A., le haya sido negada su pretensión primigenia contra Villamorey, S.A.,

quien salió favorecida con decisión de fondo, por razón de la demanda de reconvencción, ésta mantiene retenidos en depósito desde el 27 de octubre de 2008, dividendos de Lisa, S.A., con motivo del secuestro decretado como propietaria del 33.3% del capital social de Villamorey, S.A., dividendos que a la fecha de su depósito según las constancias en autos, superan en demasía el monto de la pretensión en reconvencción, y la ejecución de la sentencia, monto que puede compensar Villamorey, S.A., para dar por finalizado este proceso, sin que tengamos la necesidad de rematar las acciones que pertenecen a LISA, S.A., en las sociedades guatemaltecas enlistadas en el auto que elevó el secuestro a la categoría de embargo, sumas que según nota de Villamorey, S.A., que reposa a foja 2163 del Tomo VII, están a disposición de este Tribunal desde del 25 de noviembre de 2008.

Desde otro punto de vista, que sin duda favorece la petición de LISA, S.A., para que con sus dividendos que retiene VILLAMOREY, S.A, en Guatemala, se pague en primer orden de prelación la ejecución de la sentencia en este juzgado no impide la ejecución que otra persona jurídica adelanta contra LISA, S.A en sede del Juzgado Duodécimo del Circuito de Panamá, puesto que VILLAMOREY, S.A., tiene prelación en cobrarse en primer lugar con el producto de las resultas de este proceso ordinario, que es anterior al proceso ejecutivo que se surte contra Lisa, S.A., en el referido Tribunal de Circuito, puesto que aseguró mucho antes las resultas en este proceso ordinario en reconvencción, para garantizar el trámite de ejecución de sentencia en este Tribunal en primer lugar, sumado a ello, el embargo decretado en el proceso ejecutivo del Juzgado Duodécimo propuesto por la sociedad BDT INVESTMENT INC., contra LISA, S.A., su cuantía es muy superior al crédito de VILLAMOREY, S.A., por lo que, teniendo prelación Villamorey, S.A., frente a BDT INVESTMENT INC., persona jurídica que demanda a LISA, S.A., sus derechos no se ven afectados con la prelación que tiene VILLAMOREY, S.A., contra LISA, S.A., teniendo la suscrita que comunicar al Juzgado Duodécimo del Circuito de lo Civil, la modificación que tiene que efectuar el Juez en aquel Tribunal para la satisfacción del millonario crédito para satisfacer obligaciones contra LISA, S.A.

Lo anterior conduce a ésta juzgadora, a ordenar a VILLAMOREY, S.A., que de las sumas que retiene secuestrado en cualquier parte del mundo con los dividendos que pertenecen a LISA, S.A., se cobre el monto de la ejecución como pago de su pretensión en reconvencción al igual que debemos emitir, las órdenes correspondientes para finalizar con el trámite de ejecución de sentencia, y se proceda el archivo del expediente.

En consecuencia, la que suscribe JUEZ UNDÉCIMA DEL CIRCUITO DE LO CIVIL DEL PRIMER CIRC UITO JUDICIAL DE PANAMÁ, administrando justicia en nombre de la República y por autoridad de la Ley, en el trámite de ejecución de la Sentencia N°.42 de 11 de julio de 2008, modificada por el Primer Tribunal Superior de Justicia del Distrito de Panamá, mediante Sentencia de 28 de agosto de 2012, que cursa por su trámite de ejecución dentro de la demanda de reconvencción promovida por **VILLAMOREY contra LISA. S.A., Niega la solicitud de remate**, formulada por la firma forense GALINDO, ARIAS & LOPEZ, apoderados judiciales de la parte ejecutante en reconvencción, para la ejecución de los Certificados de Acciones de las sociedades enlistadas en la actuación dictada mediante Auto N°.1723-16 de 7 de septiembre de 2016.

Ordena, que de los dividendos de las acciones pertenecientes a LISA. S.A., y que retiene VILLAMOREY, S.A., en Guatemala o en cualquier parte del mundo, Lisa, S.A., y genere activos líquidos por su participación accionaria, sea **cancelado** el pago de la ejecución de sentencia, dictada mediante Auto N°.1723-16 de 7 de septiembre de 2016, cuyo monto asciende a **OCHOCIENTOS NOVENTA Y CUATRO MIL SETECIENTOS DIECIOCHO BALBOAS (B/.894.718.00)**, producto del reconocimiento de la demanda de reconvencción.

Ordena, comunicar al JUZGADO DUODÉCIMO DEL PRIMER CIRCUIYO JUDICIAL DE PANAMÁ, que en este proceso de ejecución no reporta saldo insoluto que deba ser puesto a su disposición dentro del proceso ejecutivo propuesto por BDT INVESTMENT INC., contra LISA, S.A.

Téngase a la firma **QUIROZ GOVEA ABOGADOS**, como nuevos

apoderados judiciales de la sociedad LISA. S.A., en los términos del poder conferido.

Fundamento Legal: Artículo 17 y 32 de la Constitución; Artículo 1º del Código de Comercio; Artículos: 1043, 1662 y demás concordantes del del Código Civil; Artículo 1259 del Código Judicial.

Notifíquese, Comuníquese y Archívese

La Juez,

Maria Leticia Cedeno S. S.
LICDA. MARIA LETICIA CEDENO SUIRA

Raquel Guzman Fernandez
LICDA. RAQUEL GUZMAN FERNANDEZ
Secretaria Judicial



CERTIFICO: que para notificar a las partes la resolución que precede, se ha Fijado Edicto ¹⁹⁷⁵ en lugar público de la Secretaría,

Hoy 06 de 12 de 20 18

a las 10:00 de la TARDE
Raquel Guzman Fernandez
Secretaria

TU 10-12-2018.

EDICTO: ~~Notifiqué al Señor(a) [Nombre]~~ a las 11:00 de la MANANA

del día 5 de diciembre de 20 18

Notifiqué al Señor(a) Dupez Gouza (Jhon Dupez)

El Secretarial

[Signature]

CERTIFICO: Que es fiel copia de su original.

6 de diciembre 2018
[Signature]
El Secretarial



REPÚBLICA DE PANAMÁ
ÓRGANO JUDICIAL

La Suscrita Secretaria General de la Corte Suprema de Justicia, en uso de sus facultades legales

CERTIFICA:

Que la firma que antecede expresiva del nombre de la Licenciada RAQUEL GUZMÁN, quien actúa en calidad de Secretaria Judicial del Juzgado Undécimo de Circuito Civil del Primer Circuito Judicial de Panamá, es auténtica.

Panamá, 7 de diciembre de 2018.

A handwritten signature in black ink, appearing to read 'Yanixsa Y. Yuen'.

LICDA. YANIXSA Y. YUEN.
Secretaria General
Corte Suprema de Justicia de Panamá. -

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondents

Court File No. CV-11-9062-00CL 0830

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

RESPONDING RECORD

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M5V 1R5

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jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondents
Xela Enterprises Ltd.

This is Exhibit "F" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR

)

TUESDAY, THE 24TH

JUSTICE MCEWEN

)

DAY OF MARCH, 2020

)



BETWEEN:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents

ORDER

THIS MOTION, made by KSV Kofman Inc. (“KSV”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property (collectively, the “**Property**”) of Xela Enterprises Ltd. (the “**Debtor**”), for an Order, *inter alia*, (i) approving the fees and disbursements of the Receiver and its legal

counsel as set out in second report of the Receiver dated February 14, 2020 (the “**Second Report**”), and (ii) certain additional ancillary relief contained herein, was heard this day by teleconference.

ON READING the Motion Record of the Receiver, including the Second Report and the appendices thereto, the fee affidavit of Steven Graff sworn February 14, 2020, and the fee affidavit of Noah Goldstein sworn February 18, 2020, and on hearing the submissions of counsel for the Receiver and such other counsel as were present and listed on the Counsel Slip, no one else appearing for any other party named on the service list, although served as evidenced by each of the affidavit of Sam Babe sworn March 4, 2020 and the affidavit of Kyle Plunkett sworn March 17, 2020, filed.

SERVICE

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated and that this motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Persons shall be authorized and permitted to serve Mr. Harald Johannessen Hals with copies of all court materials or documents filed in these proceedings by emailing a copy to harald.johannessen1951@gmail.com in accordance with the Protocol (as defined in the Order made in these proceedings on July 5, 2019 by which the Receiver was appointed (the “**Appointment Order**”)).

APPROVAL OF GABINVEST RESOLUTION

3. **THIS COURT ORDERS AND DECLARES** that the resolution of the shareholder of Gabinvest S.A., dated January 16, 2020, replacing the directors of Gabinvest S.A., as described in Section 3.0 of the Second Report (the “**Gabinvest Resolution**”), was a proper exercise of the Receiver’s exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise the Debtor’s shareholder rights.


APPROVAL OF FEES AND DISBURSEMENTS

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$107,626.81 (excluding HST) as set out in Appendix "CC" to the Second Report, are hereby approved.
5. **THIS COURT ORDERS** that the fees and disbursements of the Receiver's legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$108,783.09 (excluding HST) as set out in Appendix "DD" to the Second Report, are hereby approved.
6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.



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

MAR 26 2020

PER / PAR: 

ARGARITA
Applicant

CASTILLO -and-

XELA ENTERPRISES LTD. *et al.*
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

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

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

This is Exhibit "G" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprises et al
Defendant(s)

Case Management Yes No by Judge: McEwen J

Counsel	Telephone No:	Facsimile No:
<u>(as per counsel slip)</u>		

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

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

Upon the agreement of counsel the attached endorsement, marked as Schedule One, shall go along with the attached schedules A-C.

Insofar as the draft order at schedule B is concerned, it shall go as per the copy I have signed and also attached to this endorsement. The Order is effective from today's date, regardless of whether or not it is entered in

26 March 20
Date

McEwen J
Judge's Signature

Additional Pages _____

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents

Endorsement

McEwen, J.
March 24, 2020

This case conference was held by teleconference on March 23, 2020 and March 24, 2020 in accordance with the changes to the Commercial List operations in light of the COVID-19 crisis, and the Chief Justice's notice to the profession dated March 15, 2020.

1. The Receiver's motion, solely as it relates to the request for an Order declaring that the respondent, Juan Guillermo Gutierrez, pursuant to Rule 60.11 of the Ontario Rules of Civil Procedure, in contempt of each of (i) my Order dated July 5, 2019 (the "**Appointment Order**") and (ii) my Order dated October 29, 2019 (the "**Disclosure Order**"), is adjourned to May 14, 2020, subject to the attached litigation timetable at Schedule C. Counsel to Juan Guillermo Gutierrez has accepted service of the Receiver's Motion Record dated March 3, 2020, the Supplementary Motion Record dated March 17, 2020 and the Factum

and Brief of Authorities of the Receiver each dated March 19, 2020. Each of Greenspan Humphrey Weinstein LLP and Cambridge LLP hereby agree to waive any requirement for personal service on Mr. Gutierrez and agree to accept service on his behalf by way of email.

2. By the deadlines set out below, Juan Guillermo Gutierrez, to the extent the documentation and information is in his power, possession and/or control, will deliver, or cause to be delivered, to the Receiver, the items listed below:
 - a. within 14 calendar days of this Endorsement, any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between Mr. Gutierrez and the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
 - b. within 14 calendar days of this Endorsement, any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT to Lisa and to Xela; and
 - c. within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa's interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020. Without limiting the generality of this request, the questions attached hereto as Schedule A shall be answered.

3. By the deadlines set out below, Harald Johannessen Hals, Lester Hess Jr. and Calvin Kenneth Shield, as members of the board of directors and officers of Lisa, S.A. (“**Lisa**”) will deliver, or cause to be delivered, to the Receiver, the items listed below:
- d. within 14 calendar days of this Endorsement, any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
 - e. within 14 calendar days of this Endorsement, any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT to Lisa and to Xela and copies of bank statements evidencing such advances, as previously requested by the Receiver; and
 - f. within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa’s interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020. Without limiting the generality of this request, the questions attached hereto as Schedule A shall be answered.
4. An Order is also made, in the form attached hereto at Schedule B, approving the fees and disbursements of the Receiver and its legal counsel as set out in Second Report of the

Receiver dated February 18, 2020 (the “**Second Report**”), approving and ratifying the Gabinvest Resolution (as defined in the Second Report) and authorizing the parties to effect service on Mr. Harald Johannessen Hals by way of email at harald.johannessen1951@gmail.com in accordance with the E-Service Protocol approved in these proceedings.

5. The Receiver or the Debtor’s estate shall not be responsible for any costs relating to any legal counsel retained to act as counsel to the directors of the Debtor in these proceedings, or in any foreign legal proceedings or otherwise, unless otherwise approved by the Receiver in writing, and the Debtor’s directors shall be solely responsible for the fees and disbursements incurred by such counsel.
6. I am exercising my discretion under this endorsement to waive the time period suspensions prescribed under Ontario Regulation 73/20 made under the *Emergency Management and Civil Protection Act*.

A handwritten signature in black ink, appearing to read 'McEwen', is written over a horizontal line.

Justice McEwen

SCHEDULE A**List of Additional Questions**

1. Please provide proof of advances from BDT to Lisa totalling US47.0 million as of June 30, 2018, including any cancelled cheques payable to Lisa, wire transfers from BDT to Lisa and bank statements.
2. Please provide a detailed summary of the amounts advanced by BDT to Lisa since the date of the Assignment Transaction (as defined in the Disclosure Order), with supporting documentary evidence (copies of all cheques, wire transfers or other evidence of Lisa's use of such funds).
3. What specific date did BDT propose to satisfy LISA's debt?
4. Who on behalf of BDT made that communication?
5. Who on behalf of LISA received that communication and in what was the form of communication? Produce copies.
6. Was the BDT proposal or any similar offer reduced to writing? Produce copies.
7. When did LISA's board meet to consider the BDT proposal? Was the meeting in person or through technology?
8. Who attended the board meeting?
9. What documents or records did the Board review in considering the BDT proposal. Produce copies.
10. Produce minutes and/or notes of board meeting.
11. Produce board resolution approving the transaction.

12. What documents were signed once the board approved the BDT proposal. Produce copies.
13. Why did LISA's directors not consult with Gabinvest?
14. Why did LISA's directors not consult with Xela and/or the Receiver?
15. What was the form of assurance provided by BDT as referenced in paragraph 22 of Harald's affidavit? Produce any written assurance.
16. When did Juan learn of this February 2020 transaction?
17. Who advised him of it? Produce a copy of any written communication.
18. Produce any written communication regarding the transaction as between any of BDT, LISA, Gabinvest, Xela and all respective directors and officers

SCHEDULE B

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR

)

TUESDAY, THE 24TH

JUSTICE MCEWEN

)

DAY OF MARCH, 2020

)

B E T W E E N :

MARGARITA CASTILLO

Applicant

- and -

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

Respondents

ORDER

THIS MOTION, made by KSV Kofman Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property (collectively, the “**Property**”) of Xela Enterprises Ltd. (the “**Debtor**”), for an Order, *inter alia*, (i) approving the fees and disbursements of the Receiver and its legal

counsel as set out in second report of the Receiver dated February 14, 2020 (the “**Second Report**”), and (ii) certain additional ancillary relief contained herein, was heard this day by teleconference.

ON READING the Motion Record of the Receiver, including the Second Report and the appendices thereto, the fee affidavit of Steven Graff sworn February 14, 2020, and the fee affidavit of Noah Goldstein sworn February 18, 2020, and on hearing the submissions of counsel for the Receiver and such other counsel as were present and listed on the Counsel Slip, no one else appearing for any other party named on the service list, although served as evidenced by each of the affidavit of Sam Babe sworn March 4, 2020 and the affidavit of Kyle Plunkett sworn March 17, 2020, filed.

SERVICE

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated and that this motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Persons shall be authorized and permitted to serve Mr. Harald Johannessen Hals with copies of all court materials or documents filed in these proceedings by emailing a copy to harald.johannessen1951@gmail.com in accordance with the Protocol (as defined in the Order made in these proceedings on July 5, 2019 by which the Receiver was appointed (the “**Appointment Order**”)).

APPROVAL OF GABINVEST RESOLUTION

3. **THIS COURT ORDERS AND DECLARES** that the resolution of the shareholder of Gabinvest S.A., dated January 16, 2020, replacing the directors of Gabinvest S.A., as described in Section 3.0 of the Second Report (the “**Gabinvest Resolution**”), was a proper exercise of the Receiver’s exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise the Debtor’s shareholder rights.

APPROVAL OF FEES AND DISBURSEMENTS

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$107,626.81 (excluding HST) as set out in Appendix “CC” to the Second Report, are hereby approved.

 5. **THIS COURT ORDERS** that the fees and disbursements of the Receiver’s legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$108,783.09 (excluding HST) as set out in Appendix “DD” to the Second Report, are hereby approved.

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

ARGARITA
Applicant

CASTILLO -and-

XELA ENTERPRISES LTD. et al.

Respondents

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

847

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

ORDER

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Email: sbabe@airdberlis.com

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

SCHEDULE C

Litigation Timetable re Contempt Motion

Step to be taken	Delivered by:
1. Motion Record of the Receiver, Supplemental Motion Record and Second Supplemental Report of the Receiver	Complete
2. Responding Motion Record of J. Gutierrez et al.	March 31, 2020
3. Delivery by the Receiver of Sworn Affidavit appending the Receiver's Reports	March 31, 2020
4. Delivery by the Receiver of any Reply Materials	April 10, 2020
5. Cross-Examination of a representative of the Receiver	Week of April 20 th 2020
6. Cross-Examination of the Respondent's affiants	Week of April 20 th 2020
7. Delivery of Factum of the Receiver	May 5, 2020
8. Delivery of Responding Factum of the Respondent	May 8, 2020
9. Delivery of Reply Factum of the Receiver	May 12, 2020
10. Hearing Date:	May 14, 2020

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR

)

TUESDAY, THE 24TH

JUSTICE MCEWEN

)

DAY OF MARCH, 2020

)

BETWEEN:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents

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**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

ORDER

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Sam Babe (LSO # 49498B)

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Fax: (416) 863-1515

Email: sbabe@airdberlis.com

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

This is Exhibit "H" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

April 7, 2020

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

Chris Macleod
416.477.7007 ext. 303
cmacleod@cambridgellp.com

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

Dear Mr. Plunkett:

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

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

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

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

2. Please provide a detailed summary of the amounts advanced by BDT to Lisa since the date of the Assignment Transaction (as defined in the Disclosure Order), with

supporting documentary evidence (copies of all cheques, wire transfers or other evidence of Lisa's use of such funds).

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

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

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

4. Who on behalf of BDT made that communication?

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

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

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

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

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

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

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

8. Who attended the board meeting?

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

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

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

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

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

11. Produce board resolution approving the transaction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours very truly,

CAMBRIDGE LLP

Per:



CHRIS MACLEOD

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

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

This is Exhibit "I" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	FRIDAY, THE 28 TH
)	
JUSTICE MCEWEN	)	DAY OF AUGUST, 2020

B E T W E E N:

(Court Seal)

MARGARITA CASTILLO

Applicant

and

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

Respondents

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

ORDER

THIS MOTION, made by KSV Kofman Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property of Xela Enterprises Ltd. (the “**Company**”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

ON READING the material filed by the parties, including, but not limited to, the Motion Record of the Receiver and the Responding Motion Record of Cambridge LLP, and on hearing the submissions of the lawyers for the Receiver and such other counsel as were present and listed on the Counsel Slip.

SERVICE

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

THE COMPANY'S DOCUMENTS and DEVICES

2. **THIS COURT ORDERS** that Juan Guillermo Gutierrez ("**Juan Guillermo**") shall provide the Receiver forthwith and no later than within 7 days of this Order, the municipal address, business name and all contact information related to any storage unit or other premises previously or currently used by the Company to store documents, electronic devices or data including but not limited to the location of the Company's current and former servers including any server hosting Juan Guillermo's xela.com email address (the "**Premises**").

3. **THIS COURT ORDERS THAT** Juan Guillermo and any current or former officers, directors, servants, agents, employees of the Company ("**Company Agents**") and any person appearing to be in charge of the Premises shall forthwith permit entry into the Premises to the Receiver, its counsel, the Receiver's agent, or anyone so authorized by the Receiver ("**Authorized Persons**") for the purposes of searching for, identifying, inspecting, preserving, reproducing, and removing into the custody of the Receiver any and all Company documents, items, devices, computers, servers, iPads, Tablets, magnetic tapes or disks, DVDs, CDs, USB devices, cell phones,

or any other electronic storage or media device, including cloud-based storage belonging to the Company and any component of any of the foregoing (“**Company Documents and Devices**”).

4. **THIS COURT ORDERS** that Arturo’s Technical Services its officers, directors, servants, agents, employees, and anyone else acting on its behalf (“**ATS**”) and any person(s) appearing to be in charge of the premises known municipally as 3-100 Leek Crescent, Richmond Hill, ON L4B3E6 (the “**Old Server Premises**”) shall, upon five days’ notice from any Authorized Person, permit entry or re-entry into the Old Server Premises to the Authorized Persons for the purposes of searching for, identifying, inspecting, preserving, reproducing, and removing into the custody of the Receiver the Company Documents and Devices.

5. **THIS COURT ORDERS** that forthwith upon service of the Order, Juan Guillermo, any Company Agents and any other person(s) upon whom the Order is served, shall forthwith disclose to the Receiver and grant access and deliver up to the Receiver or any Authorized Persons any and all Company Documents and Devices wherever situate including without limitation any on-line internet or cloud based e-mail or other accounts or remotely accessed computers where information related to the Company may be stored, provide all means of accessing these documents, accounts or devices and allow the Receiver or such Authorized Persons to change the access to these accounts to allow the Receiver an adequate opportunity to secure the information contained on these accounts or computers.

6. **THIS COURT ORDERS AND DECLARES** that the Receiver is authorized to obtain from anyone in possession or control of the Premises or Old Server Premises, with entry and exit records, dating back to July 5, 2019, with respect to the storage unit(s) rented and/or occupied by the Company, Juan Guillermo Gutierrez, Company Agents, or anyone acting on their behalf.

7. **THIS COURT ORDERS AND DECLARES** that Receiver is authorized to retain a forensic specialist, who shall be an Authorized Person under this order. The Forensic Specialist shall be entitled to take an image of the data on the Company Documents and Devices. The Forensic Specialist shall be permitted to conduct such forensic examinations of Company Documents and Devices as directed by the Receiver.

8. **THIS COURT ORDERS AND DECLARES** that Juan Guillermo, the Company Agents, ATS and anyone else acting on their behalf, and any person(s) appearing to be in charge of the Premises or Old Server Premises shall allow the Authorized Persons to remain on the Premises or Old Server Premises to exercise their rights and discharge their duties as set out in this Order.

OBLIGATIONS OF PERSONS ON NOTICE OF ORDER

9. **THIS COURT ORDERS AND DECLARES** that upon notice of this Order, unless otherwise ordered by this Court or directed by the Receiver, no person shall, directly or indirectly, by any means whatsoever:

- (a) Remove, destroy, erase, delete alter, deface, discard, conceal, or destroy, in any manner, any Company Documents or Devices; and
- (b) Touch, activate, or operate any of the Company Documents and Devices either locally or remotely from any location, or access or alter any text, graphics, electronic data, information, or other content of any web site or its databases or any electronic mail, newsgroup or Internet relay chat communications, or other information, instructions or data stored in any location remote from the Premises that may contain or constitute the Company's information.

10. **THIS COURT ORDERS AND DECLARES** that, in order to give effect to the Order, any person who is ordered not to do something shall not do it personally, through others acting on his/her behalf, or on his/her instructions, or with his/her encouragement or acquiescence, or in any other way.

11. **THIS COURT ORDERS** that Juan Guillermo, the Company Agents, ATS, and anyone else acting on their behalf shall forthwith render any necessary assistance to the Receiver and Authorized Persons to enable them to effectively carry out their responsibilities under this Order.

12. **THIS COURT ORDERS** that upon notice of this Order, Juan Guillermo, the Company Agents, ATS and anyone else acting on their behalf shall forthwith render any necessary assistance to the Receiver or Authorized Persons to locate, decode, access, and decrypt the Company Documents and Devices and any and all information or electronic data to which the Authorized Persons may not have ready and immediate access, including the provision of all usernames, accounts, access codes, keys, identification codes, passwords, passphrases, encryption solutions or any other such information or knowledge necessary to achieve access thereto and shall remove and deactivate any other security safeguards existing on Company Documents and Devices.

PRIVILEGE

13. **THIS COURT ORDERS** that Juan Guillermo, or any other person purportedly acting on behalf of the Company or (previously or currently) related to the Company, cannot assert privilege against the Receiver in respect of any of the Company Documents or Devices.

14. **THIS COURT ORDERS** that Juan Guillermo shall give notice of this order to any third parties who may claim privilege over any Company Documents or Devices.

15. **THIS COURT ORDERS** that any third party with notice of this order who asserts or may assert a privilege claim with respect to any Company Documents or Devices may seek to vary or amend this Order on not less than seven (7) days notice to the Receiver and the Service List.

16. **THIS COURT ORDERS** that if, in the process of carrying out its duties, the Receiver or any Authorized Person identifies a documents which may be subject to privilege of a third party, the Receiver shall segregate such document(s) and shall not conduct any further review of such document(s) without further direction of the Court.

17. **THIS COURT ORDERS** that nothing in this order is intended to affect the privilege of any third party.

18. **THIS COURT ORDERS** that Juan Guillermo, or any other person purportedly acting on behalf of the Company, cannot assert privilege against the Receiver in respect of any documentation that is in the possession of Cambridge LLP as a result of their representation of the Company.

19. **THIS COURT ORDERS** that within fourteen (14) days of this Order Cambridge LLP shall produce to the Receiver:

- (a) Any and all corporate documents of the Company and its subsidiaries or affiliates;
- (b) Any documentation and correspondence relevant and relating to its representation of the Company, its subsidiaries or affiliates including but not limited to:
 - (i) Its representation of the Company in these proceedings;
 - (ii) Correspondence with the Company's subsidiaries, its affiliates and any other third parties; and

- (iii) Any and all correspondence respecting the February 2020 transaction with LISA S.A.;
- (c) A list of documents and correspondence over which privilege is claimed; and
- (d) No documents obtained by the Receiver, pursuant to this Order, shall be used for any purpose other than:
 - (i) Discharging the Receiver's obligations under the Appointment Order, dated July 5, 2019, as it may be amended from time to time;
 - (ii) The interviewing of Persons, as defined in the Appointment Order; and
 - (iii) Reporting to this Court from time to time.



(Signature of Judge)

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

08
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Court File No. CV-11-9062-00CCD

28 August 20

ONTARIO

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

Order to go on the consent of the parties as per the draft filed and signed.
This Order is effective from today's date and is enforceable without the
need for entry and filing.

PROCEEDING COMMENCED AT
TORONTO

McE...

ORDER

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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

Peter H. Griffin (19527Q)
pgriffin@litigate.com
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Kyle Plunkett
Email: kplunkett@airdberlis.com
Sam Babe
Email: sbabe@airdberlis.com

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

Lawyers for the Receiver

This is Exhibit "J" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

869

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

September 11, 2020

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

Joan Kasozi
jkasozi@cambridgellp.com

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

Dear Counsel:

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

Pursuant to the Order of Justice McEwen, please find attached documents in Cambridge LLP's file and a list of privileged documents pertaining to the above-mentioned matter.

Yours very truly,

CAMBRIDGE LLP
Per:



N. JOAN KASOZI
NJK/tr
Signed electronically on behalf of N. Joan Kasozi

Enclosure: Cambridge LLP Documents Dated September 11, 2020

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

CAMBRIDGE LLP DOCUMENTS

September 11, 2020

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

Christopher MacLeod (LSO# 45723M)

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

N. Joan Kasozi (LSO# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

INDEX

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

CAMBRIDGE LLP DOCUMENTS

NO.	DATE	DESCRIPTION
XELA CORPORATE DOCUMENTS		
1.	August 12, 2019	Translated Panamanian Orders
2.	November 29, 2019	LISA Correction de Demanda
3.	January 16, 2020	Email from Andy Durkovic to Receiver
4.	April 28, 2020	Anexos a Carta de LISA SA a Xela
5.	April 28, 2020	Respuesta de LISA SA a Xela
6.	April 28, 2020	Respuesta de LISA SA a Xela Translation
7.	June 24, 2020	Panamanian Order
8.	June 24, 2020	Unofficial Translation of June 24, 2020 Order
9.	July 24, 2020	Panamanian Order
10.	July 24, 2020	Unofficial Translation of July 24, 2020 Order
OTHER DOCUMENTS		
11.	March 22, 2020	Affidavit of Juan Gutierrez
12.	August 21, 2020	Affidavit of Juan Gutierrez
PRIVILEGED CORRESPONDENCE		

NO.	DATE	DESCRIPTION
13.	December 30, 2019	Emails to and from Juan Gutierrez
14.	January 9, 2020	Emails to and from Juan Gutierrez
15.	January 10, 2020	Emails to and from Juan Gutierrez
16.	January 13, 2020	Emails to and from Juan Gutierrez
17.	January 14, 2020	Emails to and from Juan Gutierrez
18.	January 15, 2020	Emails to and from Juan Gutierrez
19.	January 16, 2020	Emails to and from Juan Gutierrez
20.	January 17, 2020	Emails to and from Juan Gutierrez
21.	January 28, 2020	Emails to and from Juan Gutierrez
22.	February 20, 2020	Firm internal Emails re strategy (Litigation Privilege)
23.	March 4, 2020	Emails to and from Juan Gutierrez
24.	March 10, 2020	Emails to and from Juan Gutierrez
25.	March 16, 2020	Emails to and from Juan Gutierrez
26.	March 17, 2020	Emails to and from Juan Gutierrez
27.	March 19, 2020	Emails to and from Juan Gutierrez
28.	March 20, 2020	Emails to and from Juan Gutierrez
29.	March 21, 2020	Emails to and from Juan Gutierrez
30.	March 22, 2020	Emails to and from Juan Gutierrez
31.	March 23, 2020	Emails to and from Juan Gutierrez
32.	March 24, 2020	Emails to and from Juan Gutierrez
33.	March 25, 2020	Emails to and from Juan Gutierrez
34.	March 26, 2020	Emails to and from Juan Gutierrez
35.	March 27, 2020	Emails to and from Juan Gutierrez
36.	March 30, 2020	Emails to and from Juan Gutierrez
37.	March 31, 2020	Emails to and from Juan Gutierrez
38.	April 2, 2020	Emails to and from Juan Gutierrez
39.	April 3, 2020	Emails to and from Juan Gutierrez
40.	April 7, 2020	Emails to and from Juan Gutierrez
41.	April 8, 2020	Emails to and from Juan Gutierrez
42.	April 10, 2020	Emails to and from Juan Gutierrez

NO.	DATE	DESCRIPTION
43.	April 11, 2020	Emails to and from Juan Gutierrez
44.	April 13, 2020	Emails regarding strategy next steps
45.	April 16, 2020	Emails to and from Juan Gutierrez
46.	May 4, 2020	Emails to and from Juan Gutierrez
47.	May 12, 2020	Emails to and from Juan Gutierrez
48.	June 15, 2020	Emails to and from Juan Gutierrez
49.	August 4, 2020	Emails to and from Juan Gutierrez
50.	August 5, 2020	Emails to and from Juan Gutierrez
51.	August 9, 2020	Emails re strategy (Litigation Privilege)
52.	August 9, 2020	Emails to and from Juan Gutierrez
53.	August 19, 2020	Emails to and from Juan Gutierrez
54.	August 20, 2020	Emails to and from Juan Gutierrez
55.	August 21, 2020	Emails to and from Juan Gutierrez
56.	August 26, 2020	Emails to and from Juan Gutierrez
57.	August 28, 2020	Emails to and from Juan Gutierrez
58.	September 4, 2020	Emails to and from Juan Gutierrez
59.	September 8, 2020	Emails to and from Juan Gutierrez

This is Exhibit "K" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

September 29, 2020

Chris MacLeod
cmacleod@cambridgellp.com

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

Dear Counsel:

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

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

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

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

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

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

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

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

Yours very truly,

CAMBRIDGE LLP

Per:



CHRIS MACLEOD

CRM/jk

Signed electronically on behalf of Chris MacLeod

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

This is Exhibit "L" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**



From: Chris Macleod <cmacleod@cambridgellp.com>
Sent: Sunday, October 25, 2020 4:57 PM
To: Monique Jilesen <mjilesen@litigate.com>; Joan Kasozi <jkasozi@cambridgellp.com>; Derek Knoke <DKnoke@litigate.com>
Subject: Re: Xela - Draft Order

His flight returns next Monday. He will be in quarantine and we will act as his agent and pick up the devices and meet with D&P for mirror imaging within the timeline.

However, the only concern is if there is a delay for any reason in the flight or his mother in law dies he may be delayed. In that case we do not want him to be in breach of the court order.

Mother in law is having surgery and Juan and his wife will attend and be back next Monday barring any unforeseen events.

Happy to speak and see if we can arrive at language that works.

From: Monique Jilesen <mjilesen@litigate.com>
Date: Sunday, October 25, 2020 at 4:42 PM
To: Joan Kasozi <jkasozi@cambridgellp.com>, Derek Knoke <dknoke@litigate.com>
Cc: Chris MacLeod <cmacleod@cambridgellp.com>
Subject: RE: Xela - Draft Order

Hi Joan –

I don't think we are going to be agree to the language below given the pandemic and the uncertainty of what it would mean. We don't know when, where or how Juan is in Guatemala and have no control over his return. When he returns he will be required to be quarantined for 14 days and won't be able to attend in person to deal with this order. Please provide us with a fixed date in which the order can be complied with. There is no reason Juan's personal presence is needed for this order -you or other agents of Juan can be in

attendance if there is any concern about the imaging.

Thanks

Monique

“or within one day after Juan Guillermo’s return from Guatemala to Canada,”

From: Joan Kasozi <jkasozi@cambridgellp.com>

Sent: October 25, 2020 3:39 PM

To: Monique Jilesen <mjilesen@litigate.com>; Derek Knoke <dknoke@litigate.com>

Cc: Chris Macleod <cmacleod@cambridgellp.com>

Subject: Xela - Draft Order

Hi Monique and Derek,

Please find attached the Draft Order with our revisions. We are available to discuss.

Best,

Joan Kasozi
Litigation Associate

CAMBRIDGE LLP

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



CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

This is Exhibit "M" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE	)	TUESDAY, THE 27 th
)	
JUSTICE MCEWEN	)	DAY OF OCTOBER, 2020

B E T W E E N:

(Court Seal)

MARGARITA CASTILLO

Applicant

and

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

Respondents

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

ORDER

THIS CASE CONFERENCE, requested by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property of Xela Enterprises Ltd. (the “**Company**”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

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

1. **THIS COURT ORDERS** that within seven days of the Order, Arturos Technical Services Ltd. (“ATS”) will schedule a mutually convenient date with Duff & Phelps, the Receiver’s Forensic Specialist, for the purpose of providing the Forensic Specialist access, in accordance with this Order, to certain servers more particularly described in Schedules “A” and “B” (collectively the “Servers”).

2. **THIS COURT ORDERS** that upon being provided with the access contemplated in paragraph 1 of this Order, Duff & Phelps be and is hereby authorized and directed to make a single disk image of each of the Servers listed in Schedule “A” (together, the “Images”) to be held by Duff & Phelps in accordance with the terms of this Order.

3. **THIS COURT ORDERS** that upon being provided with the access contemplated in paragraph 1 of this Order, ATS shall deliver up the Servers at Schedule “B” to Duff & Phelps (the “Schedule B Servers”) to be held by Duff & Phelps in accordance with the terms of this Order.

4. **THIS COURT ORDERS** that Duff & Phelps will make no additional copies or images of the Servers or any of the Images.

5. **THIS COURT ORDERS** that Duff & Phelps shall maintain and preserve the Images and Schedule B Servers until further order of this Court or written consent of the Receiver and ATS.

6. **THIS COURT ORDERS** that Duff & Phelps shall not conduct, or permit any other person to conduct, any analysis or review of the Images or Schedule B Servers or any data contained in the Images or Schedule B Servers, without a further order of this Court or written consent of the Receiver and ATS.



(Signature of Judge)

SCHEDULE "A"**Description of Servers**

Servers located at Cogent Canada, Inc., 245 Consumers Rd., Suite 300, North York, ON M2J 1R3:

1. XL88-5, serial number: KQYWHNG
2. XL88-15, serial number: 06KN471
3. XL88-25, serial number: KQ63ZVA
4. XL88-1, serial number: KQYWHNA
5. XL88-20, serial number: KQ6930H
6. XL88-30, serial number: KQ8X0LK
7. XL88-35, serial number: E2BG115

SCHEDULE "B"**Description of Additional Servers described as non-operational**

	Hardware	Serial #
1.	IBM System x 3650 M3 7945-AC1 7945N2U	KQYWHPF
2.	IBM System x3550 7978 7978CCU	99L6433
3.	IBM System x3550 7978 7978CCU	99L6432

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

Court File No. CV-11-9062-00CDB
08
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ONTARIO

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

27 Oct 20
Order to go on consent as per the draft filed and signed.

PROCEEDING COMMENCED AT
TORONTO

McE...

ORDER

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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

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

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

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

AIRD & BERLIS LLP

Brookfield Place
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Toronto, ON M5J 2T9

Kyle Plunkett
Email: kplunkett@airdberlis.com
Sam Babe
Email: sbabe@airdberlis.com

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

Lawyers for the Receiver

This is Exhibit "N" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	TUESDAY, THE 27 th
)	
JUSTICE MCEWEN	)	DAY OF OCTOBER, 2020

B E T W E E N:

(Court Seal)

MARGARITA CASTILLO

Applicant

and

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

Respondents

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

ORDER

THIS CASE CONFERENCE, requested by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property of Xela Enterprises Ltd. (the “**Company**”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

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

JUAN GUILLERMO'S DEVICES

1. **THIS COURT ORDERS** that within seven (7) business days of the Order, Juan Guillermo Gutierrez (“**Juan Guillermo**”) will provide the Receiver’s Forensic Specialist, Duff & Phelps, with possession of all devices used by him, including, but not limited to, cellphones, iPads, and computers which do or may include Xela information or data (including its subsidiaries, affiliates, or former subsidiaries and affiliates) (the “**Devices**”).
2. **THIS COURT ORDERS** that Juan Guillermo will confirm under oath that the Devices are the only devices in his power, possession, or control which do or may include Xela information or data (including its subsidiaries, affiliates, or former subsidiaries and affiliates).
3. **THIS COURT ORDERS** that Duff & Phelps will be authorized to make a single forensic image of each of the Devices (the “**Images**”) in the presence of Juan Guillermo or his agent and an IT expert of Juan Guillermo’s choice within seven (7) business days of the Order.
4. **THIS COURT ORDERS** that Duff & Phelps shall be permitted to employ whatever methods it deems appropriate to image the Devices without interference by Juan Guillermo or his IT expert.
5. **THIS COURT ORDERS** that forthwith after imaging the Devices, Duff & Phelps shall return the Devices to Juan Guillermo.
6. **THIS COURT ORDERS** that Duff & Phelps will make no additional copies or images of the Devices or any of the data extracted therefrom except as necessary to comply with this Order.

7. **THIS COURT ORDERS** that, at the request of the Receiver, Duff & Phelps will be authorized to conduct forensic analyses of the Images to determine whether, when, and how many files have been deleted from the Devices. Upon completion of the analyses, Duff & Phelps shall be authorized to provide the result of such analyses (but no documents shall be released to the Receiver unless such documents are released pursuant to the protocol below) to the Receiver and Juan Guillermo.

8. **THIS COURT ORDERS** that, at the request of the Receiver, Duff & Phelps will be authorized to load the data onto the Relativity document review platform (the “**Platform**”).

9. **THIS COURT ORDERS** that once the data is loaded onto the Platform, Duff & Phelps shall grant Juan Guillermo and his authorized agents access to the Platform.

10. **THIS COURT ORDERS** that Juan Guillermo, but not the Receiver or its agents, shall have thirty-five (35) days after Duff & Phelps grants Juan Guillermo and his authorized agents access to the Platform to assert any objections to disclosure to the Receiver of any documents on the Platform based on privilege, personal information, or any other reasonable basis (the “**Objections**” or the “**Objections Date**”).

11. **THIS COURT ORDERS** that a motion for an extension of the Objections Date may be made by Juan Guillermo by motion served no less than five days before the Objections Date. Such motion for an extension must be returnable within 7 (seven) days of the Objections Date, subject only to the Court’s availability (collectively, the “**Extension Deadlines**”).

12. **THIS COURT ORDERS** that, after the Objections Date, or if a motion for extension of the Objections Date is made in accordance with the Extension Deadlines, then after the Court’s judgment thereon, the Receiver shall be given access to all the documents on the document review platform except for Objections documents. If the Receiver has not received Objections by the

Objection Date or Juan Guillermo fails to comply with any of the Extension Deadlines, the Receiver will be entitled to review all documents in the document review platform.

13. **THIS COURT ORDERS** that Juan Guillermo, in advance of the Objections date, shall prepare and provide to the Receiver, a list of documents objected to (the “Objections Documents”). The list of all Objections Documents shall include, subject to paragraph 14 below, at a minimum, the following fields: date, date sent, author, sender, all recipients, title and subject.

14. **THIS COURT ORDERS** that Juan Guillermo may assert privilege over portions of the title and/or subject descriptions by the Objections Date. Duff and Phelps shall redact the subject and/or title line in all cases where privilege has been asserted over the title and/or subject. For all claims of privilege over the title or subject, Juan Guillermo shall within 14 days of the Objections Date or extension, provide the Receiver with a basis for the assertion of privilege.

15. **THIS COURT ORDERS** that the Receiver shall be permitted to challenge any of the Objections and claims of privilege. The parties shall attempt to resolve any such challenges within three (3) business days, failing which the Receiver may address any such challenges before the Court. In the event of a challenge, the challenged document shall be provided to the Court for non-public, confidential review outside the presence of any person(s) other than counsel for the Receiver and counsel for Juan Guillermo.

16. **THIS COURT ORDERS** that the Receiver and Duff & Phelps shall not use any files from the Devices for any purpose other than the Receivership.

17. **THIS COURT ORDERS** that the Receiver shall preserve Xela and its subsidiaries privilege, except where the Receiver deems it necessary to fulfill its mandate.

18. **THIS COURT ORDERS** that the Receiver shall not disclose any files from the Devices to anyone other than its agents without approval of the Court, except as necessary to fulfill the Receiver's mandate. Agents include individuals or entities that represent and/or are retained by the Receiver to fulfill its mandate.

19. **THIS COURT ORDERS** that, upon the discharge of this receivership, Duff & Phelps shall delete the subject database in its entirety, and the Receiver shall destroy all documents and/or data retrieved from the Devices.

A handwritten signature in black ink, appearing to read "McE T.", is written above a horizontal line.

(Signature of Judge)

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

88
4

Court File No. CV-11-9062-0000

ONTARIO

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

Order to go on consent as per the draft filed and signed.

PROCEEDING COMMENCED AT
TORONTO

McE...

ORDER

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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

Peter H. Griffin (19527Q)

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

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mjilesen@litigate.com
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AIRD & BERLIS LLP

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

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

This is Exhibit "O" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

E [REDACTED]

From: Chris Macleod <cmacleod@cambridgellp.com>
Sent: Sunday, November 1, 2020 6:57 PM
To: Derek Knoke <DKnoke@litigate.com>; Joan Kasozi <jkasozi@cambridgellp.com>
Cc: joel.bowers@kroll.com
Subject: Re: Imaging Devices [IWOV-LSRSGDOCS.FID635496]

Joel-

Our client is still in Guatemala and the surgery of his mother in law will now be this Wednesday. Our plan to collect his device tomorrow Am and come to your office will need to be postponed. I will advise shortly when I have clear information on his return. I suspect a week today but I will confirm tomorrow AM.

Regards,
Chris MacLeod

From: Derek Knoke <dknoke@litigate.com>
Date: Tuesday, October 27, 2020 at 4:53 PM
To: Chris MacLeod <cmacleod@cambridgellp.com>, Joan Kasozi <jkasozi@cambridgellp.com>
Cc: "joel.bowers@kroll.com" <joel.bowers@kroll.com>, "ngoldstein@ksvadvisory.com" <ngoldstein@ksvadvisory.com>, Christina Shiels-Singh <cshiels@litigate.com>
Subject: Imaging Devices [IWOV-LSRSGDOCS.FID635496]

Hi Chris and Joan,

I've cc'd our Forensic Specialist, Joel Bowers at Duff & Phelps. I would like to coordinate a time for him to image the devices pursuant to the court order today.

He's asked that you come to his office. I understand that Juan is coming back from Guatemala next week, but I'd like to set a time and work out any other logistical details now please. Can you please advise of your availability to bring the devices to his office?

Derek

**Derek Knoke***

T 416-865-3018
M 647-272-0714
F 416-865-2876
dknoke@litigate.com

130 Adelaide St W
Suite 2600
Toronto, ON
Canada M5H 3P5
www.litigate.com

This e-mail may contain legally privileged or confidential information. This message is intended only for the recipient(s) named in the message. If you are not an intended recipient and this e-mail was received in error, please notify us by reply e-mail and delete the original message immediately. Thank you. Lenczner Slaght Royce Smith Griffin LLP.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

This is Exhibit "P" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

[Signature]
 ATTORNEY
 Jeremías Lutín Castillo
 ATTORNEY AND NOTARY PUBLIC

[stamp:] [6]3631

NOTARIZED AFFIDAVIT. In the city of Guatemala, department of Guatemala, on the third day of December of two thousand twenty, at 9:00 a.m., I, **Jeremías Lutín Castillo**, practicing Notary, located at sexta (6a) Avenida "A", eight - zero zero (8-00) of area number nine (9) Edificio Centro Operativo, Penthouse B, of the City of Guatemala, department of Guatemala, at the request of Mr. **Juan Guillermo Gutiérrez Strauss**, who states that his is sixty-four years of age, married, Executive, Guatemalan, residing in the Republic of Canada [sic], and temporarily in this capital city, identified himself with the Personal Identification Document with Unique Identification Code two thousand five hundred seventeen, twenty six thousand fifty three, zero one hundred one (2517260530101), issued by the National Registry of Individuals of the Republic of Guatemala, so that, by means of this **NOTARIZED AFFIDAVIT**, he declares as follows:

FIRST: Mr. Juan Guillermo Gutiérrez Strauss, aware of the penalties related to the crime of perjury, under solemn oath in accordance with the law, **DECLARES** as follows: **a)** that he acts in his capacity as Director - President of the company XELA ENTERPRISES LTD, which has been incorporated and registered in accordance with the laws of the Republic of Canada [sic], Province of Ontario, with Ontario business identification number one million, two hundred ninety-seven thousand, five hundred eighty (1297580); **b)** that his client is the sole shareholder of the company GABINVEST, S. A.. This company was incorporated in accordance with the laws of the Republic of Panama, registered in the Public Register of Panama on page number one hundred and seventeen thousand, five hundred and eleven (117511); said shareholding is supported by: I) share certificate number GI - zero one hundred (GI-0100) which covers three hundred and forty-eight (348) shares of the company GABINVEST, S.A., owned by XELA ENTERPRISES LTD; and II) share certificate number GI - zero one hundred and one (GI-0101) which covers seventy-five (75) shares of the company GABINVEST, S.A.,

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 [illegible] Castillo
 [illegible] NOTARY PUBLIC
 [bar code]



[partially illegible round stamp:]
 REPUBLIC OF GUATEMALA
 [emblem]
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 PRIMARY SERVICE SECTION

owned by XELA ENTERPRISES LTD; iii) share certificate number GI - zero one hundred and two (GI-0102) which covers seventy-five (75) shares of the company GABINVEST, S.A., owned by XELA ENTERPRISES LTD; c) Therefore, I DECLARE that my client, the company XELA ENTERPRISES LTD, was not notified or summoned in any way to participate in the Shareholders' Meeting of the company GABINVEST, S.A., held on January sixteenth, two thousand and twenty, in which the appointments of the recognized Board of Directors of the company GABINVEST, S.A. were rendered null and void, providing in such sense, the appointment of a new board of directors, presided by Mr. Alvaro Almengor as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. These persons are not known to my client, nor do they have the authority to represent the company GABINVEST, S.A., since they are not members of the Board of Directors proposed and elected by the Shareholders of the aforementioned company". d) I also DECLARE that my client, as sole shareholder of the Company GABINVEST, S.A. has never held a Shareholders' Meeting or been informed of any meeting of this nature BY TELEPHONE. held on April twenty-ninth, two thousand twenty, with Mr. Alvaro Almengor in his alleged capacity as President of GABINVEST, S.A.; nor has he ordered the modification of the Articles of Incorporation of the Company GABINVEST, S. A. IN ANY WAY. Therefore, any decision, appointment or order given by Mr. Alvaro Almengor as alleged President, Mr. Manuel Carrasquilla as alleged Secretary and Ms. LIDIA RAMOS as alleged Treasurer of the Company GABINVEST, S.A. HAVE NO VALUE WHATSOEVER, and are the result of falsehood in form and substance and any other crime that corresponds according to the acts committed;

SECOND: As there is nothing



further to put on record, this notarized document is concluded in the same place and date, forty-five minutes after its commencement, and it is issued on two sheets of unstamped paper, the first page written on both sides and the second on the front, to which I attach a notary stamp of ten quetzals and a revenue stamp of fifty cents of one quetzal. Having read this document in its entirety to the applicant, being well informed of its content, value and legal effects, he ratifies, accepts and signs it. I ATTEST.

[Signature]

Before me,
[Signature]
ATTORNEY
Jeremias Lutin Castillo
ATTORNEY AND NOTARY PUBLIC

[partially illegible round stamp:]
MINISTRY OF FOREIGN AFFAIRS
DEPARTMENT OF NOTARY RECORDS
GUATEMALA

[partially illegible fees stamp]
[illegible] Castillo
[illegible] NOTARY PUBLIC
[bar code]



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REPUBLIC OF GUATEMALA
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PRIMARY SERVICE SECTION

[emblem]
JUDICIAL DEPARTMENT
GUATEMALA, C.A.

JUDICIAL DEPARTMENT OF THE REPUBLIC OF GUATEMALA
GENERAL ARCHIVE OF NOTARY RECORDS
ELECTRONIC REGISTRY OF NOTARIES
GUATEMALA, C.A.

2020-14085/AAMELGAR

THE UNDERSIGNED DEPUTY DIRECTOR OF THE GENERAL ARCHIVE OF NOTARY RECORDS OF THE JUDICIAL DEPARTMENT OF THE REPUBLIC OF GUATEMALA HEREBY CERTIFIES: That the signature of the Notary **JEREMÍAS LUTIN CASTILLO** is AUTHENTIC, by virtue of being the one that corresponds to the aforementioned notary in conformity with Record thirty thousand, six hundred and forty-five of Page twenty-three thousand, seven hundred and twenty-nine of Book six-E of the Electronic Registry of Notaries contained in this Archive. I, the undersigned, do not assume any responsibility for the content nor for the legal effectiveness of the document whose signature is legalized.

FEE: Q. 150.00; AGREEMENT 24-2011 OF THE SUPREME COURT OF JUSTICE. Electronic Payment Form -FEI- 175084515584

Guatemala, December third, two thousand and twenty.

[Seal:]
JUDICIAL DEPARTMENT
GENERAL ARCHIVE OF NOTARY
RECORDS
AUTHENTICATION
GUATEMALA, CENTRAL AMERICA

[Signature]
Ms. Wanda Martínez Bravatti
Coordinator II
Metropolitan Deputy Director
General Archive of Notary
Records

[Seal:]
JUDICIAL DEPARTMENT
GENERAL ARCHIVE OF NOTARY
RECORDS
AUTHENTICATION
GUATEMALA, CENTRAL AMERICA

[right margin, vertical:]
[2 illegible fees stamps dated 2020]

7a AVENIDA 9-20, EDIFICIO JADE, ZONE 9, GUATEMALA, CENTRAL AMERICA
TELEPHONE: 22905112



[partially illegible round stamp:]
REPUBLIC OF GUATEMALA
[illegible]
PRIMARY SERVICE SECTION

This is Exhibit "Q" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**



From: Joan Kasozi <jkasozi@cambridgellp.com>
Sent: Saturday, December 19, 2020 1:23 PM
To: Monique Jilesen <mjilesen@litigate.com>; Derek Knoke <dknoke@litigate.com>
Cc: Chris Macleod <cmacleod@cambridgellp.com>
Subject: Margarita Castillo v Xela Enterprises Ltd. et al

Good afternoon,

Please find attached a letter from Chris Macleod.

Best regards,

Joan Kasozi
Litigation Associate

CAMBRIDGE LLP

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



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

December 18, 2020

Chris MacLeod
cmacleod@cambridgellp.com

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

Dear Ms. Jilesen:

Re: Margarita Castillo v Xela Enterprises Ltd. et al.
Compliance with Order dated October 27, 2020

We refer to the Court's Order dated October 27, 2020 (the "Order"), requiring Mr. Juan Gutierrez to deliver personal electronic devices in furtherance of the Receiver's ongoing investigation into certain transactions in which the Receiver has expressed interest.

As we discussed prior to his departure, Mr. Gutierrez was forced to travel to Guatemala with his wife on October 26, 2020, due to serious medical issues facing his 96-year-old mother-in-law. As we reported to you at various points during the month, his mother-in-law underwent multiple emergency surgeries related to the removal of a cancerous tumor and related complications, and, sadly, she passed away on November 27, 2020. After finalizing some of her personal affairs, Mr. Gutierrez and his wife were able to return to Toronto late last night, where they have commenced the applicable mandatory two-week COVID quarantine protocols.

We further take note of yesterday's with-prejudice proposal from Weir Foulds on behalf of BDT, a copy of which was delivered to us. While the Receiver has not yet reacted to that proposal, we consider it reasonable and appropriate to limit the Receiver's jurisdiction in exchange for the proposed formal agreement from BDT, enforceable in Panama, that would guarantee to the Receiver all of the benefits he could possibly expect from his

ongoing investigation into the subject transactions, even assuming an optimal outcome in the various relevant foreign jurisdictions. It is also clear that continuing with the investigative steps currently underway – including the document review and legal challenges attendant to an examination of Mr. Gutierrez’s personal devices – will result in substantial additional receivership costs, all of which BDT would be expected to shoulder under the Weir Foulds proposal.

For those reasons, we suggest that review of Mr. Gutierrez’s personal devices be paused to allow for discussions about the Weir Foulds proposal to take their course and, if necessary, for the Court to weigh in on the appropriateness of the proposal. In that regard, in order to eliminate possible concerns over urgency and/or the integrity of the devices, we would image them strictly for preservation purposes, and provide for them to be held in the custody of a specific Duff & Phelps employee to be designated by us and named in a modified Order, until further Order of the Court.

Lastly, we reference your letter dated November 24, 2020, responding to our request for specific information concerning the Receiver’s conduct of the receivership. Your letter provides little if any of the information we requested. We believe that we are entitled to the specifics, and we reserve all rights in that regard.

Unfortunately, your letter of November 24, 2020 also continues to advance the narrative that Mr. Gutierrez has not cooperated with the receivership, which we contest in the strongest possible terms. First, we dispute that Mr. Gutierrez has done anything but act in good faith in connection with the composition of the Gabinvest and LISA boards, and we have provided you with copies of his formal requests that those entities cooperate with the Receiver. We therefore disagree that Mr. Gutierrez has done anything to impede the Receiver’s ability to exercise Xela’s rights over its subsidiaries. Second, we understand that Mr. Gutierrez has already provided the Receiver with everything he knows concerning what you describe as the reviewable transactions. It is our understanding that both LISA’s loan commitment in December 2019 and its settlement agreement with BDT in January 2020 were carried out in their entirety by LISA in Panama, with only the general knowledge of Mr. Gutierrez and none of his input.

More importantly, however, it is clear that the Receiver’s investigation into the subject transactions could not possibly yield any greater benefit to the receivership than what BDT has now offered freely and voluntarily to the Receiver through the Weir Foulds proposal. We are hopeful, therefore, that these issues can soon be set aside as moot.

We look forward to hearing from you at your earliest convenience.

Yours very truly,

CAMBRIDGE LLP

Per:

A handwritten signature in black ink, appearing to read 'CM', with a small checkmark at the end.

CHRIS MACLEOD

CRM/jk

Signed electronically on behalf of Chris MacLeod

This is Exhibit "R" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

1. I Juan Guillermo Gutierrez am the President of Xela Enterprises Ltd. ("**Xela**") and as such, have knowledge of the matters contained in this affidavit. Where the statements made herein are based on information and/or belief, I state the source of the information and/or belief, and verily believe it to be true.
2. This affidavit is given pursuant to Paragraph 2 of the Court's Order dated 27 October 2020 (the "Order"), relating to review of my personal electronic devices for the potential presence of documents belonging to Xela or its subsidiaries or affiliates.

3. I have in my possession three personal electronic devices that are covered by the Order, two iPads, one of which was accidentally destroyed several years ago when I inadvertently left it on the roof of my car and it was crushed by road traffic, and one iPhone (collectively the "Devices"). In accordance with Paragraph 2 of the Order, I hereby affirm that the Devices are the only electronic devices in my power, possession, or control that contain or may contain information or data belonging to Xela and/or its current or former subsidiaries and/or affiliates.

4. I swear this Affidavit in response to the Receiver's motion to compel disclosure and for no other or improper purpose.

SWORN BEFORE ME via video conference at the City of Toronto, in the Province of Ontario on January 7, 2020.

Commissioner for Taking Affidavits
(or as may be)

N. Joan Kasozi (LSO #70332Q)

JUAN GUILLERMO GUTIERREZ

This is Exhibit "S" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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.

NOTICE OF MOTION
(Investigative Powers & Recognition Order)

KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all the assets, undertakings and properties (collectively, the “**Property**”) of Xela Enterprises Ltd. (the “**Company**”), will make a motion to the Honourable Justice McEwen of the Commercial List on a date to be fixed by the registrar by judicial videoconference via Zoom or at 330 University Avenue, Toronto, Ontario.

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

1. **THE MOTION IS FOR** an order:

(a) expanding the Receiver’s investigative powers, including authority to:

- (i) investigate, identify, quantify, and take all steps necessary, in the opinion of the Receiver, to review:
- (1) the sale, conveyance, or transfer in 2016 by Empress Arturo International (“**EAI**”) of the shares of BDT Investments Ltd. (“**BDT**”) and Corporacion Arven, Limited (“**Arven**”) to Juan Arturo Gutierrez, and then from Juan Arturo Gutierrez to the ARTCARM Trust, a Barbados domiciled trust (the “**EAI Transaction**”);
 - (2) the assignment in January 2018 by Lisa, S.A. (“**Lisa**”) of the proceeds from the litigation arising from shareholder disputes involving the Avicola Group (the “**Avicola Litigation**”) to BDT (“**Assignment Transaction**”);
 - (3) the sale, conveyance, transfer, or assignment of Lisa’s interest in the Avicola Group to BDT in early 2020 (the “**Lisa Transfer**”);
 - (4) the assignment of the right to control Lisa’s litigation with the Avicola Group (“**Litigation Assignment**”)
- (collectively, the “**Reviewable Transactions**”), and to conduct such review and investigation of the Reviewable Transactions that the Receiver deems necessary;
- (ii) conduct such additional review and investigation of the Reviewable Transactions as well as the business and affairs of the Company and its current and former direct and indirect subsidiaries, affiliates, customers,

directors, officers and employees as it deems necessary (collectively the “**Investigation**”);

- (iii) examine under oath persons whom the Receiver deems appropriate on any matters relating to the Company, the Reviewable Transactions, and the Investigation, as the Receiver deems necessary; and
 - (iv) take any steps reasonably incidental to the exercise of these powers;
- (b) requiring Juan Guillermo Gutierrez (“**Juan Guillermo**”) to immediately provide the Receiver with all encryption codes, keys, passwords or any other such information or knowledge necessary to unlock and access the data on any images or hard drives in the possession of the Receiver’s forensic agent, Duff & Phelps, LLC (“**Duff & Phelps**”) including but not limited to the DataShield Fantom Drive;
- (c) requiring Arturo’s Technical Services Ltd. (“**ATS**”) to identify the location of the images of the “Blue Network Servers” (as identified by Julio Fabrini, the Company’s former head of IT) in his interview dated November 26, 2020, discussed below) on the hard drives in the possession of Duff & Phelps by identifying the file names, paths and any other information necessary to identify the Blue Network Server images;
- (d) granting the Receiver, without any limitation whatsoever, authorization to access and review the images of the Blue Network Servers that are in Duff & Phelps’ possession further to the Order of this Court dated October 27, 2020, including any content of the images;

- (e) requiring ATS to provide the Receiver with an electronic copy of all emails sent or received by Juan Guillermo (regardless of the email address to which it was forwarded and regardless as to whether the email was sent directly to him or it was one on which he was copied) at any email address maintained on the ATS servers to the date of this Order, along with any encryption codes, keys, or passwords used to secure the emails;
- (f) requiring Harald Johannessen Hals, Calvin Shields, Lester C. Hess Jr., Jose Eduardo San Juan and David Harry to provide the Receiver with all available information or documents in their control relating to:
 - (i) shares, share registers, accounting, correspondence and related information of Gabinvest, S.A. (“**Gabinvest**”) and Lisa; and
 - (ii) the Reviewable Transactions;
- (g) requiring Alfaro, Ferrer & Ramirez Abogados (“**AFRA**”), as former resident agent of Gabinvest and Lisa in Panama, to deliver to the Receiver and its agents in Panama, Hatstone Abogados (“**Hatstone**”), their entire file, including but not limited to, all information related to the constitution, shares issued, KYC (know your client), correspondence, instructions given to AFRA and all information related to Gabinvest and Lisa;
- (h) authorizing the Receiver and its agents in Panama, Hatstone, to take any steps reasonably incidental to the recognition and enforcement of this Order and any other Orders issued by this Court in this matter in Panama;

- (i) seeking an Order to domesticate the July 5, 2019 Order (appointing the Receiver) in Panama and seeking the assistance of the Panamanian Courts to permit the Receiver to exercise control over the Company's subsidiaries and give effect to the Order requested herein as well as all Orders issued by this Court and other related relief;
- (j) approving the fees and disbursements of the Receiver and its legal counsel, Lenczner Slaght Royce Smith Griffin LLP and Aird & Berlis LLP, for the periods referenced in their respective fee affidavits;
- (k) seeking the aid and recognition of foreign courts to give effect to the Order requested herein; and
- (l) such further and other relief as to this Honourable Court may seem just.

2. **THE GROUNDS FOR THE MOTION ARE:**

Investigative Powers

Background

- (a) in 2015, a judgment debt was obtained against Juan Guillermo, Juan Arturo Gutierrez, and the Company (the "**Judgment Debt**");
- (b) a portion of the Judgment Debt remains outstanding;
- (c) various related-party transactions (the EAI Transaction and the Assignment Transaction) were completed for the benefit of Juan Guillermo's children;

- (d) as a result, the once-lucrative Company was suddenly devoid of cashflow and effectively ceased operations;
- (e) Juan Guillermo's children benefited while the Company's creditors and securityholders were prejudiced;
- (f) the Company does not have any assets to pay the Judgment Debt;
- (g) on July 5, 2019, the Receiver was appointed to manage and control the Company, its assets and its businesses;
- (h) where the Receiver takes any action under the Appointment Order it does so to the exclusion of any other party;
- (i) following the appointment of the Receiver, it appears that there has been a further transfer of Company assets out of the reach of the Receiver and the Company's creditors (the Lisa Transfer);

The Receiver's Investigation

- (j) since its appointment, the Receiver has attempted to investigate the Reviewable Transactions in an effort to satisfy the Company's financial obligations;
- (k) the Appointment Order:
 - (i) provides the Receiver with the usual powers to take possession of and exercise control over the property of the Company; and

- (ii) imposes a duty on persons with notice of the order to provide access and cooperation;
- (l) the Receiver has not been able to effect control over the Company's subsidiaries, Lisa and Gabinvest, which are located in Panama and which are the subject of the Reviewable Transactions;
- (m) the Receiver has not received cooperation from various parties to obtain information and documents relating to the Company and its subsidiaries with respect to the Reviewable Transactions;
- (n) the Receiver has made numerous requests from various parties who have or ought to have information concerning the Reviewable Transactions;
- (o) the Receiver has not received the requested information. Instead, it has received misleading information as well as threats of criminal complaints against its agent in Panama and other interference;
- (p) the Receiver has neither found evidence to support the Reviewable Transactions nor has it found evidence of a commercially reasonable basis for the Reviewable Transactions;
- (q) the Receiver has not received any documentation concerning the Lisa Transfer;

Juan Guillermo's Devices

- (r) on October 27, 2020, this Court ordered (on consent) Juan Guillermo to provide the Receiver with all devices used by him that might contain Company information

within seven business days of the Order for imaging by Duff & Phelps. The Order provided for a protocol for a review of the images;

- (s) the devices were not presented for imaging until January 5, 2021;
- (t) Juan Guillermo refused to permit the devices to be imaged or reviewed in accordance with the October 27, 2020 Order and instead required that the images of the devices be protected by password;
- (u) the passwords have not been provided to the Receiver;

Company Records

The Servers

- (v) on August 28, 2020, this Court issued an Order that required Juan Guillermo and ATS to provide the Receiver with access to Company devices and data as well as to provide the Receiver with necessary assistance to decode the data;
- (w) the August 28, 2020 Order was served on ATS;
- (x) ATS did not advise the Receiver that it was in the possession of servers which held exclusively Company data (the “**Blue Network Servers**”);
- (y) instead, ATS advised the Receiver that “The Xela documents you are seeking are maintained on the servers acquired from Xela that, although presently decommissioned, is integrated with the ATS network at large”;
- (z) on October 27, 2020, this Court ordered, on the consent of ATS, that ATS’ servers be imaged without any analysis or review without further Order of the Court;

- (aa) on November 26, 2020, the Receiver conducted an interview of Julio Fabrini, ATS' Chief Information Officer, who was the Company's former head of IT, who advised that the Blue Network Servers (which contain the Company's data) are not integrated with the ATS network at large – instead they are completely separate;
- (bb) Mr. Fabrini undertook to advise the Receiver which of the servers imaged are the Blue Network Servers. Neither Mr. Fabrini nor ATS has yet done so. Instead, they have rejected the Receiver's entitlement to the Blue Network Servers;

Information from the Directors of Gabinvest and Lisa

- (cc) Gabinvest had three directors as at January 1, 2020 (Harald Johannessen Hals, Jose Eduardo San Juan and David Harry);
- (dd) Lisa had three directors as at January 1, 2020 (Harald Johannessen Hals, Calvin Shields and Lester C. Hess Jr.);
- (ee) the Receiver requested information from Lisa's directors, but they have not provided the information requested by the Receiver;
- (ff) Mr. Hals, who is Juan Guillermo's brother-in-law, has specifically refused to recognize the Receiver's authority or to cooperate with the Receiver's requests for information, notwithstanding having sworn an affidavit in this proceeding;

Alfaro, Ferer & Ramirez Abogados (AFRA)

- (gg) AFRA was Lisa's and Gabinvest's registered agent in Panama to maintain those companies' share registers, accounting information and other documents;
- (hh) AFRA resigned as registered agent on February 17, 2020;
- (ii) the Receiver has requested documents directly from AFRA, but AFRA will only release Lisa and Gabinvest's documents to the Receiver by court order;

The Receiver's Fees & Disbursements

- (jj) the Court last approved the fees and disbursements of the Receiver and its counsel on March 24, 2020;
- (kk) the Receiver and counsel have undertaken extensive efforts to gain access to the Company's records and data and to investigate the Reviewable Transactions. The Receiver has been met with resistance and delay at every instance;
- (ll) the matter is complex. The Company's multi-jurisdictional, corporate structure and the extensive materials filed in this matter have required extensive resources and time;
- (mm) the rates and fees charged are consistent with other firms practicing in the insolvency and restructuring industry in the Toronto market, and they are reasonable in the circumstances;
- (nn) the Receiver requires the Court's assistance to permit it to fulfill the purposes for which it was appointed;

- (oo) Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (pp) the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and
- (qq) such further and other grounds as counsel may advise and this Court may permit.

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

1. the Fourth Report of the Receiver;
2. the prior Reports of the Receiver in this proceeding;
3. Brief of Documents to the Fourth Report of the Receiver;
4. fee affidavits, to be affirmed; and
5. such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 15, 2021

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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

NOTICE OF MOTION
(Investigative Powers & Recognition Order)

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Lawyers for the Receiver, KSV Restructuring Inc.

This is Exhibit "T" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in cursive script, appearing to read "Shane Ramnanan", written in black ink.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Loretta Murphy, C. Tran.

ATIO Certified Translator # 2853

CERTIFIED TRANSLATION
DECLARATION

Toronto, Ontario, Canada

I, **LORETTA MURPHY**, of the city of Toronto, in the Province of Ontario

HEREBY CERTIFY THAT:

To the best of my knowledge and capabilities, I have performed the following translation, which is an accurate and authentic rendition from Spanish into English of the attached copies of a Criminal Complaint filed by Mr. JAVIER ALCIDES DE LEÓN ALMENGOR, as legal representative of the plaintiff, Mr. HARALD JOHANNESSEN HALS, (as Treasurer of the company GABINVEST, S. A.), against the defendants ALVARO ALMENGOR, MANUEL CARRASQUILLA and LIDIA RAMOS. The source document was submitted to me as an electronic copy.

DECLARED this 9th day of February, 2021.

Loretta Murphy, M.A., C. Tran.
ATIO Certified Translator #2853
Association of Translators and Interpreters of Ontario



[logo:] PGN
 ATTORNEY GENERAL'S OFFICE
 [seal:] PGN
 ATTORNEY GENERAL'S OFFICE
 ACCUSATORIAL CRIMINAL JUSTICE SYSTEM
 Public Prosecutor's Office in Panama

**PUBLIC PROSECUTOR'S OFFICE
 METROPOLITAN PROSECUTOR'S OFFICE
 SECOND SUBREGIONAL
 PRIMARY SERVICE SECTION**

Panama, January 26, 2021.
 File 202100003611
 Resolution No. 147

This office is in charge of the investigation for the alleged perpetration of a crime **AGAINST PUBLIC TRUST** by the **FALSIFICATION OF DOCUMENTS IN GENERAL**, in the complaint filed by the Attorney **JAVIER ALCIDES DE LEÓN ALMENGOR**.

It is noted in the criminal complaint that the plaintiff is Mr. **HARALD JOHANNESSEN HALS**, with passport No. 242086470, with legal residence in Guatemala, Republic of Guatemala, in his capacity as treasurer of **GABINVEST, S. A.**, Limited Liability Company registered on Page No. 117511 in the Public Register of Panama; the legal representative is **JAVIER ALCIDES DE LEÓN ALMENGOR**, with personal identity card No. 8-440-686; and the defendant party is **ALVARO ALMENGOR**, with personal identity card No. 8-751-1550, **MANUEL CARRASQUILLA** and **LIDIA RAMOS** of unknown generals.

It is noted in the criminal complaint that the circumstances leading to the facts on which the complaint is based, and the times at which the possible criminal conduct unfolded, are explained.

As a form of criminal conduct, the plaintiff's attorney invokes Article 366, concerning the crimes **AGAINST PUBLIC TRUST** by the **FALSIFICATION OF DOCUMENTS IN GENERAL**, both established in the Criminal Code.

As for the provisional amount of the damages caused to the plaintiff, the sum of two million balboas (B/. 2,000,000.00) is set.

CONSIDERATIONS

It is incumbent upon this Office to assess the admissibility of the complaint filed by the attorney Mr. **JAVIER ALCIDES DE LEÓN ALMENGOR**, legal representative of Mr. **HARALD JOHANNESSEN HALS** - [signature]



[partially illegible round stamp:]
 REPUBLIC OF GUATEMALA
 [emblem]
 [illegible]
 PRIMARY SERVICE SECTION

with passport No. 242086470, in his capacity as treasurer of **GABINVEST, S. A.**, Limited Liability Company registered on Page No. 117511 in the Public Register of Panama - acting in his capacity as Notary Public 11, in accordance with the requirements established in Articles 79, 88 and other corresponding articles of the Code of Criminal Procedure.

Regarding the identity and residential details observed in the complaint, which have been submitted in writing through the attorney, duly signed by the plaintiff, the plaintiff's general information has been established, and details have been provided to identify the defendants, in accordance with the provisions of the law.

Furthermore, in relation to the facts on which the complaint under study is based, they have been duly argued in a clear and concise manner, indicating where and how the act was committed and the reasons for which it is considered that penalizable conduct has occurred to the detriment of the plaintiff, and the possible amount of the Civil Lawsuit for which reparation is sought.

It must be made clear that it is incumbent upon the Public Prosecutor's Office to direct all necessary actions that are not contrary to the law, with the purpose of pursuing the offenses, practicing or ordering the execution of all proceedings useful for this purpose, without prejudice to the victim being able to exercise his rights, including to intervene as plaintiff and demand the liability of the accused, and to obtain civil indemnification for the damages and losses arising from the crime.

Based on the abovementioned facts, according to Article 84 of the Code of Criminal Procedure, in accordance with Article 79 of the same criminal law, the victim of the crime or the party directly offended by the crime is a legitimate plaintiff, and as such, in the case at hand, Mr. **HARALD JOHANNESSEN HALS**, with passport No. 242086470, in his capacity as treasurer of **GABINVEST, S. A.**, Limited Liability Company registered on Page No. 117511 in the Public Register of Panama, has been affected and is considered a legitimate plaintiff.

Finally, Article 89 of the Code of Criminal Procedure states that the written complaint may be filed before the Public Prosecutor's Office, and therefore, according to the requirements of Article 88 of the Code of Criminal Procedure, the same complies with the requirements of form and substance provided by the law for its assessment.

In view of the foregoing considerations, the undersigned Deputy Metropolitan Prosecutor, Second Subregional Primary Service Section, hereby signs and interprets the



DECIDES:

FIRST: To admit the criminal complaint filed by Mr. **JAVIER ALCIDES DE LEÓN ALMENGOR**, with personal identity card No. 8-440-686, legal representative of Mr. **HARALD JOHANNESSEN HALS**, with passport No. 2242086470, with residence in Guatemala, Republic of Guatemala, in his capacity as treasurer of **GABINVEST, S. A.**, Limited Liability Company registered on Page No. 117511 in the Public Register of Panama.

SECOND: To admit as legitimate plaintiff, Mr. **HARALD JOHANNESSEN HALS**, passport No. 242086470, with residence in Guatemala, Republic of Guatemala, in his capacity as treasurer of **GABINVEST, S. A.**, Limited Liability Company registered on Page No. 117511 in the Public Register of Panama, as victim; and **JAVIER ALCIDES DE LEON ALMENGOR**, with personal identity card No. 8-440-686, as legal representative in accordance with the power of attorney granted to him.

THIRD: To admit as defendants **ALVARO ALMENGOR**, with personal identity card No. 8-751-1550, **MANUEL CARRASQUILLA** and **LIDIA RAMOS**, both of unknown generals.

FOURTH: To admit the submitted documents that accompany the complaint.

FIFTH: To send the necessary communications, in order to comply with the decision.

LEGAL GROUNDS: Articles 84, 88 and 89 of the Code of Criminal Procedure.

SO ORDERED.

[signature]

LEYDI NUÑEZ

Deputy Prosecutor of the Metropolitan Prosecutor's Office
Second Subregional Primary Service Section

[partially illegible stamp dated January 27, 2021, 2:10 pm]

[signature]

[stamp:] PUBLIC PROSECUTOR'S OFFICE
METROPOLITAN PROSECUTOR'S OFFICE
PRIMARY SERVICE SECTION
I CERTIFY THAT THE FOREGOING IS A TRUE COPY OF ITS ORIGINAL
In Panama on February 2, 2021
[signature]
Signature



POWER OF ATTORNEY

[stamp:] 054622

I, the undersigned, HARALD JOHANESSEN [sic: JOHANNESSEN] HALS, of legal age, unmarried, Guatemalan, Executive, with residence in the Republic of Guatemala, holder of passport number two hundred and forty-two million, eighty-six thousand, four hundred and seventy (242086470) issued by the Directorate General de Migration, acting in my capacity as Treasurer of **GABINVEST, S.A.**, Limited Liability Company registered on Page No. 117511 in the Public Register of Panama, Commercial Section of the Public Register of Panama, duly authorized for this act, in the name and representation of the corporation that I represent, grant sufficient **POWER OF ATTORNEY** to **JAVIER ALCIDES DE LEON ALMENGOR**, who is of legal age, holder of personal identity card No. eight - four hundred and forty- six hundred and eighty-six (**8-440-686**), Attorney at Law of the Republic of Panama, with professional offices at Avenida Ricardo J. Alfaro, Edificio The Century Tower, Piso 19, Office 1912, with telephone **61150108**, e-mail **javierdeleon0873@hotmail.com**, where he receives legal and personal notifications, in order to represent us in the Criminal Complaint filed against: **ALVARO ALMENGOR**, Male, Panamanian citizen, of legal age, with personal identity number **8-751-1550**; **MANUEL CARRASQUILLA**, with generals that we declare we do not know; **LIDIA RAMOS**, with generals that we declare we do not know; and **AGAINST ANY OTHER PERSON WHO MAY BE RESPONSIBLE**, for the alleged crime **AGAINST PUBLIC TRUST**, in the form of **INSERTING FALSE STATEMENTS IN A PUBLIC DOCUMENT**, to the detriment of **GABINVEST, S. A.**

The Attorney **DE LEON ALMENGOR** is expressly authorized so that in my name and on my behalf, he may accept, warn, agree, change, undertake, answer, correct, delegate, withdraw, intervene, (as he deems convenient or necessary), appoint, notify, request, ratify, take up, receive, relinquish, waive, require, withdraw, revoke, release, replace, execute, or transact with the present power of attorney for the proper defense of my interests and rights.

Granted and signed in the city of Guatemala, Republic of Guatemala, on the nineteenth day of October of the year two thousand and twenty.

Signature of representative: [signature]

Position in the corporation: Treasurer

In the City of Guatemala, on the nineteenth day of the month of October of two thousand and twenty, as Notary, I ATTEST that the foregoing signature is **AUTHENTIC** as it was signed on today's date in my presence, by Mr. Harald Johannessen Hals, who is a person previously known to me; who signs again together with the undersigned Notary Public, at the foot of the present certificate of authenticity.

[signature]
 [handwritten:] *In my presence.*
 [signature]
 [3x stamps:] ATTORNEY
 MANUEL ALBERTO SÚC TILÓM
 ATTORNEY AND NOTARY PUBLIC
 [2x fees stamps]



[emblem]
JUDICIAL DEPARTMENT
GUATEMALA, C.A.

JUDICIAL DEPARTMENT OF THE REPUBLIC OF GUATEMALA
GENERAL ARCHIVE OF NOTARY RECORDS
ELECTRONIC REGISTRY OF NOTARIES
GUATEMALA, C.A.

2020-11812/LMECHEVERRIA

THE UNDERSIGNED DEPUTY DIRECTOR OF THE GENERAL ARCHIVE OF NOTARY RECORDS OF THE JUDICIAL DEPARTMENT OF THE REPUBLIC OF GUATEMALA, CERTIFIES: That the signature of the Notary **MANUEL ALBERTO SUC TILOM** is AUTHENTIC, by virtue of being the one that corresponds to the aforementioned notary in conformity with Record fifteen thousand and twenty on Page seven thousand, eight hundred and five of Book six-E of the Electronic Registry of Notaries contained in this Archive.

I, the undersigned, do not assume any responsibility for the content nor for the legal effectiveness of the document whose signature is legalized.

FEE: Q. 150.00 ACCORD: 24-2011 OF THE SUPREME COURT OF JUSTICE. Electronic Payment Form -FEI- 128999067857

Guatemala, October twenty-second, two thousand and twenty.

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MINISTRY OF FOREIGN AFFAIRS
DEPARTMENT OF NOTARY RECORDS
GUATEMALA

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JUDICIAL DEPARTMENT
GENERAL ARCHIVE OF NOTARY
RECORDS
AUTHENTICATION
GUATEMALA, CENTRAL AMERICA

[Signature]
Ms. Wanda Martinez Bravatti
Coordinator II
Metropolitan Deputy Director
General Archive of Notary
Records

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JUDICIAL DEPARTMENT
GENERAL ARCHIVE OF NOTARY
RECORDS
AUTHENTICATION
GUATEMALA, CENTRAL AMERICA

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7a AVENIDA 9-20, EDIFICIO JADE, ZONE 9, GUATEMALA, CENTRAL AMERICA
TELEPHONE: 24287201



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PRIMARY SERVICE SECTION

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JAVIER ALCIDES DE LEON ALMENGOR
ATTORNEY AT LAW

Avenida Ricardo J. Alfaro, Edificio P.H. The CENTURY TOWER, Piso 19, oficina 1912. Telephone: 61150108
 Email address javierdeleon0873@hotmail.com

CRIMINAL COMPLAINT AGAINST
 ALVARO ALMENGOR, MANUEL
 CARRASQUILLA AND ANY OTHER
 PERSON RESPONSIBLE FOR THE
 ALLEGED PERPETRATION OF THE
 CRIME AGAINST PUBLIC TRUST
 (INSERTION OF FALSE
 STATEMENTS IN A PUBLIC
 DOCUMENT), TO THE DETRIMENT
 OF GABINVEST S.A.

**FIRST METROPOLITAN SUBREGIONAL PRIMARY SERVICE SECTION OF THE
 PUBLIC PROSECUTOR'S OFFICE, E.S.D.**

I, the undersigned, Mr. **JAVIER ALCIDES DE LEON ALMENGOR**, holder of personal identity card No. eight - four hundred and forty - six hundred and eighty-six (8-440-686), practicing attorney at law, with professional offices at Avenida Ricardo J. Alfaro, Edificio P.H. The Century Tower, Piso 19, Office 1912, with telephone number 61150108, email address javierdeleon0873@hotmail.com, in my capacity as Principal Attorney-in-fact for Mr. **HARALD JOHANNESSEN HALS**, male, of legal age, with Passport No. 242086470, with residence in Guatemala City, Republic of **GUATEMALA**, in his capacity as Treasurer of **GABINVEST, S.A.** Limited Liability Company registered on Page No. 117511, in the Public Register of Panama, duly authorized by the Board of Directors, respectfully appear before your Office, for the purpose of filing a **FORMAL CRIMINAL COMPLAINT**, against: Mr. **ALVARO ALMENGOR**, male, Panamanian citizen, of legal age, with personal identity card No. **8-751-1550**; **MANUEL CARRASQUILLA**, with generals that we declare we do not know; **LIDIA RAMOS**, with generals that we declare we do not know; and **AGAINST ANY OTHER PERSON WHO MAY BE RESPONSIBLE**, for the alleged perpetration of the crime **AGAINST PUBLIC TRUST**, in the form of **INSERTING FALSE STATEMENTS IN A PUBLIC DOCUMENT**, to the detriment of **GABINVEST, S.A.**



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 PRIMARY SERVICE SECTION

[Translation - Page 6]

I. **THE PLAINTIFF**

The Plaintiff is **HARALD JOHANNESSEN HALS**, male, of legal age, with Passport No. 242086470, with residence in Guatemala City, Republic of **GUATEMALA**, in his capacity as Treasurer of **GABINVEST, S.A.**, Limited Liability Company registered on Page No. 117511, in the Public Register of Panama, duly authorized by the Board of Directors of **GABINVEST, S.A.**

II. **THE DEFENDANTS**

The Defendants are Mr. **ALVARO ALMENGOR**, male, Panamanian citizen, of legal age, with personal identity card No. **8-751-1550**; **MANUEL CARRASQUILLA**, with generals that we declare we do not know; **LIDIA RAMOS**, with generals that we declare we do not know; and **AGAINST ANY OTHER PERSON WHO MAY BE RESPONSIBLE.**

III. **THE CRIME**

The violation of the criminal law is set forth in Volume II, Chapter III, Title XI, of the Criminal Code, whose Article 366 states as follows:

Article 366. Any person who falsifies or alters, totally or partially, a public deed, a public or authentic document, which may result in damages, shall be sentenced to four to eight years of imprisonment.

The same punishment shall be imposed on anyone who inserts or causes to insert false statements in an authentic public document concerning a fact that the document must prove, in such a way that it may result in damage to another person.

IV. **EVIDENTIAL ELEMENTS ON WHICH OUR COMPLAINT IS BASED**

FIRST: On September 10, 2013, a Shareholders' meeting of the Company **GABINVEST S.A.** was held. The agenda of the meeting included the election of the Board of Directors, with **EDUARDO SAN**



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JUAN, the Principal, being elected as President and Legal Representative of the aforementioned Limited Liability Company; **DAVID HARRY** as Secretary; and **HARALD JOHANNESSEN** as Treasurer. This decision was registered in Deed 16715 dated September 10, 2013, of the First Notary Public's Office of the Circuit of Panama, and its due registration in the Public Register of Panama.

SECOND: That on January 16, 2020, **ALVARO ALMENGOR**, on behalf of the law firm **HATSTONE ASOCIADOS**, executed the Minutes of a Shareholders' meeting, which renders the appointments of the recognized Board of Directors of the aforementioned Company **GABINVEST S.A.** null and void, and provides for the appointment of a new Board of Directors, with the following being elected: **ALVARO ALMENGOR**, as President, **MANUEL CARRASQUILLA** as Secretary; and **LIDIA RAMOS** as Treasurer, all of whom were unauthorized to convene said meeting. Said decision was recorded in Deed 791 dated January 16, 2020, of the Eighth Notary Public's Office of the Circuit of Panama and its subsequent registration in the Public Register of Panama.

THIRD: In this regard, on April 29, 2020, **ALVARO ALMENGOR**, together with **MANUEL CARRASQUILLA**, acting as President and Secretary respectively (unlawfully), of the Company **GABINVEST S.A.**, executed the Minutes of a Shareholders' meeting of the aforementioned Company, in which they indicated "that due to the exceptional circumstances arising from COVID-19, it is extremely difficult to hold physical meetings, therefore this meeting will have to be held by telephone." They also inserted a clause in these minutes amending the Articles of Incorporation which stated as follows: "Shareholders' meetings may be held by telephone and other electronic means of communication and shall be considered as meetings in which the shareholders were physically present. Meetings of the Board of Directors may also be held by telephone and other electronic means of communication and shall be considered as meetings in which the directors were physically present."

FOURTH: Additionally, in that meeting, the Board of Directors was appointed by means of Deed 791 dated January 16, 2020, in which **ALVARO ALMENGOR** was appointed as President, **MANUEL CARRASQUILLA** as Secretary, and **LIDIA RAMOS** as Treasurer. Said Minutes were recorded in public deed 4957 dated April 29, 2020 of the Eighth Notary Public's Office of Panama, and subsequently registered in the Public Register of Panama.



FIFTH: The actions of the defendants violated the bylaws of the Articles of Incorporation of the Company **GABINVEST S.A.**, since **THE SHAREHOLDER** of the referred Company **NEVER** participated in the Shareholders' Meeting to remove the Board of Directors presided by the Principal **JOSE EDUARDO SAN JUAN**, since no request was made to call the meeting, as it was falsely asserted in Deed 791 dated January 16, 2020 of the Eighth Circuit Notary Public's Office of the Circuit of Panama. In the same manner, false information was included in Deed 4957 dated April 29, 2020, of the Eighth Notary Public's Office of the Circuit of Panama, since the Articles of Incorporation of the affected Limited Liability Company, did not establish the possibility of holding meetings by telephone or any other electronic means in any of its clauses, as said Public Deed attempts to amend in its Twelfth clause. This situation contradicts the fact that said meeting was held. Therefore, the punishable act shall be considered as committed.

SIXTH: We see that in this particular case, **ALVARO ALMENGOR**, acting on behalf of the law firm **HATSTONE ASOCIADOS**, executed the Minutes of a Shareholders' meeting, which renders the appointments of the recognized Board of Directors of the aforementioned Limited Liability Company **GABINVEST S.A.** null and void, and provides for the appointment of a new Board of Directors, with the following being elected: **ALVARO ALMENGOR**, as President; **MANUEL CARRASQUILLA** as Secretary; and **LIDIA RAMOS** as Treasurer, without being authorized to convene said meeting. Therefore, the crime was committed the moment that decision was recorded in Deed 791 dated January 16, 2020, of the Eighth Notary Public's Office of the Circuit of Panama and its subsequent registration in the Public Register of Panama. [Handwritten:] *Having noticed the punishable act at the end of October, 2020. Said Notary Public is located at Obarrio, Edif. Plaza Obarrio 1er Piso, Office 108, Av. Samuel Lewis.*

SEVENTH: Mr. **JUAN GUILLERMO GUTIERREZ STRAUSS**, in his capacity as **PRESIDENT** of the Company **XELA ENTERPRISES**, sole shareholder of the Company **GABINVEST S.A.**, made a sworn statement before a Notary Public in the city of **GUATEMALA**, Republic of **GUATEMALA**, on December 3, 2020, in which, for the matters at hand, he stated as follows:



This being the case, the crime of inserting false statements in a private document, like all other forms of false documentation, is a violation of public trust. We must understand the concept of public trust through Carrara's thesis regarding this legal process.

Carrara considers that public trust is linked to the power of the creator of the documents, specifically, to the idea of the state as the creator of the document from which public trust arises. In fact, Carrara thought that it is a human need to believe in other people or in certain signs, values or objects. To the extent that this belief is not based on the Authority (the State), we are faced with private⁴ trust, which is based on trust in the good faith of others; but if this trust is imposed by the Authority, we are faced with public trust, so that when the citizen believes in a currency, he does so because the authority so provides.

In fact, Carrara states as follows:

"As long as we consider men in a state of mere natural association, ordered on egalitarian principles, it will not be possible for us to imagine the concept of public trust, that is to say, of a common bond that obliges them to believe certain things. When a man comes into contact with his fellows, regarding his operations and contracts, he has a frequent need to believe; but, if no authority is presupposed which imposes upon him superior reasons for believing, he will always believe, either induced by his senses, his experience or his judgment, or led by the confidence in the individual who assures him of some certain fact."

Jurisprudence and legal doctrine hold that the interest that is legally protected through the criminalization of the insertion of false statements in a public document is related to the collective trust in certain documents, signs, values or objects that have evidentiary weight.

In this regard, Francisco Bernate Ochoa points out in his book "Notes on the Crime regarding the Insertion of False Statements in Public Documents.["] Research Drafts No. 62, ISSN: 0124-700X, Faculty of Jurisprudence, University of Rosario, that:

"The development of social relations necessarily implies a minimum of trust among people and between them and the public authority; the peaceful coexistence and the legitimacy and enforceability of the acts issued by the administration depends on this, being precisely for these purposes that the Colombian Political Constitution establishes that the actions of individuals and public authorities must adhere to the principles of good faith". From this principle of trust, public trust emerges as an autonomous value and



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 PRIMARY SERVICE SECTION
 [Translation - Page 10]

[This paragraph is not continued from previous page] no way to participate in the Shareholders' Meeting of the Company GABINVEST S.A., held on January sixteenth, two thousand and twenty, in which the appointments of the recognized Board of Directors of the Company GABINVEST, S.A., were rendered null and void, providing for the appointment of a new Board of Directors, presided by Mr. ALVARO ALMENGOR as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. Said persons are not known to my client, nor are they authorized to represent the company GABINVEST, S.A. since they are not members of the Board of Directors proposed and elected by the Shareholder of the aforementioned company". (emphasis added).

EIGHTH: In this regard, **GUTIERREZ STRAUSS**, stated that:

"d) Similarly (sic), I DECLARE that my client, in his capacity as sole shareholder of the Company **GABINVEST, S.A.** has never held a Shareholders' Meeting or been informed of any meeting of this nature BY TELEPHONE. Said meeting was held on April twenty-ninth, two thousand twenty, with Mr. Alvaro Almengor in his alleged capacity as President of GABINVEST, S.A.; nor has he ordered the modification of the Articles of Incorporation of the Company GABINVEST, S.A. IN ANY WAY. Therefore, any decision, appointment or order given by Mr. Alvaro Almengor as alleged President, Mr. Manuel Carrasquilla as alleged Secretary and Ms. LIDIA RAMOS as alleged Treasurer of the Company GABINVEST, S.A. HAVE NO VALUE WHATSOEVER, and are the result of falsehood in form and substance and any other crime that may correspond according to the acts committed. (emphasis added)

NINTH: The crime of inserting false statements in a public document, also known as historical forgery, provided for in the previous Article 366 of the Code of Criminal Procedure, punishes anyone who inserts or causes to insert in a public deed or public or authentic document, false statements concerning a fact that the document must prove, which may result in damage. In principle, the doctrine states "... it is a document that in its formal aspect (date, signature, seals, signs of authenticity) is authentic, it reflects the truth, but it is false due to the fact that its content contains false statements" (GUERRA DE VILLALBAZ, Aura, *Compendium of Criminal Law (Special Part, Panama, 2010)*, page 363.



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PRIMARY SERVICE SECTION

[This section is continued from page 10:]

the legal asset that is the object of criminal protection, of which the collectivity itself is the owner, and finds completion in the credibility enjoyed by those signs, objects or external forms that constitute means of proof of the creation, modification or extinction of legally relevant situations.

TENTH: That the actions taken by the **DEFENDANTS** herein, caused financial loss to my client, since, to date, it has not been possible to access the sum of money delivered to the aforementioned **DEFENDANTS**. Therefore, we estimate provisional damages at **TWO MILLION BALBOAS (B/.2,000,000.00)**.

v. **EVIDENCE**

- Electronic copy of the Public Register of Public Deed 791 dated January 16, 2020 of the Eighth Notary Public's Office of the Circuit of the Province of Panama.
- Electronic copy of Public Deed 4957 dated April 29, 2020 of the Eighth Notary Public's Office of the Circuit of the Province of Panama.
- Certification of good standing of the Limited Liability Company **GABINVEST S.A.**
- Certification of good standing of the Limited Liability Company XELA [handwritten:] LISA ENTERPRISES LTD. [initials]
- Declaration of the Shareholder of the Limited Liability Company **GABINVEST S.A.** before the Notary Public, in which he affirms that he did not take part in the aforementioned meetings.

vi. **SPECIAL REQUEST**

- An inspection visit shall be made **URGENTLY** to the Public Register of Panama in order to corroborate the above.
- The Public Register of Panama shall be **URGENTLY** requested to provisionally **SUSPEND** the spurious deeds until the facts are clarified.
- An inspection visit shall be made **URGENTLY** to the Eighth Notary Public's Office of the First Judicial Circuit of Panama in order to locate the Minutes of the Shareholders' Meetings held on January 16 and April 29, 2020, which were subsequently notarized in public deeds 791 and 4957 respectively.



LEGAL GROUNDS: Articles 220, 221 of the Criminal Code; 84, 85, 86, 87, 88 and 89 of the Procedural Code of Panama.

With my usual respect,

Panama, on the filing date,

[Signature]
JAVIER A. DE LEON ALMENGOR, Atty.
ATTORNEY AT LAW

[Signature]
HARALD JOHANNESSEN HALS – PLAINTIFF
POSITION: [handwritten:] *Director – President*
PLACE AND DATE: [handwritten:] *Guatemala, January 18, 2021*

In the city of Guatemala, on the eighteenth of January two thousand and twenty-one, in my capacity as Notary, I HEREBY ATTEST that the foregoing signature is AUTHENTIC as it was signed on today's date in my presence, by Mr. HARALD JOHANNESSEN HALS, who is a person that I know; who signs again together with the undersigned Notary Public, at the foot of the present certificate of authenticity.

[Signature]

IN MY PRESENCE,
[Signature]
Jeremias Lutin Castillo
ATTORNEY AND NOTARY PUBLIC

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PRIMARY SERVICE SECTION

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GUATEMALA, C.A.

JUDICIAL DEPARTMENT OF THE REPUBLIC OF GUATEMALA
GENERAL ARCHIVE OF NOTARY RECORDS
ELECTRONIC REGISTRY OF NOTARIES
GUATEMALA, C.A.

2021-593/AAMELGAR

THE UNDERSIGNED DEPUTY DIRECTOR OF THE GENERAL ARCHIVE OF NOTARY RECORDS OF THE JUDICIAL DEPARTMENT OF THE REPUBLIC OF GUATEMALA HEREBY CERTIFIES: That the signature of the Notary **JEREMÍAS LUTIN CASTILLO** is AUTHENTIC, by virtue of being the one that corresponds to the aforementioned notary in conformity with Record thirty thousand, six hundred and forty-five of Page twenty-three thousand, seven hundred and twenty-nine of Book six-E of the Electronic Registry of Notaries contained in this Archive.

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Guatemala, January eighteenth two thousand and twenty-one.

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JUDICIAL DEPARTMENT
GENERAL ARCHIVE OF NOTARY RECORDS
AUTHENTICATION
GUATEMALA, CENTRAL AMERICA

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JUDICIAL DEPARTMENT
GENERAL ARCHIVE OF NOTARY RECORDS
AUTHENTICATION
GUATEMALA, CENTRAL AMERICA

[Signature]
Ms. Wanda Martínez Bravatti
Coordinator II
Metropolitan Deputy Director
General Archive of Notary
Records

[Seal:]
JUDICIAL DEPARTMENT
GENERAL ARCHIVE OF NOTARY RECORDS
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PRIMARY SERVICE SECTION

7a AVENIDA 9-20, EDIFICIO JADE, ZONE 9, GUATEMALA, CENTRAL AMERICA
TELEPHONE: 22905112



[emblem] Republic of Guatemala

MINISTRY OF FOREIGN AFFAIRS

APOSTIL
(Hague Convention of October 5, 1961)

[QR code]
Verification Code: ux29g0
ONLINE VERIFICATION
To verify the issue of this apostil, go to:
<https://apostilla.minex.gob.gt>

1. **Country: Republic of Guatemala**

This public document

2. **Has been signed by:** WANDA MARTINEZ BRAVATTI

3. **Acting in her capacity of** COORDINATOR II, METROPOLITAN DEPUTY DIRECTOR

4. **And bears the stamp of** GENERAL NOTARY RECORDS ARCHIVE

Certificate

5. **In:** GUATEMALA CITY, GUATEMALA 6. **On:** 2021/01/18

7. **By:** GIOVANI DE PAZ ACEVEDO - 8. **Under number:** 2208782021

HEAD OF NOTARIZATIONS
DEPARTMENT

9. Seal/ stamp: [partially illegible round stamp:]
MINISTRY OF FOREIGN AFFAIRS

[signature]

[2x fees stamps dated 2021,
nos. 841591 and 841592]

10. **Signature**

The Ministry of Foreign Affairs does not assume any responsibility for the content or validity of this document and merely authenticates the signature of the officer involved.

This is an official document issued by the Ministry of Foreign Affairs of the Republic of Guatemala.



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PRIMARY SERVICE SECTION

[Signature]
 ATTORNEY
 Jeremías Lutin Castillo
 ATTORNEY AND NOTARY PUBLIC

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NOTARIZED AFFIDAVIT. In the city of Guatemala, department of Guatemala, on the third day of December of two thousand twenty, at 9:00 a.m., I, **Jeremías Lutin Castillo**, practicing Notary, located at sexta (6a) Avenida "A", eight - zero zero (8-00) of area number nine (9) Edificio Centro Operativo, Penthouse B, of the City of Guatemala, department of Guatemala, at the request of Mr. **Juan Guillermo Gutiérrez Strauss**, who states that his is sixty-four years of age, married, Executive, Guatemalan, residing in the Republic of Canada [sic], and temporarily in this capital city, identified himself with the Personal Identification Document with Unique Identification Code two thousand five hundred seventeen, twenty six thousand fifty three, zero one hundred one (2517260530101), issued by the National Registry of Individuals of the Republic of Guatemala, so that, by means of this **NOTARIZED AFFIDAVIT**, he declares as follows:

FIRST: Mr. Juan Guillermo Gutiérrez Strauss, aware of the penalties related to the crime of perjury, under solemn oath in accordance with the law, **DECLARES** as follows: **a)** that he acts in his capacity as Director - President of the company XELA ENTERPRISES LTD, which has been incorporated and registered in accordance with the laws of the Republic of Canada [sic], Province of Ontario, with Ontario business identification number one million, two hundred ninety-seven thousand, five hundred eighty (1297580); **b)** that his client is the sole shareholder of the company GABINVEST, S. A.. This company was incorporated in accordance with the laws of the Republic of Panama, registered in the Public Register of Panama on page number one hundred and seventeen thousand, five hundred and eleven (117511); said shareholding is supported by: I) share certificate number GI - zero one hundred (GI-0100) which covers three hundred and forty-eight (348) shares of the company GABINVEST, S.A., owned by XELA ENTERPRISES LTD; and II) share certificate number GI - zero one hundred and one (GI-0101) which covers seventy-five (75) shares of the company GABINVEST, S.A.,

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owned by XELA ENTERPRISES LTD; iii) share certificate number GI - zero one hundred and two (GI-0102) which covers seventy-five (75) shares of the company GABINVEST, S.A., owned by XELA ENTERPRISES LTD; c) Therefore, I DECLARE that my client, the company XELA ENTERPRISES LTD, was not notified or summoned in any way to participate in the Shareholders' Meeting of the company GABINVEST, S.A., held on January sixteenth, two thousand and twenty, in which the appointments of the recognized Board of Directors of the company GABINVEST, S.A. were rendered null and void, providing in such sense, the appointment of a new board of directors, presided by Mr. Alvaro Almengor as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. These persons are not known to my client, nor do they have the authority to represent the company GABINVEST, S.A., since they are not members of the Board of Directors proposed and elected by the Shareholders of the aforementioned company". d) I also DECLARE that my client, as sole shareholder of the Company GABINVEST, S.A. has never held a Shareholders' Meeting or been informed of any meeting of this nature BY TELEPHONE. held on April twenty-ninth, two thousand twenty, with Mr. Alvaro Almengor in his alleged capacity as President of GABINVEST, S.A.; nor has he ordered the modification of the Articles of Incorporation of the Company GABINVEST, S. A. IN ANY WAY. Therefore, any decision, appointment or order given by Mr. Alvaro Almengor as alleged President, Mr. Manuel Carrasquilla as alleged Secretary and Ms. LIDIA RAMOS as alleged Treasurer of the Company GABINVEST, S.A. HAVE NO VALUE WHATSOEVER, and are the result of falsehood in form and substance and any other crime that corresponds according to the acts committed;

SECOND: As there is nothing



further to put on record, this notarized document is concluded in the same place and date, forty-five minutes after its commencement, and it is issued on two sheets of unstamped paper, the first page written on both sides and the second on the front, to which I attach a notary stamp of ten quetzals and a revenue stamp of fifty cents of one quetzal. Having read this document in its entirety to the applicant, being well informed of its content, value and legal effects, he ratifies, accepts and signs it. I ATTEST.

[Signature]

Before me,
[Signature]
ATTORNEY
Jeremías Lutín Castillo
ATTORNEY AND NOTARY PUBLIC

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MINISTRY OF FOREIGN AFFAIRS
DEPARTMENT OF NOTARY RECORDS
GUATEMALA

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PRIMARY SERVICE SECTION

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GUATEMALA, C.A.

JUDICIAL DEPARTMENT OF THE REPUBLIC OF GUATEMALA
GENERAL ARCHIVE OF NOTARY RECORDS
ELECTRONIC REGISTRY OF NOTARIES
GUATEMALA, C.A.

2020-14085/AAMELGAR

THE UNDERSIGNED DEPUTY DIRECTOR OF THE GENERAL ARCHIVE OF NOTARY RECORDS OF THE JUDICIAL DEPARTMENT OF THE REPUBLIC OF GUATEMALA HEREBY CERTIFIES: That the signature of the Notary **JEREMÍAS LUTIN CASTILLO** is AUTHENTIC, by virtue of being the one that corresponds to the aforementioned notary in conformity with Record thirty thousand, six hundred and forty-five of Page twenty-three thousand, seven hundred and twenty-nine of Book six-E of the Electronic Registry of Notaries contained in this Archive. I, the undersigned, do not assume any responsibility for the content nor for the legal effectiveness of the document whose signature is legalized.

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Guatemala, December third, two thousand and twenty.

[Seal:]
JUDICIAL DEPARTMENT
GENERAL ARCHIVE OF NOTARY
RECORDS
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[Signature]
Ms. Wanda Martínez Bravatti
Coordinator II
Metropolitan Deputy Director
General Archive of Notary
Records

[Seal:]
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7a AVENIDA 9-20, EDIFICIO JADE, ZONE 9, GUATEMALA, CENTRAL AMERICA
TELEPHONE: 22905112



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PRIMARY SERVICE SECTION

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Public Register of Panama

SIGNED BY: UMBERTO ELIAS [signature]
 PEDRESCHI PIMENTEL
 DATE: 2021/01/18 11:44:20 -05:00
 PURPOSE: REQUEST FOR PUBLIC REGISTRY
 LOCATION: PANAMA, PANAMA

CERTIFICATE OF LEGAL PERSON

HAVING REVIEWED THE REQUEST

11042/2021 (0) DATED 2021/01/18

THE CORPORATION

LISA, S.A.
 TYPE OF COMPANY: LIMITED LIABILITY COMPANY
 HAS BEEN REGISTERED ON (COMMERCIAL) PAGE No. 117512 (S) SINCE FRIDAY, SEPTEMBER
 23, 1983
 - THE COMPANY IS ACTIVE

- ITS OFFICERS ARE:

SUBSCRIBER: MARIBLANCA STAFF
 SUBSCRIBER: IVAN ROBLES

DIRECTOR / PRESIDENT: HARALD JOHANNESSEN HALS
 DIRECTOR / SECRETARY: LESTER C. HESS JR.
 DIRECTOR/TREASURER: CALVIN KENNETH SHIELDS
 DIRECTOR: ALVARO ALMENGOR
 DIRECTOR: MANUEL CARRASQUILLA
 DIRECTOR: CARL O'SHEA

REGISTERED AGENT: HATSTONE ATTORNEYS

- THE LEGAL REPRESENTATION SHALL BE CARRIED OUT BY:
THE PRESIDENT.- ITS CAPITAL IS COMPOSED OF SHARES WITHOUT VALUE
THE CAPITAL STOCK IS (500) COMMON SHARES, REGISTERED WITHOUT NOMINAL VALUE.

- ITS DURATION IS UNLIMITED.

- ITS REGISTERED OFFICE IS IN PANAMA, PROVINCE OF PANAMA.

ENTRIES FILED THAT ARE IN PROGRESS

THERE ARE NO PENDING ENTRIES.

CUSTODY REGIME: ACCORDING TO THE INFORMATION REGISTERED IN THIS REGISTER, THE
 COMPANY REFERRED TO IN THE CERTIFICATE HAS NOT BEEN SUBJECT TO THE CUSTODY
 SYSTEM.

ISSUED IN THE PROVINCE OF PANAMA ON MONDAY, JANUARY 18, 2021 AT 10:27 A.M..**NOTE: FEES FOR THIS CERTIFICATE WERE PAID IN THE AMOUNT OF 30.00 BALBOAS UNDER
RECEIPT NUMBER 1402832689.**

[QR Code] Validate your electronic document using the QR CODE printed at the foot of the page or by using Electronic Identification
 Number: 03B7DC86-A164-45A4-8BC3-A998E27938BB
 Public Register of Panama – Via Espana, in front of Hospital Bar Perolsid
 Apartado Postal 0830 – 1596, Republic of Panama – (507) 501-9900



1/1

[emblem]

Public Register of Panama

SIGNED BY: UMBERTO ELIAS [signature]
 PEDRESCHI PIMENTEL
 DATE: 2021/01/18 11:45:43 -05:00
 PURPOSE: REQUEST FOR PUBLIC REGISTRY
 LOCATION: PANAMA, PANAMA

CERTIFICATE OF LEGAL PERSON

HAVING REVIEWED THE REQUEST

11060/2021 (0) DATED 2021/01/18

THE CORPORATION

GABINVEST, S.A.
 TYPE OF COMPANY: LIMITED LIABILITY COMPANY
 HAS BEEN REGISTERED ON (COMMERCIAL) PAGE No. 117511 (S) SINCE FRIDAY, SEPTEMBER 23, 1983
 - THE COMPANY IS ACTIVE

- ITS OFFICERS ARE:

SUBSCRIBER: IVAN ROBLES
 SUBSCRIBER: MARIBLANCA STAFF

DIRECTOR: ALVARO ALMENGOR
 DIRECTOR / SECRETARY: MANUEL CARRASQUILLA
 DIRECTOR/TREASURER: LIDIA RAMOS

- THE LEGAL REPRESENTATION SHALL BE CARRIED OUT BY:
 THE PRESIDENT.

- ITS CAPITAL IS COMPOSED OF SHARES WITHOUT VALUE
 THE CAPITAL STOCK IS FIVE HUNDRED COMMON SHARES, REGISTERED WITHOUT NOMINAL VALUE.

- ITS DURATION IS UNLIMITED.

- ITS REGISTERED OFFICE IS IN PANAMA, PROVINCE OF PANAMA.

ENTRIES FILED THAT ARE IN PROGRESS

ENTRY 79534/2020 (0) DATED 2020/02/27 12:43:10 P.M. NOTARY NO. 11 PANAMA. REGISTRATION OF MINUTES OF INCORPORATION, REGISTRATION OF CORRECTION OF GENERAL DETAILS, PRE-REGISTRATION COMPLIANCE SEARCH FEE, PRE -REGISTRATION COMPLIANCE SEARCH FEE

ENTRY 138886/2020 (0) DATED 2020/06/22 11:58:09 A.M.. FEES FOR SERVICES FROM LEGAL CONSULTING DIRECTORATE

ENTRY 143630/2020 (0) DATED 2020/06/26 01:49:01 P.M.. NOTARY NO. 8 PANAMA. REGISTRATION OF MINUTES OF SUBSCRIBERS AND AMENDMENTS OR REVOCATIONS, REGISTRATION OF AMENDMENT TO GENERAL DETAILS, REGISTRATION OF AMENDMENT DUE TO REASONS ATTRIBUTABLE TO THE REGISTER, PRE-REGISTRATION COMPLIANCE SEARCH FEE, PRE-REGISTRATION COMPLIANCE SEARCH FEE.

ENTRY 229251/2020 (0) DATED 2020/09/23 02:19:17 P.M. FEES FOR SERVICES FROM LEGAL CONSULTING DIRECTORATE

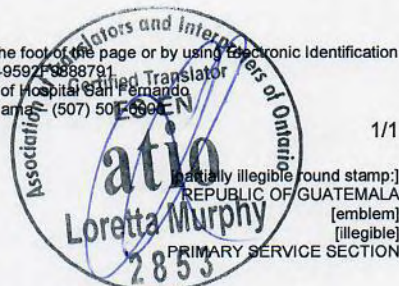
RESIGNATION OF REGISTERED AGENT: ENTERED ON TUESDAY, FEBRUARY 18, 2020 UNDER ENTRY NUMBER 67947/2020 (0) THE FOLLOWING REGISTERED AGENT(S) HAVE RESIGNED: ALFARO, FERRER & RAMIREZ .

CUSTODY REGIME: ACCORDING TO THE INFORMATION REGISTERED IN THIS REGISTRY, THE COMPANY OBJECT OF THE CERTIFICATE HAS NOT BEEN SUBJECT TO THE CUSTODY REGIME.

ISSUED IN THE PROVINCE OF PANAMA ON MONDAY, JANUARY 18, 2021 AT 10:35 A.M..

NOTE: FEES FOR THIS CERTIFICATE WERE PAID IN THE AMOUNT OF 30.00 BALBOAS UNDER RECEIPT NUMBER 1402832707.

[QR Code] Validate your electronic document using the QR CODE printed at the foot of the page or by using the electronic identification Number: 332EAFDB-EBFC-48B7-9733-9592F988791
 Public Register of Panama – Via Espana, in front of Hospital San Fernando
 Apartado Postal 0830 – 1596, Republic of Panama – (507) 501-4901



1/1

[Illegible round stamp]
 REPUBLIC OF GUATEMALA
 [emblem]
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 PRIMARY SERVICE SECTION



**MINISTERIO PÚBLICO
FISCALIA METROPOLITANA
SECCIÓN DE ATENCIÓN PRIMARIA
SEGUNDA SUB-REGIONAL**

Panamá, 26 de enero de 2021.
Carpetilla 202100003611
Resolución N° 147

Este despacho tiene a su cargo la investigación por la presunta comisión de un delito **CONTRA LA FE PÚBLICA** en la modalidad de **FALSIFICACIÓN DE DOCUMENTOS EN GENERAL**, querrela presentada por el Licenciado **JAVIER ALCIDES DE LEÓN ALMENGOR**.

Se observa que en el libelo de querrela se presenta como querellante el señor **HARALD JOHANNESSEN HALS**, con pasaporte N° 242086470, con domicilio en Guatemala, República de Guatemala, en su calidad de tesorero de **GABINVEST, S.A.**, Sociedad Anónima registrada a Folio N° 117511 en el Registro Público de Panamá, como apoderado judicial el Licenciado **JAVIER ALCIDES DE LEÓN ALMENGOR**, con cédula de identidad personal N° 8-440-686 y como parte querrellada **ALVARO ALMENGOR**, con cédula de identidad personal N° 8-751-1550, **MANUEL CARRASQUILLA** y **LIDIA RAMOS** de generales desconocidas.

Se observa que, en el escrito de querrela, se explica las circunstancias en las que se dieron los hechos que fundamenta la querrela, y los tiempos en que se desplegó la posible conducta delictiva.

Como conducta penal, el abogado querellante invoca, el artículo 366, concerniente a los delitos **CONTRA LA FE PÚBLICA** en la modalidad de **FALSIFICACIÓN DE DOCUMENTOS EN GENERAL**, establecidos en el Código Penal.

En cuanto a la cuantía provisional de los daños y perjuicios que le han causado al querellante, establecen la suma de dos millones de balboas (B/. 2,000.000.00).

CONSIDERACIONES

Corresponde a este Despacho, valorar la admisibilidad de la querrela interpuesta por el Licenciado **JAVIER ALCIDES DE LEÓN ALMENGOR**, apoderado judicial del señor **HARALD JOHANNESSEN HALS**, con pasaporte N° 242086470, en su



calidad de tesorero de **GABINVEST, S.A.**, Sociedad Anónima registrada a Folio N° 117511 en el Registro Público de Panamá, actuando en su condición de Notario Público Undécimo, de conformidad a los requisitos establecidos en el artículo 79, 88 y demás concordantes del Código Procesal Penal.

En cuanto a los datos de identidad, domicilio, observados en la querrela que ha sido presentada por escrito a través del letrado debidamente firmado por el querellante, se ha establecido, las generales del querellante, y suministrado datos para individualizar a los querrellados, conforme a lo que establece la norma.

Por otra parte, con relación a los hechos en los cuales se fundamenta la querrela en estudio, han sido debidamente argumentados de manera clara, precisa, indicando donde y como se cometió el hecho y los motivos por los cuales considera se ha ejecutado una conducta punible en perjuicio de su poderdante y la posible cuantía resarcitoria de la Acción Civil cuya reparación se pretende.

Es necesario, dejar por sentado que corresponde al Ministerio Público dirigir todas las acciones necesarias y que no sean contrarias a la ley, con la finalidad de perseguir los delitos, practicando u ordenando la ejecución de todas las diligencias útiles para tal fin, sin menoscabo de que la víctima pueda ejercer sus derechos, entre ellos intervenir como querellante y exigir la responsabilidad del imputado y obtener la indemnización civil por los daños y perjuicios derivados del delito.

Por lo anterior expuesto, de acuerdo al artículo 84 del Código Procesal Penal, en concordancia con el artículo 79 de la misma excerta penal, es querellante legítimo, la víctima del delito u ofendido directamente por este, de tal manera que el caso que nos ocupa, el señor **HARALD JOHANNESSEN HALS**, con pasaporte N° 242086470, en su calidad de tesorero de **GABINVEST, S.A.**, Sociedad Anónima registrada a Folio N° 117511 en el Registro Público de Panamá, ha resultado afectado por los que se le considera querellante legítimo.

Por último, el artículo 89 del Código Procesal Penal, señala que el escrito de querrela puede ser aportado ante el Ministerio Público, por lo cual, al tenor de los requisitos del artículo 88 del Código Procesal Penal, la misma cumple con los presupuestos de forma y fondo que la norma dispone para su valoración.

Por las consideraciones antes expuestas la suscrita, Fiscal Adjunta de la Fiscalía Metropolitana, Sección de Atención Primaria, Segunda Subregional,



DISPONE:

PRIMERO: Admitir el escrito de querrela penal formulado por el Licenciado **JAVIER ALCIDES DE LEÓN ALMENGOR**, con cédula de identidad personal N° 8-440-686, apoderado judicial del señor **HARALD JOHANNESSEN HALS**, con pasaporte N° 242086470, con domicilio en Guatemala, República de Guatemala, en su calidad de tesoroero de **GABINVEST, S.A.**, Sociedad Anónima registrada a Folio N° 117511 en el Registro Público de Panamá

SEGUNDO: Téngase como querellante legítimo al señor **HARALD JOHANNESSEN HALS**, con pasaporte N° 242086470, con domicilio en Guatemala, República de Guatemala, en su calidad de tesoroero de **GABINVEST, S.A.**, Sociedad Anónima registrada a Folio N° 117511 en el Registro Público de Panamá, en calidad de víctima y como apoderado judicial el Licenciado **JAVIER ALCIDES DE LEÓN ALMENGOR**, con cédula de identidad personal N° 8-440-686, de conformidad al poder a él entregado.

TERCERO: Téngase como querellado **ALVARO ALMENGOR**, con cédula de identidad personal N° 8-751-1550, **MANUEL CARRASQUILLA** y **LIDIA RAMOS** de generales desconocidas.

CUARTO: Téngase por presentados los documentos que acompañan la querrela.

QUINTO: Girar las comunicaciones de lugar, a fin de dar cumplimiento a lo resuelto.

FUNDAMENTO DE DERECHO: Artículo 84, 88 y 89 del Código Procesal Penal.
NOTIFÍQUESE.

[Handwritten Signature]
LEYDI NUÑEZ
Fiscal Adjunta de la Fiscalía Metropolitana
Sección de Atención Primaria - Segunda Sub-Regional

2:10 TARDE
27 ene 2021
delo ERIC RIVERO G.
[Handwritten Signature]

MINISTERIO PÚBLICO
FISCALÍA METROPOLITANA
SECCIÓN DE ATENCIÓN PRIMARIA
atio
Loretta Murphy
2853
Certified Translator
ES-EN
Association of Translators and Interpreters of Ontario

CERTIFICO QUE LO ANTERIOR ES FIEL COPIA
DE SU ORIGINAL
En Panamá, el día 02 de Febrero de 2021

[Handwritten Signature]
Firma

1

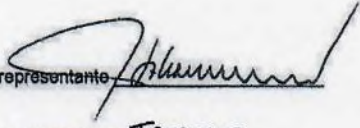
PODER JUDICIAL ESPECIAL CON REPRESENTACIÓN

054622


El suscrito, HARALD JOHANESSEN HALS, mayor de edad, soltero, guatemalteco, ejecutivo, con domicilio en la República de Guatemala, portador del pasaporte número doscientos cuarenta y dos millones ochenta y seis mil cuatrocientos setenta (242086470) emitido por la Dirección General de Migración, actuando en calidad de Tesorero de **GABINVEST, S.A.**, Sociedad Anónima registrada a Folio N°117511, en el Registro Público de Panamá, Sección Mercantil del Registro Público de Panamá, debidamente facultado para este acto, y en nombre y representación de la corporación que represento, confiere **PODER JUDICIAL ESPECIAL CON REPRESENTACIÓN** suficiente a favor d **JAVIER ALCIDÉS DE LEON ALMENGOR**, quien es mayor de edad, portador de la cédula de identidad personal No. ocho-cuatrocientos cuarenta- seiscientos ochenta y seis (8-440-686), Abogado en ejercicio de la República de Panamá, con domicilio profesional en Avenida Ricardo J. Alfaro, Edificio The Century Tower, Piso 19, Oficina 1912, con teléfono 61150108, correo electrónico **javierdeleon0873@hotmail.com**, donde recibe notificaciones judiciales y personales, a fin de que asuma nuestra representación dentro de la Querrela Criminal incoada en contra **ALVARO ALMENGOR**, Varón, ciudadano Panameño, mayor de edad, con cédula de identidad personal N°8-751-1550, **MANUEL CARRASQUILLA**, demás generales que juramos desconocer, **LIDIA RAMOS**, demás generales que juramos desconocer y **CONTRA CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE**, por la presunta comisión del Delito **CONTRA LA FE PUBLICA**, en la modalidad de **FALSEDAD IDEOLOGICA**, en perjuicio de **GABINVEST, S.A.**

El Licenciado **DE LEON ALMENGOR**, queda expresamente facultado para que en mi nombre y representación pueda aceptar, advertir, allanarse, cambiar, comprometer, contestar, corregir, delegar, desistír, intervenir, (como lo estime conveniente o necesario), nombrar, notificarse, pedir, ratificar, reasumir, recibir, reiterar, renunciar, requerir, retirar, revocar, solicitar, sustituir, trazar o transigir con el presente poder por la buena defensa de mis intereses y derechos.

Otorgado y firmado en la ciudad de Guatemala, República de Guatemala, el diecinueve de octubre de dos mil veinte.

Firma de representante 
 Cargo en la corporación: Tesorero

En la Ciudad de Guatemala, a los diecinueve días del mes de octubre de dos mil veinte, como Notario DOY FE que la firma que antecede es **AUTÉNTICA** por haber sido puesta el día de hoy en mi presencia, por el señor Harald Johannessen Hals, quien es persona de mi anterior conocimiento; quien vuelve a firmar junto con el Infrascrito Notario, al pie de la presente acta de legalización de firma.

 Ante M:


 LICENCIADO
 MANUEL ALBERTO SÚC TÍLO
 ABOGADO Y NOTARIO
 ES EN
 atio
 Loretta Murphy
 2853

LICENCIADO
 MANUEL ALBERTO SÚC TÍLO
 ABOGADO Y NOTARIO
 MANUEL ALBERTO SÚC TÍLO
 ABOGADO Y NOTARIO



GUATEMALA, C.A.

**ORGANISMO JUDICIAL DE LA REPÚBLICA DE GUATEMALA
ARCHIVO GENERAL DE PROTOCOLOS
REGISTRO ELECTRÓNICO DE NOTARIOS
GUATEMALA, C.A.**

2020-11812/LMECHEVERRIA

LA INFRASCrita SUBDIRECTORA DEL ARCHIVO GENERAL DE PROTOCOLOS DEL ORGANISMO JUDICIAL DE LA REPÚBLICA DE GUATEMALA, CERTIFICA: Que la firma de el (la) Notario (a) **MANUEL ALBERTO SUC TILOM** es **AUTÉNTICA**, en virtud de ser la que corresponde a el (la) citado (a) notario (a) de conformidad con el Registro quince mil veinte de Folio siete mil ochocientos cinco del Libro seis-E del Registro Electrónico de Notarios que obra en este Archivo.
La suscrita, no prejuzga ni asume responsabilidad alguna por el contenido ni por la eficacia jurídica del documento, de cuya firma se legaliza.
TARIFA: Q. 150.00 ACUERDO 24-2011 DE LA CORTE SUPREMA DE JUSTICIA. Formulario Electrónico de Ingresos -FEI- 128999067857

Guatemala, veintidós de octubre de dos mil veinte.

**Licda. Wanda Martínez Bravatti
Coordinador II
Subdirector Metropolitano
Archivo General de Protocolos**



RELACION
PARTAM
E AUTEN
GUATEMALA

7a. AVENIDA 9-20, EDIFICIO JADE, ZONA 9, GUATEMALA, CENTROAMÉRICA
TELÉFONO: 24287201



003047

JAVIER ALCIDES DE LEON ALMENGOR
ABOGADO- ATTORNEY AT LAW

Avenida Ricardo J. Alfaro, Edificio P.H. The CENTURY TOWER, Piso 19, oficina 1912. Teléfono 61150108.
Correo Electrónico javierdeleon0873@hotmail.com

QUERRELLA PENAL, EN CONTRA DE
ALVARO ALMENGOR, MANUEL
CARRASQUILLA Y CUALQUIER OTRA PERSONA
QUE RESULTE RESPONSABLE, POR LA
SUPUESTA COMISION DEL DELITO CONTRA LA
FE PUBLICA (FALSEDAD IDEOLOGICA), EN
PERJUICIO DE GABINVEST S.A.

SECCION DE ATENCION PRIMARIA DE LA PRIMERA SUB REGIONAL METROPOLITANA DEL
MINISTERIO PUBLICO, E.S.D.

Quien suscribe , Licenciado **JAVIER ALCIDES DE LEON ALMENGOR**, portador de la cédula de Identidad personal No. ocho- cuatrocientos cuarenta- selscientos ochenta y seis (8-440-686), Abogado en ejercicio, con domicilio profesional en Avenida Ricardo J. Alfaro, Edificio P.H. The Century Tower, Piso 19, Oficina 1912, con teléfono 61150108, correo electrónico javierdeleon0873@hotmail.com, en mi condición de Apoderado Principal del señor **HARALD JOHANNESSEN HALS**, Varón, mayor de edad, con Pasaporte 242086470 con Domicilio en la Ciudad de Guatemala, República de **GUATEMALA**, en su calidad de Tesorero de **GABINVEST, S.A.**, Sociedad Anónima registrada a Folio N°117511, en el Registro Público de Panamá, debidamente autorizado por la Junta Directiva, acudo ante su Despacho con mi respeto acostumbrado, a efectos de interponer **FORMAL QUERRELLA PENAL**, en contra de los señores **ALVARO ALMENGOR**, Varón, ciudadano Panameño, mayor de edad, con cédula de identidad personal N°8-751-1550, **MANUEL CARRASQUILLA**, demás generales que juramos desconocer, **LIDIA RAMOS**, demás generales que juramos desconocer y **CONTRA CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE**, por la presunta comisión del Delito **CONTRA LA FE PUBLICA**, en la modalidad de **FALSEDAD IDEOLOGICA**, en perjuicio de **GABINVEST, S.A.**



I. PARTE QUERELLANTE

Lo constituye para estos efectos, **HARALD JOHANNESSEN HALS**, Varón, mayor de edad, con Pasaporte 242086470 con Domicilio en la Ciudad de Guatemala, República de **GUATEMALA**, en su calidad de Tesorero de **GABINVEST, S.A.**, Sociedad Anónima registrada a Folio N°117511, en el Registro Público de Panamá, debidamente autorizado por la Junta Directiva de **GABINVEST S.A.**

II. LOS QUERELLADOS

Se tienen como Querellados a los señores **ALVARO ALMENGOR**, Varón, ciudadano Panameño, mayor de edad, con cédula de identidad personal **N°8-751-1550**, **MANUEL CARRASQUILLA**, demás generales que juramos desconocer, **LIDIA RAMOS**, demás generales que juramos desconocer y **CONTRA CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE.**

III. EL DELITO

La infracción a la norma penal, se encuentra contemplada dentro del Libro II, Capítulo III, Título XI, del Código Penal, que en su artículo 366 señalan:

Artículo 366. Quien falsifique o altere, total o parcialmente una escritura pública, un documento público o auténtico de modo, que pueda resultar perjuicio, será sancionado con prisión de cuatro a ocho años.

Igual sanción se impondrá a quien inserte o haga insertar en un documento público auténtico declaraciones falsas concernientes a un hecho que el documento deba probar, siempre que pueda ocasionar un perjuicio a otro.

IV. ELEMENTOS DE CONVICCIÓN QUE FUNDAMENTAN NUESTRA QUERELLA

PRIMERO: Para la fecha del 10 de septiembre de 2013, se realizó una reunión de Accionistas de la Sociedad **GABINVEST S.A.**, en la cual dentro de su orden del día estuvo la escogencia de la Junta Directiva de la misma, siendo nuestro poderdante **EDUARDO SAN**



JUAN Presidente y Representante Legal de la precitada Sociedad Anónima; **DAVID HARRY** como Secretario y **HARALD JOHANNESSEN** como Tesorero, decisión que quedó inscrita mediante Escritura 16715 de fecha 10 de septiembre de 2013, de la Notaría Primera de Circuito de Panamá, y su debida inscripción en el Registro Público de Panamá.

SEGUNDO: Que para la fecha del 16 de Enero de 2020, **ALVARO ALMENGOR**, en representación de la Firma de Abogados **HATSTONE ASOCIADOS**, suscribe un Acta de reunión de Accionistas, mediante la cual deja sin efecto los nombramientos de la Junta Directiva reconocida de la prenombrada Sociedad Anónima **GABINVEST S.A.**, y disponen el nombramiento de una Nueva Junta Directiva siendo los mismos, **ALVARO ALMENGOR** como Presidente, **MANUEL CARRASQUILLA** como Secretario y **LIDIA RAMOS** como Tesorera, sin que los mismos tuvieran el aval para realizar dicha convocatoria. Dicha Decisión quedó consignada a través de la Escritura 791 de 16 de Enero de 2020, de la Notaría Octava de Circuito de Panamá y su posterior inscripción en el Registro Público de Panamá.

TERCERO: En ese orden de ideas, para la fecha del 29 de abril de 2020, **ALVARO ALMENGOR**, en conjunto con **MANUEL CARRASQUILLA**, actuando como Presidente y Secretario respectivamente (Ilegalmente), de la Sociedad **GABINVEST S.A.**, suscriben un Acta de Reunión de Accionistas de la citada Sociedad, en la cual indicaron "que debido a las circunstancias excepcionales derivadas del Covid19, es extremadamente difícil celebrar reuniones físicas, por lo que esta reunión tendrá que realizarse por teléfono". Así mismo hacen insertar en dicha Acta una cláusula modificando el Pacto Social señalando "Las reuniones de accionistas pueden realizarse por teléfono y otras formas electrónicas de comunicación y se considerarán reuniones en las que los accionistas estuvieron físicamente presentes. Las reuniones de la Junta Directiva también pueden realizarse por teléfono y otras formas electrónicas de comunicación y se consideraran reuniones en las que los directores estuvieron físicamente presentes".

CUARTO: Adicionalmente en esa supuesta reunión conformaron el nombramiento de la Junta Directiva **IMPUESTA** mediante Escritura 791 de 16 de enero de 2020, en la que nombraron a **ALVARO ALMENGOR** como Presidente, **MANUEL CARRASQUILLA** como Secretario, **LIDIA RAMOS** como Tesorera. Dicha Acta fue elevada a escritura pública 4957



de 29 de Abril de 2020 de la Notaría Octava de Circuito de Panamá, y posteriormente inscrita en el Registro Público de Panamá.

QUINTO: Que las acciones desplegadas por los hoy Querellados violentaron los estatutos del Pacto Social de la Sociedad **GABINVEST S.A.**, toda vez que **EL ACCIONISTA** de la referida Sociedad **JAMAS** participó en reunión de Junta de Accionistas para remover la Junta Directiva Presidida por nuestro Poderdante **JOSE EDUARDO SAN JUAN**, ya que no se solicitó la convocatoria para la celebración de la misma, tal como se aseveró falsamente en la Escritura 791 de 16 de enero de 2020 de la notaría octava de circuito de Panamá; de la misma forma, se insertó información falsa a través de la Escritura 4957 de 29 de Abril de 2020, de la Notaría Octava de Circuito de Panamá, toda vez que el Pacto Social de la Sociedad Anónima afectada, en ninguna de sus cláusulas establecía la celebración de reuniones a través de teléfono ni ningún otro medio electrónico, como pretende modificar en la misma Escritura Pública en su cláusula Duodécima, situación que se contradice con la celebración de esa misma reunión, por lo que el hecho punible se configura totalmente.

SEXTO: Vemos que en el caso en concreto, **ALVARO ALMENGOR**, en representación de la Firma de Abogados **HATSTONE ASOCIADOS**, suscribe un Acta de reunión de Accionistas, mediante la cual deja sin efecto los nombramientos de la Junta Directiva reconocida de la prenombrada Sociedad Anónima **GABINVEST S.A.**, y disponen el nombramiento de una Nueva Junta Directiva siendo los mismos, **ALVARO ALMENGOR** como Presidente, **MANUEL CARRASQUILLA** como Secretario y **LIDIA RAMOS** como Tesorera, sin que los mismos tuvieran el aval para realizar dicha convocatoria. Así las cosas el delito se consumó en el momento que dicha Decisión quedó consignada a través de la Escritura 791 de 16 de Enero de 2020, de la Notaría Octava de Circuito de Panamá y su posterior inscripción en el Registro Público de Panamá. *Para calificación del hecho punible Para la fecha de Finales de Octubre de 2020. Dicho notario está ubicado en Obispo, Edificio Plaza Obispo 1er Piso Oficina 108 Ave. Samuel Lewis.*

SEPTIMO: El señor **JUAN GUILLERMO GUTIERREZ STRAUSS**, en su calidad de PRESIDENTE de la Sociedad **XELA ENTERPRISES**, única accionista de la Sociedad **GABINVEST S.A.**, rindió declaración jurada Notarial ante Notario Público en la Ciudad de **GUATEMALA**, República de **GUATEMALA**, para la fecha del tres (3) de diciembre de 2020, en la cual con los hechos que hoy nos ocupan señaló lo siguiente:



Así las cosas el delito de falsedad ideológica en documento privado, como todas las demás modalidades de falsedad documental, atenta contra la fe pública. Debemos entender el concepto de fe pública a través de la tesis de Carrara sobre este bien jurídico.

Carrara entiende que la fe pública se encuentra ligada a la potestad del creador de los documentos, en concreto, a la idea del estado como creador del documento del que emana la fe pública. En efecto, carrara entendía que es una necesidad del hombre el creer en otras personas o en determinados signos, valores u objetos. En la medida en que esa creencia no se fundamente en la Autoridad (el estado) estamos frente a la fe privada,⁴ que se basa en la confianza en la buena fe ajena; mientras que, si esa confianza es impuesta por la Autoridad, estamos frente a la fe pública, de manera que cuando el ciudadano cree en una moneda, lo hace porque la autoridad así lo dispone.

En efecto, afirma Carrara lo siguiente:

“Mientras consideremos a los hombres en un estado de mera asociación natural, ordenada sobre principios igualitarios, no nos será posible imaginar el concepto de fe pública, es decir, de un vínculo común que los obligue a creer ciertas cosas. Al ponerse el hombre en contacto con sus semejantes, tiene en sus operaciones y contratos frecuente necesidad de creer; pero, si no se presupone una autoridad que le imponga razones superiores para creer, él creerá siempre, o inducido por sus sentidos, su experiencia o su juicio, o llevado por la confianza en el individuo que le asegura algún hecho determinado”.

La jurisprudencia y la doctrina sostienen que el interés jurídicamente tutelado a través de la criminalización de la falsedad ideológica se relaciona con la confianza colectiva en determinados documentos, signos, valores u objetos que tengan capacidad probatoria.

Sobre el punto, señala Francisco Bernate Ochoa en su libro “Apuntes sobre el Delito de Falsedad Ideológica, Borradores de Investigación No. No. 62, ISSN: 0124-700X Facultad de Jurisprudencia, Universidad del Rosario, que:

“El desenvolvimiento de las relaciones sociales implica, necesariamente, un mínimo de confianza entre los asociados y de éstos con la autoridad pública; de ello depende la coexistencia pacífica y la legitimidad y obligatoriedad de los actos que la administración expida, siendo precisamente a esos propósitos que la Constitución Política colombiana establece que “las actuaciones de los particulares y de las autoridades públicas deberán ceñirse a los postulados de la buena fe”. De este principio de confianza, surge la fe pública como valor autónomo y bien



ninguna forma para participar en la Asamblea de Accionistas de la entidad GABINVEST, S.A., celebrada el dieciséis de enero de dos mil veinte, mediante la cual se dejó sin efecto los nombramientos de la Junta Directiva reconocida de la entidad GABINVEST, S.A. , disponiendo en tal sentido, el nombramiento de una nueva junta Directiva, presidida por el señor ALVARO ALMENGOR como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera. Dichas personas no son del conocimiento de mi representada, y tampoco tienen el aval, autorización o mandato para representar a la entidad GABINVEST, S.A. por no ser miembros de Junta Directiva propuestos y electos por el Accionista de la mencionada sociedad." (lo resaltado es nuestro).

OCTAVO: En ese mismo orden de ideas, **GUTIERREZ STRAUSS**, manifestó que:

"d) asimismo (sic), DECLARO, que nunca mi representada, en su calidad de único accionista de la entidad GABINVEST, S.A. ha celebrado Asamblea de Accionista o ha estado informado de ninguna sesión de esta naturaleza VIA TELEFONICA celebrada con fecha veintinueve de abril de dos mil veinte, con los señores Alvaro Almengor en su supuesta calidad de Presidente de GABINVEST, S.A.; así como tampoco ha ordenado la modificación del pacto Social de la entidad GABINVEST, S.A. DE NINGUNA FORMA, por lo que cualquier decisión, nombramiento o disposición realizada por los señores Alvaro Almengor como supuesto Presidente, Manuel Carrasquilla como supuesto Secretario y LIDIA RAMOS como supuesta Tesorera de la entidad GABINVEST, S.A. NO TIENE NINGUN VALOR ALGUNO, y son producto de falsedad en su forma y fondo y cualquier otro delito que corresponda según los actos cometidos." (lo resaltado es nuestro).

NOVENO: El delito de falsedad ideológica también conocido como falsedad histórica, previsto en el anterior artículo 366 del Código Procesal Penal, sanciona a quien incluye o haga incluir en una escritura pública o documento público o auténtico, declaraciones falsas concernientes a un hecho que el documento deba aprobar de modo que pueda resultar perjuicio. En principio señala la doctrina "... se trata de un documento que en su aspecto formal (fecha, firma, sellos signos de autenticidad) es auténtico, se ajusta a la verdad, pero adolece de falsedad por su contenido donde aparecen declaraciones falsas"(GUERRA DE VILLALAZ, Aura Emérita. Compendio de Derecho Penal (Parte Especial), Panamá, 2010, pág.363.



Jurídico objeto de tutela penal, del cual es titular la colectividad misma, y halla concreción en la credibilidad de que gozan aquellos signos, objetos o formas exteriores que constituyen medios de prueba de la creación, modificación o extinción de situaciones jurídicamente relevantes.

DECIMO: Que las acciones desplegadas por los hoy **QUERELLADOS**, constituyeron un perjuicio económico a mi representado, toda vez que hasta la fecha no ha sido posible disponer de la suma de dinero entregada a los precitados **QUERELLADOS**, por lo que estimamos un perjuicio provisional en **DOS MILLONES DE BALBOAS (B/. 2,000.000.00)**.

V. PRUEBAS

- Copia electrónica del Registro público de la Escritura Pública 791 del 16 de enero de 2020 de la Notaría Octava de Circuito de la Provincia de Panamá.
- Copia electrónica de la Escritura Pública 4957 del 29 de abril de 2020 de la Notaría Octava de Circuito de la Provincia de Panamá.
- Certificación de existencia de la Sociedad Anónima **GABINVEST S.A.**
- Certificación de la existencia de la Sociedad Anónima ^{Ltda} ~~XELA EMPRESAS~~ **IESP.**
- Declaración Notarial del Accionista de la Sociedad Anónima **GABINVEST S.A.** en la cual deja claro su no participación en las reuniones aludidas.

VI. SOLICITUD ESPECIAL

- Con carácter de **URGENCIA** Se realice una Inspección Ocular al Registro Público de Panamá, a efectos de corroborar lo aquí externado.
- Con carácter de **URGENCIA** Se oficie al Registro Público de Panamá, a fin de que **SUSPENDAN** provisionalmente las escrituras tachadas de espúreas hasta se esclarezcan los hechos.
- Con carácter de **URGENCIA** Se realice una Inspección Ocular en la Notaría Octava de Circuito del Primer Circuito Judicial de Panamá, a efectos de ubicar la Minuta / Acta de celebración de las reuniones de accionistas llevadas a cabo los días 16 de Enero y 29 de abril de 2020, que posteriormente protocolizaron en las escrituras públicas 791 y 4957 respectivamente.





FUNDAMENTO DE DERECHO: Artículos 220, 221 del Código Penal; 84, 85, 86, 87, 88 y 89 del Código Procesal de Panamá.

Con mi respeto acostumbrado,

Panamá, a la fecha de su presentación,

Licdo. JAVIER A. DE LEON ALMENGOR
ABOGADO.

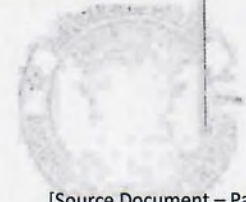
HARALD JOHANNESSEN HALS - QUERELLANTE
CARGO: Director Presidente
LUGAR Y FECHA: GUATEMALA, 18 Enero 2021

En la Ciudad de Guatemala, el dieciocho de enero de dos mil veintuno, como Notario DOY FE, que la firma que antecede es AUTÉNTICA, por haber sido puesta el día de hoy en mi presencia por el señor HARALD JOHANNESSEN HALS, quien es persona de mi anterior conocimiento y quien vuelve a firmar junto conmigo, al ple de la presente acta de legalización de firma.



ANTE MÍ,

LICENCIADO
Jeremías Lutín Castillo
ABOGADO Y NOTARIO





GUATEMALA, C.A.

**ORGANISMO JUDICIAL DE LA REPÚBLICA DE GUATEMALA
ARCHIVO GENERAL DE PROTOCOLOS
REGISTRO ELECTRÓNICO DE NOTARIOS
GUATEMALA, C.A.**

2021-593/AAMELGAR

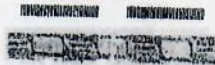
LA INFRASCRITA SUBDIRECTORA DEL ARCHIVO GENERAL DE PROTOCOLOS DEL ORGANISMO JUDICIAL DE LA REPÚBLICA DE GUATEMALA, CERTIFICA: Que la firma de el (la) Notario (a) **JEREMÍAS LUTIN CASTILLO** es AUTÉNTICA, en virtud de ser la que corresponde a el (la) citado (a) notario (a) de conformidad con el Registro treinta mil seiscientos cuarenta y cinco de Folio veintitrés mil setecientos veintinueve del Libro seis-E del Registro Electrónico de Notarios que obra en este Archivo.

La suscrita, no prejuzga ni asume responsabilidad alguna por el contenido ni por la eficacia jurídica del documento, de cuya firma se legaliza.

TARIFA: Q. 150.00 ACUERDO 24-2011 DE LA CORTE SUPREMA DE JUSTICIA. Formulario Electrónico de Ingresos -FEI- 151876003292

Guatemala, dieciocho de enero de dos mil veintiuno.

Licda. Wanda Martínez Bravatti
Coordinador II
Subdirector Metropolitano
Archivo General de Protocolos



7a. AVENIDA 9-20, EDIFICIO JADE, ZONA 9. GUATEMALA, CENTRO AMÉRICA
TELÉFONO: 22905112





República de Guatemala

MINISTERIO DE RELACIONES EXTERIORES

APOSTILLE (Convention de La Haye du 5 octobre 1961)



Código de verificación: **UX29G0**

VERIFICACIÓN EN LÍNEA
La autenticidad de este apostilla puede ser verificada en:
To verify the validity of this apostille, see:
Cette apostille peut être vérifiée à l'adresse suivante:
<https://apostille.minrex.gob.gt>

1. País: República de Guatemala
(country / Pays)

El presente documento público
(this public document / le présent acte public)

2. Ha sido firmado por: WANDA MARTINEZ BRAVATTI
(has been signed by / a été signé par:)

3. Quien actúa en la calidad de: COORDINADOR II SUBDIRECTOR METROPOLITANO
(acting in capacity of / agissant en qualité de:)

4. Y está revestido del sello / timbre de: ARCHIVO GENERAL DE PROTOCOLOS
(Bears the seal / stamp of / est revêtu du sceau / timbre de:)

Certificado Certificate / Attesté

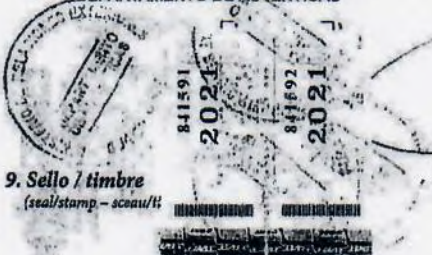
5. En: CIUDAD DE GUATEMALA, GUATEMALA
(at / à:)

6. El día: 18/01/2021
(the / le:)

7. Por: GIOVANI DE PAZ ACEVEDO - JEFE DEL DEPARTAMENTO DE AUTENTICAS
(by / par:)

8. Bajo el número: 2208782021
(number / sous n°:)

9. Sello / timbre
(seal/stamp - sceau/ti)



10. Firma
(signature / signature:)

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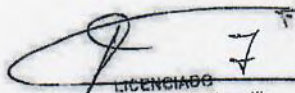
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1 de 2


 LICENCIADO
 Jeremías Lutín Castillo
 ABOGADO Y NOTARIO

13631

ACTA NOTARIAL DE DECLARACIÓN JURADA. En la ciudad de Guatemala, departamento de Guatemala, el tres de diciembre de dos mil veinte, siendo las nueve horas, Yo, Jeremías Lutín Castillo, Notario en ejercicio, me encuentro constituido en la sexta (6ª) avenida "A", ocho - cero cero (8-00) de la zona nueve (9), Edificio Centro Operativo, Penthouse B, de la Ciudad de Guatemala, departamento de Guatemala, a requerimiento del señor **Juan Guillermo Gutiérrez Strauss**, quien manifiesta ser de sesenta y cuatro años de edad, casado, ejecutivo, guatemalteco, con domicilio la República de Canadá, y de tránsito por esta ciudad capital, se identifica con el Documento Personal de Identificación con Código Único de Identificación dos mil quinientos diecisiete, veintiséis mil cincuenta y tres, cero ciento uno (2517260530101), extendido por el Registro Nacional de las Personas de la República de Guatemala, a efecto que por la presente **ACTA NOTARIAL DE DECLARACIÓN JURADA**, haga constar lo siguiente: **PRIMERO:** El señor Juan Guillermo Gutiérrez Strauss, enterado de las penas relativas al delito de perjurio, bajo juramento solemne prestado de conformidad con la ley, DECLARA lo siguiente: a) que actúa en su calidad de Director - Presidente de la entidad XELA ENTERPRISES LTD, entidad constituida e inscrita de conformidad con las leyes de la República de Canadá, Provincia de Ontario, con número de empresa en Ontario un millón doscientos noventa y siete mil quinientos ochenta (1297580); b) que su representada, es única accionista de la entidad GABINVEST, S.A., entidad constituida de conformidad con las leyes de la República de Panamá, inscrita en el Registro Público de Panamá, al folio número ciento diecisiete mil quinientos once (117511); dicha participación accionaria está sustentada con: I) certificado de acción número GI - cero cien (GI-0100) el cual ampara trescientas cuarenta y ocho (348) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD; y II) certificado de acción número GI - cero ciento uno (GI-0101) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A.,

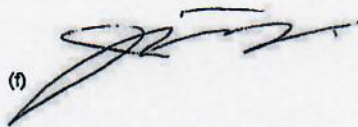


propiedad de XELA ENTERPRISES LTD.; iii) certificado de acción número GI – cero ciento dos (GI-0102) el cual ampara sesenta y cinco (75) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD.; c) Siendo así, DECLARO que mi representada, la entidad XELA ENTERPRISES LTD, no fue notificada o convocada de ninguna forma para participar en la Asamblea de Accionistas de la entidad GABINVEST, S.A., celebrada el dieciséis de enero de dos mil veinte, mediante la cual se dejó sin efecto los nombramientos de la Junta Directiva reconocida de la entidad GABINVEST, S.A., disponiendo en tal sentido, el nombramiento de una nueva junta directiva, presidida por el señor Alvaro Almengor como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera. Dichas personas no son del conocimiento de mi representada, y tampoco tienen el aval, autorización o mandato para representar a la entidad GABINVEST, S.A., por no ser miembros de Junta Directiva propuestos y electos por el Accionista de la mencionada sociedad; d) asimismo DECLARO, que nunca mi representada, en su calidad de único accionista de la entidad GABINVEST, S.A. ha celebrado Asamblea de Accionistas o ha estado informado de ninguna de sesión de esta naturaleza VÍA TELEFÓNICA celebrada con fecha veintinueve de abril de dos mil veinte, con los señores Alvaro Almengor en su supuesta calidad de Presidente de GABINVEST, S.A.; así como tampoco ha ordenado la modificación del pacto Social de la entidad GABINVEST, S.A. DE NINGUNA FORMA, por lo que cualquier decisión, nombramiento o disposición realizada por los señores Alvaro Almengor como supuesto Presidente, MANUEL CARRASQUILLA como supuesto Secretario y LIDIA RAMOS como supuesta Tesorera de la entidad GABINVEST, S.A., NO TIENE VALOR ALGUNO, y son producto de falsedad en su forma y fondo y cualquier otro delito que corresponda según los actos cometidos. **SEGUNDO:** No habiendo nada más que hacer constar, se da por terminada la presente acta notarial en el mismo lugar y fecha cuarenta y cinco minutos después de su



Inicio, la cual se encuentra contenida en dos hojas de papel simple, útil la primera en ambos lados y la segunda en su anverso, a la que le adhiero un timbre notarial de diez quetzales y un timbre fiscal de cincuenta centavos de quetzal. Leído íntegramente lo escrito al requirente, bien impuesto de su contenido, valor y efectos legales, la ratifica, acepta y firma. DOY FE.

DE REG
DEPART
DE AUT
ATEMI

(f) 

Ante mí:





GUATEMALA, C.A.

**ORGANISMO JUDICIAL DE LA REPÚBLICA DE GUATEMALA
ARCHIVO GENERAL DE PROTOCOLOS
REGISTRO ELECTRÓNICO DE NOTARIOS
GUATEMALA, C.A.**

2020-14085/AAMELGAR

LA INFRASCrita SUBDIRECTORA DEL ARCHIVO GENERAL DE PROTOCOLOS DEL ORGANISMO JUDICIAL DE LA REPÚBLICA DE GUATEMALA, CERTIFICA: Que la firma de el (la) Notario (a) **JEREMÍAS LUTIN CASTILLO** es AUTÉNTICA, en virtud de ser la que corresponde a el (la) citado (a) notario (a) de conformidad con el Registro treinta mil seiscientos cuarenta y cinco de Folio veintitrés mil setecientos veintinueve del Libro seis-E del Registro Electrónico de Notarios que obra en este Archivo.

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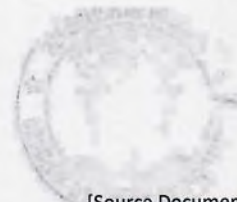
TARIFA: Q. 150.00 ACUERDO 24-2011 DE LA CORTE SUPREMA DE JUSTICIA. Formulario Electrónico de Ingresos -FEI- 175084515584

Guatemala, tres de diciembre de dos mil veinte.

**Licda. Wanda Martínez Bravatti
Coordinador II
Subdirector Metropolitano
Archivo General de Protocolos**



7a. AVENIDA 9-20, EDIFICIO JADE, ZONA 9, GUATEMALA, CENTROAMÉRICA
TELÉFONO: 24267201





Registro Público de Panamá

FIRMADO POR: UMBERTO ELIAS
 PEDRESCHI PIMENTEL
 FECHA: 2021.01.18 11:44:20 -05:00
 MOTIVO: SOLICITUD DE PUBLICIDAD
 LOCALIZACION: PANAMA, PANAMA

CERTIFICADO DE PERSONA JURÍDICA

CON VISTA A LA SOLICITUD

11042/2021 (0) DE FECHA 18/01/2021

QUE LA SOCIEDAD

LISA, S.A.

TIPO DE SOCIEDAD: SOCIEDAD ANONIMA

SE ENCUENTRA REGISTRADA EN (MERCANTIL) FOLIO Nº 117512 (S) DESDE EL VIERNES, 23 DE SEPTIEMBRE DE 1983

- QUE LA SOCIEDAD SE ENCUENTRA VIGENTE

- QUE SUS CARGOS SON:

SUSCRIPTOR: MARIBLANCA STAFF

SUSCRIPTOR: IVAN ROBLES

DIRECTOR / PRESIDENTE: HARALD JOHANNESSEN HALS

DIRECTOR / SECRETARIO: LESTER C. HESS JR.

DIRECTOR / TESORERO: CALVIN KENNETH SHIELDS

DIRECTOR: ALVARO ALMENGOR

DIRECTOR: MANUEL CARRASQUILLA

DIRECTOR: CARL O'SHEA

AGENTE RESIDENTE: HATSTONE ABOGADOS

- QUE LA REPRESENTACIÓN LEGAL LA EJERCERÁ:
 EL PRESIDENTE.

- QUE SU CAPITAL ES DE ACCIONES SIN VALOR
 EL CAPITAL SOCIAL ES DE (500) ACCIONES COMUNES, NOMINATIVAS SIN VALOR NOMINAL.

- QUE SU DURACIÓN ES PERPETUA

- QUE SU DOMICILIO ES PANAMÁ, PROVINCIA PANAMÁ

ENTRADAS PRESENTADAS QUE SE ENCUENTRAN EN PROCESO

NO HAY ENTRADAS PENDIENTES.

RÉGIMEN DE CUSTODIA: CONFORME A LA INFORMACIÓN QUE CONSTA INSCRITA EN ESTE REGISTRO, LA SOCIEDAD OBJETO DEL CERTIFICADO NO SE HA ACOGIDO AL RÉGIMEN DE CUSTODIA.

EXPEDIDO EN LA PROVINCIA DE PANAMÁ EL LUNES, 18 DE ENERO DE 2021A LAS 10:27 A.M..

NOTA: ESTA CERTIFICACIÓN PAGÓ DERECHOS POR UN VALOR DE 30.00 BALBOAS CON EL NÚMERO DE LIQUIDACIÓN 1402832689



Valide su documento electrónico a través del CÓDIGO QR impreso en el pie de página o a través del Identificador Electrónico: 03B7D46-A164-45A4-98C3-A98E279388B
 Registro Público de Panamá - Vía España, frente al Hospital San Fernando
 Apartado Postal 0830 - 1596 Panamá, República de Panamá - (507) 601-6000





Registro Público de Panamá

FIRMADO POR: UMBERTO ELIAS
 PEDRESCHI PIMENTEL
 FECHA: 2021.01.18 11:45:43 -05:00
 MOTIVO: SOLICITUD DE PUBLICIDAD
 LOCALIZACION: PANAMA, PANAMA

CERTIFICADO DE PERSONA JURÍDICA

CON VISTA A LA SOLICITUD
 11060/2021 (0) DE FECHA 18/01/2021
 QUE LA SOCIEDAD

GABINVEST, S.A.
 TIPO DE SOCIEDAD: SOCIEDAD ANONIMA
 SE ENCUENTRA REGISTRADA EN (MERCANTIL) FOLIO N° 117511 (S) DESDE EL VIERNES, 23 DE SEPTIEMBRE DE 1983

- QUE LA SOCIEDAD SE ENCUENTRA VIGENTE

- QUE SUS CARGOS SON:
 SUSCRIPTOR: IVAN ROBLES
 SUSCRIPTOR: MARIBLANCA STAFF

DIRECTOR / PRESIDENTE: ALVARO ALMENGOR
 DIRECTOR / SECRETARIO: MANUEL CARRASQUILLA
 DIRECTOR / TESORERO: LIDIA RAMOS

- QUE LA REPRESENTACIÓN LEGAL LA EJERCERÁ:
 EL PRESIDENTE.

- QUE SU CAPITAL ES DE ACCIONES SIN VALOR NOMINAL
 EL CAPITAL SOCIAL ES DE QUINIENTAS ACCIONES SIN VALOR NOMINAL.

- QUE SU DURACIÓN ES PERPETUA
 - QUE SU DOMICILIO ES PANAMÁ, DISTRITO PANAMÁ, PROVINCIA PANAMÁ

ENTRADAS PRESENTADAS QUE SE ENCUENTRAN EN PROCESO

ENTRADA 79534/2020 (0) DE FECHA 27/02/2020 12:43:10 P.M. NOTARIA NO. 11 PANAMÁ. REGISTRO ACTA DE SOCIEDAD MERCANTIL, REGISTRO CORRECCIÓN DE GENERALES, SERVICIO DERECHOS DE CALIFICACIÓN, SERVICIO DERECHOS DE CALIFICACIÓN

ENTRADA 138886/2020 (0) DE FECHA 22/06/2020 11:58:09 A.M.. SERVICIO MEMORIAL PARA LA DIRECCIÓN DE ASESORÍA LEGAL

ENTRADA 143630/2020 (0) DE FECHA 26/06/2020 01:49:01 P.M. NOTARIA NO. 8 PANAMÁ. REGISTRO ACTO DE SUSCRIPTORES Y MODIFICACIONES O REVOCATORIAS, REGISTRO CORRECCIÓN DE GENERALES, REGISTRO CORRECCIÓN POR CAUSAS IMPUTABLES AL REGISTRO, SERVICIO DERECHOS DE CALIFICACIÓN, SERVICIO DERECHOS DE CALIFICACIÓN

ENTRADA 229251/2020 (0) DE FECHA 23/09/2020 02:19:17 P.M.. SERVICIO MEMORIAL PARA LA DIRECCIÓN DE ASESORÍA LEGAL

RENUNCIA DE AGENTE RESIDENTE: INSCRITO EL DÍA MARTES, 18 DE FEBRERO DE 2020 EN EL NÚMERO DE ENTRADA 67947/2020 (0) HA(N) RENUNCIADO EL/LOS SIGUIENTE(S) AGENTE(S) RESIDENTE(S): ALFARO, FERRER & RAMIREZ .

RÉGIMEN DE CUSTODIA: CONFORME A LA INFORMACIÓN QUE CONSTA INSCRITA EN ESTE REGISTRO, LA SOCIEDAD OBJETO DEL CERTIFICADO NO SE HA ACOGIDO AL RÉGIMEN DE CUSTODIA.

EXPEDIDO EN LA PROVINCIA DE PANAMÁ EL LUNES, 18 DE ENERO DE 2021A LAS 10:35 A.M..

NOTA: ESTA CERTIFICACIÓN PAGÓ DERECHOS POR UN VALOR DE 30.00 BALBOÁS CON EL NÚMERO DE LIQUIDACIÓN 1402832707



Valide su documento electrónico a través del CÓDIGO QR Impreso en el pie de página o a través del Identificador Electrónico: 332EAFDB-EBFC-48B7-9733-9592F9888795
 Registro Público de Panamá - Vía España, Frente al Hospital San Fernando
 Apartado Postal 0830 - 1596 Panamá, República de Panamá - (507) 501-6000



This is Exhibit "U" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

NOTICE OF CROSS-MOTION

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

PROPOSED METHOD OF HEARING: The Motion is to be heard

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

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

In person;

By telephone conference;

[X] By video conference.

at the following location:

330 University Avenue, Toronto, Ontario

THE MOTION IS FOR:

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

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

THE GROUNDS FOR THE MOTION ARE:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

January 18, 2021

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989

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al.
Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF CROSS-MOTION

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Lawyers for the Respondent
Juan Guillermo Gutierrez

This is Exhibit "V" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents

**NOTICE OF MOTION OF BDT INVESTMENTS INC. AND ARTURO'S
TECHNICAL SERVICES INC.**

BDT INVESTMENTS INC. ("BDT") and ARTURO'S TECHNICAL SERVICES INC., ("ATS" and together with BDT, the "Moving Parties") will make a motion to a judge presiding over the Commercial List on a date to be scheduled by judicial videoconference via Zoom or at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order:
 - (a) Authorizing and directing the Receiver to enter into the settlement transaction (the "**Transaction**") contemplated in the settlement proposal

(the “**Proposal**”) substantially in the form attached to the Notice of Motion as Schedule “A”;

- (b) Discharging the Receiver upon execution of the Proposal;
- (c) In the alternative, partially discharging the Receiver, such that its mandate is limited to monitoring the progress of certain litigation in the country of Panama (the “**Panama Litigation**”) managed by BDT; and,
- (d) Such further and other relief as counsel may advise and to this Honourable Court appears just.

THE GROUNDS FOR THE MOTION ARE:

1. BDT is a corporation incorporated pursuant to the laws of Barbados;
2. Lisa S.A. (“**Lisa**”) is a corporation incorporated pursuant to the laws of Panama;
3. Lisa holds 33.33% of the outstanding common shares of Villamorey S.A. (“**Villamorey**”), a corporation incorporated pursuant to the laws of Panama;
4. Since 1999, Lisa and Villamorey have been involved in the Panama Litigation primarily in respect of unpaid dividends payable to Lisa by Villamorey of approximately \$40.8 million USD;
5. BDT is the assignee of all of Lisa’s rights and interests in the Panama Litigation and any proceeds arising therefrom;

6. The Panama Litigation is at an advanced stage such that BDT anticipates recovery of approximately \$14 million USD or more, within a few months or less;
7. The Proposal provides for BDT paying into Court to the credit of this proceeding an amount equal to the amount owing to Castillo Judgment, plus interest and costs, and plus the Receiver's fees and disbursements as approved;
8. The Proposal provides that for the purposes of the Proposal and matters arising out of the Proposal, BDT attorns to the jurisdiction of Ontario;
9. The Proposal is both commercially reasonable and just in the circumstances;
10. The Receiver's contemplated actions are time-consuming, expensive, are of limited value in Ontario;
11. Any electronic information that the Receiver has not yet reviewed will be preserved;
12. None of the matters which the Receiver contemplates investigating are in respect of exigible assets in Ontario;
13. The Receiver is appointed only in relation to property of Xela for the purpose of enforcing the Castillo Judgment;
14. The Receiver is appointed pursuant to s. 101 of the Courts of Justice Act only, and its powers are limited to Ontario;
15. The Appointment Order permits Xela to make a motion to the Court for termination of the receivership upon receipt by Castillo of the Judgment Debt, plus receivership fees and expenses;

16. There is little benefit from the continuation of the receivership in Ontario given the Proposal;
17. The continuation of the receivership will unreasonably increase costs and expenses with little prospect of recovery;
18. It is no longer just and convenient to continue the appointment of the Receiver;
19. Section 101 of the *Courts of Justice Act*, 1990 RSO c C43, as amended;
20. Rule 41.06 of the *Rules of Civil Procedure*, RRO 1990 Reg 194, as amended; and,
21. Such further and other grounds as counsel may advise and this Honourable Court may permit.

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

1. The Affidavit of Andres Gutierrez to be sworn and the exhibits thereto.
2. such further and other material as counsel may advise and this Honourable Court may permit.

February 9, 2021

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Bosch Gutierrez, Dionisio Gutierrez
Mayorga, and Juan Jose Gutierrez
Moyorga

MARGARITA CASTILLO
Applicant

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

NOTICE OF MOTION

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

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

- and -

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

Respondents

SETTLEMENT PROPOSAL

IN CONSIDERATION of KSV Restructuring Inc. (“**KSV**”) in its capacity as court-appointed receiver of Xela Enterprises Ltd. (the “**Receiver**”) agreeing to an order discharging KSV as Receiver, or partially discharging KSV such that its powers are limited to requesting and receiving reports on the status of enforcement efforts and reporting to the Court as required (the “**Limited Receivership Period**”), BDT INVESTMENTS LTD. (“**BDT**”) agrees to the following terms and conditions:

1. BDT shall assign up to an amount sufficient to pay Ms. Castillo’s judgment amount, with interest, plus the costs of the Receiver and its counsel, as approved by the Court (the “**Professional Fees**”), from the proceeds of any and all aspects of the litigation proceedings against Villamorey in Panama (“**Settlement Funds**”) to be paid to the Accountant of the Superior Court of Justice (the “**Accountant**”) to the credit of this proceeding.
2. The Limited Receivership Period, if any, shall terminate, and the Receiver discharged, on the earlier of:
 - a. The payment of Settlement Funds to the Accountant, with the discharge subject to release of the Professional Fees; and,

- b. An order is issued terminating the Limited Receivership Period.
3. During the Limited Receivership Period:
 - a. All documents and data, including the server images in the possession of the technology consultant retained by the Receiver (the “**IT Consultant**”), shall remain preserved by the IT Consultant and not reviewed or examined.
 - b. BDT will make its reasonable best efforts to enforce any orders in Panama and collect the amounts owing to Lisa.
 - c. BDT will cause its counsel to provide monthly reports to the Receiver with respect to the status of the litigation and enforcement steps.
4. If during the Limited Receivership Period, the Receiver is of the opinion that BDT is not prosecuting the litigation in a reasonable manner, then the Receiver may bring a motion to the Court on 10 days’ notice to Juan Gutierrez (c/o Cambridge LLP, ATS (c/o WeirFoulds LLP) and BDT (c/o WeirFoulds LLP, only as agent for service, and provided that BDT shall only be considered to have attorned to Ontario in respect of the settlement proposal).
5. In the event that the Receiver brings such a motion, the Settlement Funds will be deemed to exclude costs relating to such a motion, and any costs of the Receiver if the Limited Receivership Period is terminated and the Receiver is re-vested with its full authority under the original Appointment Order.
6. At any time, if any person pays to the Receiver the amount of the Judgment and the Receiver’s costs, or if the Settlement Funds are received, then the Receiver agrees that any person may move for an order discharging the Receiver, and the Receiver will agree to such discharge.

This is Exhibit "W" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in cursive script, appearing to read "Shane Ramnanan", written in black ink.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

1. I am making this affirmation pursuant to and in compliance with the Order of Justice McEwen of the Ontario Superior Court of Justice dated 10 February 2021 (**the "Order"**). A copy of the Order is attached hereto as **Exhibit "A"**.
2. On February 11, 2021, I affirmed in writing before a commissioner for the taking of oaths that my Affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Vastillo is withdrawn and is not to be used to support the Criminal Complaint ("**Withdrawal Affirmation**"). Attached hereto and marked as **Exhibit "B"** is a true copy of my Affidavit sworn February 11, 2021.
3. On February 11, 2021, I provided a copy of the Order and the Withdrawal Affirmation to Javier Alcides De Leon Almengor, and directed Javier Alcides de Leon Almengor in writing to withdraw the Criminal Complaint. Attached hereto and marked as **Exhibit "C"** is a true copy of my email and letter with attachments that I sent to Javier Alcides de Leon Almengor on February 11, 2021.

4. On February 11, 2021, I provided a copy of the Order and the Withdrawal Affirmation to Harald Johannessen Hals and I directed Mr. Hals in writing to withdraw the Criminal Complaint. Attached hereto and marked as **Exhibit "D"** is a true copy of my email, letter and attachments that were sent to Mr. Hal on February 11, 2021.

5. On the same day, a letter was sent via courier to the public prosecutor's office in Panama with a copy of the Complaint Withdrawal. I do not have the email address for the Public Prosecutor's office in Panama. Attached hereto and marked as **Exhibit "E"** is a true copy of the letter and attachments that I sent to the Public Prosecutor and the DHL courier slip.

6. I have taken and will continue to take all steps within my control to effect the withdrawal of the Criminal Complaint and my Affidavit sworn on December 3, 2020.

7. I swear this Affidavit in compliance with paragraph 8 of the Order and for no other or improper purpose.

SWORN BEFORE ME via video conference at the City of Toronto, in the Province of Ontario, before me on February 12, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO# 70332Q)



JUAN GUILLERMO GUTIERREZ

This is Exhibit "A" referred to in the Affidavit of Juan Guillermo Gutierrez sworn by Juan Guillermo Gutierrez at the City of Toronto, in the Province of Ontario, before me on February 12, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

TUESDAY, THE 10TH
DAY OF FEBRUARY , 2021

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

(Withdrawal of Affidavit and Criminal Complaint in Panama)

THIS MOTION for interim relief made by KSV Restructuring Inc. (“KSV”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “Receiver”), without security, of the assets, undertaking and property of Xela Enterprises Ltd. (the “Company”) for an order compelling Juan Guillermo Gutierrez to withdraw a declaration (affirmed in Guatemala) and a criminal complaint (filed against the Receiver’s representatives in Panama), among other things,

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 Motion Record of the Receiver dated February 9, 2021 and the materials filed, and on hearing the submissions of the lawyers for the Receiver and lawyers for Juan Guillermo Gutierrez and in the presence of counsel for the Applicant, counsel for the Avicola Group and certain individuals, counsel for Arturo's Technical Services Ltd. and BDT Investments Inc. and Panamanian counsel for the Receiver,

1. **THIS COURT ORDERS** that the time for service of this Motion and the Motion Record herein are properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Harald Johannessen Hals ("Hals") shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021, withdraw the criminal complaint against Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos made to the Public's Prosecutor's Office in Panama (File 20210000361) (the "Criminal Complaint").
3. **THIS COURT ORDERS** that Hals shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021:
 - (a) direct Javier Alcides De Leon Almengor in writing to withdraw the Criminal Complaint;

- (b) execute a written withdrawal of the Criminal Complaint witnessed and affirmed before a Notary Public or commissioner for taking oaths (the “Complaint Withdrawal”);
 - (c) provide the public prosecutor’s office in Panama with a copy of the Complaint Withdrawal; and
 - (d) provide a copy of this Order and the Complaint Withdrawal Javier Alcides de Leon Almengor.
4. **THIS COURT ORDERS** that Hals shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint.
5. **THIS COURT ORDERS** that Hals shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 3 above have been completed, together with copies of all written records of the steps having been taken.
6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez, also known as Juan Guillermo Gutierrez Strauss (“Juan Guillermo Gutierrez”), shall, by 5 p.m. (EST) on Thursday, February 11, 2021:
- (a) affirm in writing before a Notary Public or commissioner for the taking of oaths that his affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Castillo (the “Affidavit”) is withdrawn and is not to be used to support the Criminal Complaint (the “Withdrawal Affirmation”);
 - (b) provide the public prosecutor’s office in Panama with the Withdrawal Affirmation;

- (c) provide a copy of this Order to the public prosecutor's office in Panama;
- (d) provide a copy of this Order and the Withdrawal Affirmation to Hals and Javier Alcides de Leon Almengor; and
- (e) direct Hals and Javier Alcides de Leon Almengor in writing to withdraw the Criminal Complaint.

7. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Affidavit.

8. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 6 above have been completed, together with copies of all written records of the steps having been taken.

9. **THIS COURT ORDERS** that no person with notice of the Order, including but not limited to Hals and Juan Guillermo Gutierrez, shall take any steps to advance the Criminal Complaint or to participate in any way in the Criminal Complaint or proceedings arising out of the Criminal Complaint and/or any other criminal proceedings against Alvaro Almengor, Manuel Carrasquilla, Lidia Ramos or any other agent or representative of the Receiver without leave of this Court.

10. **THIS COURT ORDERS** that this Order is without prejudice to the right of Hals or Juan Guillermo Gutierrez to return to this Court on at least 4 days notice to seek leave of this Court to file proceedings in Panama.

11. **THIS COURT ORDERS** that this Order shall be in full force in effect immediately once signed without the need to be entered with the Court.

12. **THIS COURT ORDERS** that the costs of this motion for interim relief is reserved to hearing of the balance of the Receiver's motion to be scheduled.

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

A handwritten signature in black ink, appearing to read 'McEwen', is written above a horizontal line. The signature is stylized and cursive.

(Signature of Judge)

1010

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
(Withdrawal of Affidavit and Criminal Complaint)

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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130 Adelaide Street West, Suite 2600

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Tel: (416) 865-2926

Derek Knoke (75555E)

dknoke@litigate.com

Tel: (416) 865-3018

AIRD & BERLIS LLP

Brookfield Place

181 Bay Street, Suite 1800

Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

This is Exhibit "B" referred to in the Affidavit of Juan Guillermo Gutierrez sworn by Juan Guillermo Gutierrez at the City of Toronto, in the Province of Ontario, before me on February 12, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

1. I am making this affirmation pursuant to and in compliance with the Order of Justice McEwen of the Ontario Superior Court of Justice dated 10 February 2021 (**the "Order"**). A copy of the Order is attached hereto as **Exhibit "A"**.
2. The Order relates to the criminal complaint in Panama City by Harald Johannessen Hals dated 20 January 2021, entitled "QUERRELLA PENAL, EN CONTRA DE ALVARO ALMENGOR, MANUEL CARRASQUILLA Y CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE, POR LA SUPUESTA COMISION DEL DELITO CONTRA LA FE PUBLICA (FALSEDAD IDEOLOGICA) EN PERJUICIO DE GABINVEST S.A." (the "**Criminal Complaint**").
3. The Order relates to the sworn statement I made on 3 December 2020 (**the "Sworn Statement"**), concerning the Criminal Complaint. A copy of the Sworn Statement is attached hereto as **Exhibit "B"**.

4. In compliance with the Order, I hereby withdraw the Sworn Statement and any reliance that may have been placed upon it in support of the criminal complaint.

SWORN BEFORE ME via video conference at the City of Toronto, in the Province of Ontario, before me on February 11, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO# 70332Q)



JUAN GUILLERMO GUTIERREZ

EXHIBIT A

This is Exhibit "A" referred to in the Affidavit of Juan Guillermo Gutierrez sworn via videoconference on February 11, 2021



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

TUESDAY, THE 10TH
DAY OF FEBRUARY , 2021

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
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Respondents

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

ORDER

(Withdrawal of Affidavit and Criminal Complaint in Panama)

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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 Motion Record of the Receiver dated February 9, 2021 and the materials filed, and on hearing the submissions of the lawyers for the Receiver and lawyers for Juan Guillermo Gutierrez and in the presence of counsel for the Applicant, counsel for the Avicola Group and certain individuals, counsel for Arturo's Technical Services Ltd. and BDT Investments Inc. and Panamanian counsel for the Receiver,

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

2. **THIS COURT ORDERS** that Harald Johannessen Hals ("Hals") shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021, withdraw the criminal complaint against Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos made to the Public's Prosecutor's Office in Panama (File 20210000361) (the "Criminal Complaint").

3. **THIS COURT ORDERS** that Hals shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021:
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- (a) affirm in writing before a Notary Public or commissioner for the taking of oaths that his affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Castillo (the “Affidavit”) is withdrawn and is not to be used to support the Criminal Complaint (the “Withdrawal Affirmation”);
 - (b) provide the public prosecutor’s office in Panama with the Withdrawal Affirmation;

- (c) provide a copy of this Order to the public prosecutor's office in Panama;
- (d) provide a copy of this Order and the Withdrawal Affirmation to Hals and Javier Alcides de Leon Almengor; and
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10. **THIS COURT ORDERS** that this Order is without prejudice to the right of Hals or Juan Guillermo Gutierrez to return to this Court on at least 4 days notice to seek leave of this Court to file proceedings in Panama.

11. **THIS COURT ORDERS** that this Order shall be in full force in effect immediately once signed without the need to be entered with the Court.

12. **THIS COURT ORDERS** that the costs of this motion for interim relief is reserved to hearing of the balance of the Receiver's motion to be scheduled.

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

A handwritten signature in black ink, appearing to read 'McEwen', is written above a horizontal line.

(Signature of Judge)

1021

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
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ORDER
(Withdrawal of Affidavit and Criminal Complaint)

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

Barristers

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Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

EXHIBIT B

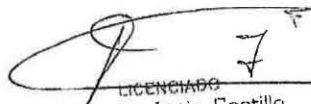
This is Exhibit "B" referred to in the Affidavit of Juan Guillermo Gutierrez sworn via videoconference on February 11, 2021



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

1 de 2


 LICENCIADO
 Jeremías Lutín Castillo
 ABOGADO Y NOTARIO

63631

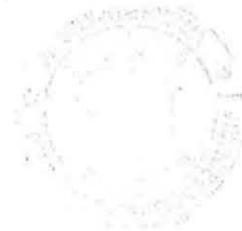


MINISTERIO

ACTA NOTARIAL DE DECLARACIÓN JURADA. En la ciudad de Guatemala, departamento de Guatemala, el tres de diciembre de dos mil veinte, siendo las nueve horas, Yo, **Jeremías Lutín Castillo**, Notario en ejercicio, me encuentro constituido en la sexta (6ª) avenida "A", ocho - cero cero (8-00) de la zona nueve (9), Edificio Centro Operativo, Penthouse B, de la Ciudad de Guatemala, departamento de Guatemala, a requerimiento del señor **Juan Guillermo Gutiérrez Strauss**, quien manifiesta ser de sesenta y cuatro años de edad, casado, ejecutivo, guatemalteco, con domicilio la República de Canadá, y de tránsito por esta ciudad capital, se identifica con el Documento Personal de Identificación con Código Único de Identificación dos mil quinientos diecisiete, veintiséis mil cincuenta y tres, cero ciento uno (2517260530101), extendido por el Registro Nacional de las Personas de la República de Guatemala, a efecto que por la presente **ACTA NOTARIAL DE DECLARACIÓN JURADA**, haga constar lo siguiente: **PRIMERO:** El señor Juan Guillermo Gutiérrez Strauss, enterado de las penas relativas al delito de perjurio, bajo juramento solemne prestado de conformidad con la ley, **DECLARA** lo siguiente: **a)** que actúa en su calidad de Director - Presidente de la entidad XELA ENTERPRISES LTD, entidad constituida e inscrita de conformidad con las leyes de la República de Canadá, Provincia de Ontario, con número de empresa en Ontario un millón doscientos noventa y siete mil quinientos ochenta (1297580); **b)** que su representada, es única accionista de la entidad GABINVEST, S.A., entidad constituida de conformidad con las leyes de la República de Panamá, inscrita en el Registro Público de Panamá, al folio número ciento diecisiete mil quinientos once (117511); dicha participación accionaria está sustentada con: **i)** certificado de acción número GI - cero cien (GI-0100) el cual ampara trescientas cuarenta y ocho (348) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD; y **ii)** certificado de acción número GI - cero ciento uno (GI-0101) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A.,

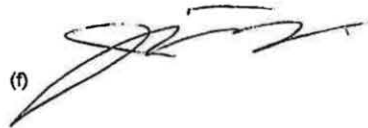


propiedad de XELA ENTERPRISES LTD.; iii) certificado de acción número GI – cero ciento dos (GI-0102) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD.; c) Siendo así, DECLARO que mi representada, la entidad XELA ENTERPRISES LTD, no fue notificada o convocada de ninguna forma para participar en la Asamblea de Accionistas de la entidad GABINVEST, S.A., celebrada el dieciséis de enero de dos mil veinte, mediante la cual se dejó sin efecto los nombramientos de la Junta Directiva reconocida de la entidad GABINVEST, S.A., disponiendo en tal sentido, el nombramiento de una nueva junta directiva, presidida por el señor Alvaro Almengor como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera. Dichas personas no son del conocimiento de mi representada, y tampoco tienen el aval, autorización o mandato para representar a la entidad GABINVEST, S.A., por no ser miembros de Junta Directiva propuestos y electos por el Accionista de la mencionada sociedad; d) asimismo DECLARO, que nunca mi representada, en su calidad de único accionista de la entidad GABINVEST, S.A. ha celebrado Asamblea de Accionistas o ha estado informado de ninguna de sesión de esta naturaleza VÍA TELEFÓNICA celebrada con fecha veintinueve de abril de dos mil veinte, con los señores Alvaro Almengor en su supuesta calidad de Presidente de GABINVEST, S.A.; así como tampoco ha ordenado la modificación del pacto Social de la entidad GABINVEST, S.A. DE NINGUNA FORMA, por lo que cualquier decisión, nombramiento o disposición realizada por los señores Alvaro Almengor como supuesto Presidente, MANUEL CARRASQUILLA como supuesto Secretario y LIDIA RAMOS como supuesta Tesorera de la entidad GABINVEST, S.A., NO TIENE VALOR ALGUNO, y son producto de falsedad en su forma y fondo y cualquier otro delito que corresponda según los actos cometidos. **SEGUNDO:** No habiendo nada más que hacer constar se da por terminada la presente acta notarial en el mismo lugar y fecha cuarenta y cinco minutos después de su

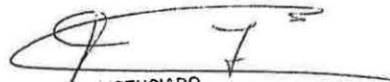


1 de 2.

Inicio, la cual se encuentra contenida en dos hojas de papel simple, útil la primera en ambos lados y la segunda en su anverso, a la que le adhiero un timbre notarial de diez quetzales y un timbre fiscal de cincuenta centavos de quetzal. Leído íntegramente lo escrito al requirente, bien impuesto de su contenido, valor y efectos legales, la ratifica, acepta y firma. DOY FE.

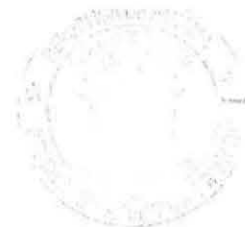
(f) 

Ante mí:


LICENCIADO
Jeremías Lutín Castillo
ABOGADO Y NOTARIO



DE REG
EPART
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1027

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

Chris Macleod (LSUC# 45723M)
cmacleod@cambridgellp.com
Tel: 647.346.6696

N. Joan Kasozi (LSUC# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent,
Juan Guillermo Gutierrez

This is Exhibit "C" referred to in the Affidavit of Juan Guillermo Gutierrez sworn by Juan Guillermo Gutierrez at the City of Toronto, in the Province of Ontario, before me on February 12, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

1029

Amanda Masuku

From: Juan Gutierrez <JGutierrez@arturos.com>
Sent: February 11, 2021 7:23 PM
To: javierdeleon0873@hotmail.com
Cc: Chris Macleod
Subject: Letter re Criminal Complaint.
Attachments: (2021-02-11) Letter to Mr. Almengor.pdf

Please see attached,

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

1030

Mr. Javier Alcides de León Almengor
Avenida Ricardo Alfaro
Edificio P.H. Century Tower
Piso 19, Oficina 1912
Panama City, Panama

Javierdeleon0973@hotmail.com

VIA DHL and EMAIL

11 February 2021

Dear Mr. Alcides de León:

Attached as Annex A is a copy of an Order entered yesterday by Justice McEwen, the judge presiding over the receivership proceedings in Toronto (the "Order"). The Order requires withdrawal of the criminal complaint dated 20 January 2021, entitled "QUERRELLA PENAL, EN CONTRA DE ALVARO ALMENGOR, MANUEL CARRASQUILLA Y CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE, POR LA SUPUESTA COMISION DEL DELITO CONTRA LA FE PUBLICA (FALSEDAD IDEOLOGICA) EN PERJUICIO DE GABINVEST S.A." (the "Criminal Complaint").

In accordance with the Order, I have today executed an affirmation (the "Affirmation") withdrawing my sworn statement dated 3 December 2020 (the "Sworn Statement") and any reliance on it in support of the Criminal Complaint. A copy of the Affirmation is attached as Annex B. A copy of the Sworn Statement is attached as Annex C.

Further, as required by the Order, I am hereby directing you to withdraw the Criminal Complaint.

Thank you for your immediate attention to this matter.



Juan Guillermo Gutierrez

ANNEX A

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

TUESDAY, THE 10TH
DAY OF FEBRUARY , 2021

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

(Withdrawal of Affidavit and Criminal Complaint in Panama)

THIS MOTION for interim relief made by KSV Restructuring Inc. (“KSV”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “Receiver”), without security, of the assets, undertaking and property of Xela Enterprises Ltd. (the “Company”) for an order compelling Juan Guillermo Gutierrez to withdraw a declaration (affirmed in Guatemala) and a criminal complaint (filed against the Receiver’s representatives in Panama), among other things,

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 Motion Record of the Receiver dated February 9, 2021 and the materials filed, and on hearing the submissions of the lawyers for the Receiver and lawyers for Juan Guillermo Gutierrez and in the presence of counsel for the Applicant, counsel for the Avicola Group and certain individuals, counsel for Arturo's Technical Services Ltd. and BDT Investments Inc. and Panamanian counsel for the Receiver,

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

2. **THIS COURT ORDERS** that Harald Johannessen Hals ("Hals") shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021, withdraw the criminal complaint against Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos made to the Public's Prosecutor's Office in Panama (File 20210000361) (the "Criminal Complaint").

3. **THIS COURT ORDERS** that Hals shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021:
 - (a) direct Javier Alcides De Leon Almengor in writing to withdraw the Criminal Complaint;

- (b) execute a written withdrawal of the Criminal Complaint witnessed and affirmed before a Notary Public or commissioner for taking oaths (the “Complaint Withdrawal”);
 - (c) provide the public prosecutor’s office in Panama with a copy of the Complaint Withdrawal; and
 - (d) provide a copy of this Order and the Complaint Withdrawal Javier Alcides de Leon Almengor.
4. **THIS COURT ORDERS** that Hals shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint.
5. **THIS COURT ORDERS** that Hals shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 3 above have been completed, together with copies of all written records of the steps having been taken.
6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez, also known as Juan Guillermo Gutierrez Strauss (“Juan Guillermo Gutierrez”), shall, by 5 p.m. (EST) on Thursday, February 11, 2021:
- (a) affirm in writing before a Notary Public or commissioner for the taking of oaths that his affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Castillo (the “Affidavit”) is withdrawn and is not to be used to support the Criminal Complaint (the “Withdrawal Affirmation”);
 - (b) provide the public prosecutor’s office in Panama with the Withdrawal Affirmation;

- (c) provide a copy of this Order to the public prosecutor's office in Panama;
- (d) provide a copy of this Order and the Withdrawal Affirmation to Hals and Javier Alcides de Leon Almengor; and
- (e) direct Hals and Javier Alcides de Leon Almengor in writing to withdraw the Criminal Complaint.

7. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Affidavit.

8. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 6 above have been completed, together with copies of all written records of the steps having been taken.

9. **THIS COURT ORDERS** that no person with notice of the Order, including but not limited to Hals and Juan Guillermo Gutierrez, shall take any steps to advance the Criminal Complaint or to participate in any way in the Criminal Complaint or proceedings arising out of the Criminal Complaint and/or any other criminal proceedings against Alvaro Almengor, Manuel Carrasquilla, Lidia Ramos or any other agent or representative of the Receiver without leave of this Court.

10. **THIS COURT ORDERS** that this Order is without prejudice to the right of Hals or Juan Guillermo Gutierrez to return to this Court on at least 4 days notice to seek leave of this Court to file proceedings in Panama.

11. **THIS COURT ORDERS** that this Order shall be in full force in effect immediately once signed without the need to be entered with the Court.

12. **THIS COURT ORDERS** that the costs of this motion for interim relief is reserved to hearing of the balance of the Receiver's motion to be scheduled.

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

A handwritten signature in black ink, appearing to read 'McEwen', is written above a horizontal line.

(Signature of Judge)

1037

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
(Withdrawal of Affidavit and Criminal Complaint)

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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Email: kplunkett@airdberlis.com

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Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

ANNEX B

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

1. I am making this affirmation pursuant to and in compliance with the Order of Justice McEwen of the Ontario Superior Court of Justice dated 10 February 2021 (**the "Order"**). A copy of the Order is attached hereto as **Exhibit "A"**.
2. The Order relates to the criminal complaint in Panama City by Harald Johannessen Hals dated 20 January 2021, entitled "QUERRELLA PENAL, EN CONTRA DE ALVARO ALMENGOR, MANUEL CARRASQUILLA Y CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE, POR LA SUPUESTA COMISION DEL DELITO CONTRA LA FE PUBLICA (FALSEDAD IDEOLOGICA) EN PERJUICIO DE GABINVEST S.A." (the "**Criminal Complaint**").
3. The Order relates to the sworn statement I made on 3 December 2020 (**the "Sworn Statement"**), concerning the Criminal Complaint. A copy of the Sworn Statement is attached hereto as **Exhibit "B"**.

4. In compliance with the Order, I hereby withdraw the Sworn Statement and any reliance that may have been placed upon it in support of the criminal complaint.

SWORN BEFORE ME via video conference at the City of Toronto, in the Province of Ontario, before me on February 11, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO# 70332Q)



JUAN GUILLERMO GUTIERREZ

EXHIBIT A

This is Exhibit "A" referred to in the Affidavit of Juan Guillermo Gutierrez sworn via videoconference on February 11, 2021



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

TUESDAY, THE 10TH
DAY OF FEBRUARY , 2021

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

(Withdrawal of Affidavit and Criminal Complaint in Panama)

THIS MOTION for interim relief made by KSV Restructuring Inc. (“KSV”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “Receiver”), without security, of the assets, undertaking and property of Xela Enterprises Ltd. (the “Company”) for an order compelling Juan Guillermo Gutierrez to withdraw a declaration (affirmed in Guatemala) and a criminal complaint (filed against the Receiver’s representatives in Panama), among other things,

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 Motion Record of the Receiver dated February 9, 2021 and the materials filed, and on hearing the submissions of the lawyers for the Receiver and lawyers for Juan Guillermo Gutierrez and in the presence of counsel for the Applicant, counsel for the Avicola Group and certain individuals, counsel for Arturo's Technical Services Ltd. and BDT Investments Inc. and Panamanian counsel for the Receiver,

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

2. **THIS COURT ORDERS** that Harald Johannessen Hals ("Hals") shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021, withdraw the criminal complaint against Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos made to the Public's Prosecutor's Office in Panama (File 20210000361) (the "Criminal Complaint").

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- (b) execute a written withdrawal of the Criminal Complaint witnessed and affirmed before a Notary Public or commissioner for taking oaths (the “Complaint Withdrawal”);
 - (c) provide the public prosecutor’s office in Panama with a copy of the Complaint Withdrawal; and
 - (d) provide a copy of this Order and the Complaint Withdrawal Javier Alcides de Leon Almengor.
4. **THIS COURT ORDERS** that Hals shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint.
5. **THIS COURT ORDERS** that Hals shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 3 above have been completed, together with copies of all written records of the steps having been taken.
6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez, also known as Juan Guillermo Gutierrez Strauss (“Juan Guillermo Gutierrez”), shall, by 5 p.m. (EST) on Thursday, February 11, 2021:
- (a) affirm in writing before a Notary Public or commissioner for the taking of oaths that his affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Castillo (the “Affidavit”) is withdrawn and is not to be used to support the Criminal Complaint (the “Withdrawal Affirmation”);
 - (b) provide the public prosecutor’s office in Panama with the Withdrawal Affirmation;

- (c) provide a copy of this Order to the public prosecutor's office in Panama;
- (d) provide a copy of this Order and the Withdrawal Affirmation to Hals and Javier Alcides de Leon Almengor; and
- (e) direct Hals and Javier Alcides de Leon Almengor in writing to withdraw the Criminal Complaint.

7. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Affidavit.

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9. **THIS COURT ORDERS** that no person with notice of the Order, including but not limited to Hals and Juan Guillermo Gutierrez, shall take any steps to advance the Criminal Complaint or to participate in any way in the Criminal Complaint or proceedings arising out of the Criminal Complaint and/or any other criminal proceedings against Alvaro Almengor, Manuel Carrasquilla, Lidia Ramos or any other agent or representative of the Receiver without leave of this Court.

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

A handwritten signature in black ink, appearing to read 'McEwen', is written above a horizontal line.

(Signature of Judge)

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISE LTD. et al.
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

ORDER
(Withdrawal of Affidavit and Criminal Complaint)

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

EXHIBIT B

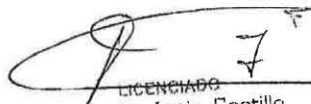
This is Exhibit "B" referred to in the Affidavit of Juan Guillermo Gutierrez sworn via videoconference on February 11, 2021



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

1 de 2


 LICENCIADO
 Jeremías Lutín Castillo
 ABOGADO Y NOTARIO

63631

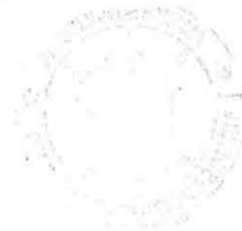


MINISTERIO

ACTA NOTARIAL DE DECLARACIÓN JURADA. En la ciudad de Guatemala, departamento de Guatemala, el tres de diciembre de dos mil veinte, siendo las nueve horas, Yo, **Jeremías Lutín Castillo**, Notario en ejercicio, me encuentro constituido en la sexta (6ª) avenida "A", ocho - cero cero (8-00) de la zona nueve (9), Edificio Centro Operativo, Penthouse B, de la Ciudad de Guatemala, departamento de Guatemala, a requerimiento del señor **Juan Guillermo Gutiérrez Strauss**, quien manifiesta ser de sesenta y cuatro años de edad, casado, ejecutivo, guatemalteco, con domicilio la República de Canadá, y de tránsito por esta ciudad capital, se identifica con el Documento Personal de Identificación con Código Único de Identificación dos mil quinientos diecisiete, veintiséis mil cincuenta y tres, cero ciento uno (2517260530101), extendido por el Registro Nacional de las Personas de la República de Guatemala, a efecto que por la presente **ACTA NOTARIAL DE DECLARACIÓN JURADA**, haga constar lo siguiente: **PRIMERO:** El señor Juan Guillermo Gutiérrez Strauss, enterado de las penas relativas al delito de perjurio, bajo juramento solemne prestado de conformidad con la ley, **DECLARA** lo siguiente: **a)** que actúa en su calidad de Director - Presidente de la entidad XELA ENTERPRISES LTD, entidad constituida e inscrita de conformidad con las leyes de la República de Canadá, Provincia de Ontario, con número de empresa en Ontario un millón doscientos noventa y siete mil quinientos ochenta (1297580; **b)** que su representada, es única accionista de la entidad GABINVEST, S.A., entidad constituida de conformidad con las leyes de la República de Panamá, inscrita en el Registro Público de Panamá, al folio número ciento diecisiete mil quinientos once (117511); dicha participación accionaria está sustentada con: **i)** certificado de acción número GI - cero cien (GI-0100) el cual ampara trescientas cuarenta y ocho (348) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD; y **ii)** certificado de acción número GI - cero ciento uno (GI-0101) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A.,

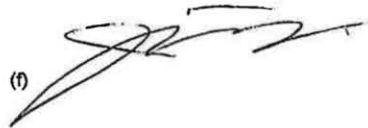


propiedad de XELA ENTERPRISES LTD.; iii) certificado de acción número GI – cero ciento dos (GI-0102) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD.; c) Siendo así, DECLARO que mi representada, la entidad XELA ENTERPRISES LTD, no fue notificada o convocada de ninguna forma para participar en la Asamblea de Accionistas de la entidad GABINVEST, S.A., celebrada el dieciséis de enero de dos mil veinte, mediante la cual se dejó sin efecto los nombramientos de la Junta Directiva reconocida de la entidad GABINVEST, S.A., disponiendo en tal sentido, el nombramiento de una nueva junta directiva, presidida por el señor Alvaro Almengor como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera. Dichas personas no son del conocimiento de mi representada, y tampoco tienen el aval, autorización o mandato para representar a la entidad GABINVEST, S.A., por no ser miembros de Junta Directiva propuestos y electos por el Accionista de la mencionada sociedad; d) asimismo DECLARO, que nunca mi representada, en su calidad de único accionista de la entidad GABINVEST, S.A. ha celebrado Asamblea de Accionistas o ha estado informado de ninguna de sesión de esta naturaleza VÍA TELEFÓNICA celebrada con fecha veintinueve de abril de dos mil veinte, con los señores Alvaro Almengor en su supuesta calidad de Presidente de GABINVEST, S.A.; así como tampoco ha ordenado la modificación del pacto Social de la entidad GABINVEST, S.A. DE NINGUNA FORMA, por lo que cualquier decisión, nombramiento o disposición realizada por los señores Alvaro Almengor como supuesto Presidente, MANUEL CARRASQUILLA como supuesto Secretario y LIDIA RAMOS como supuesta Tesorera de la entidad GABINVEST, S.A., NO TIENE VALOR ALGUNO, y son producto de falsedad en su forma y fondo y cualquier otro delito que corresponda según los actos cometidos. **SEGUNDO:** No habiendo nada más que hacer constar se da por terminada la presente acta notarial en el mismo lugar y fecha cuarenta y cinco minutos después de su

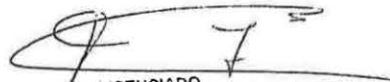


1 de 2.

Inicio, la cual se encuentra contenida en dos hojas de papel simple, útil la primera en ambos lados y la segunda en su anverso, a la que le adhiero un timbre notarial de diez quetzales y un timbre fiscal de cincuenta centavos de quetzal. Leído íntegramente lo escrito al requirente, bien impuesto de su contenido, valor y efectos legales, la ratifica, acepta y firma. DOY FE.

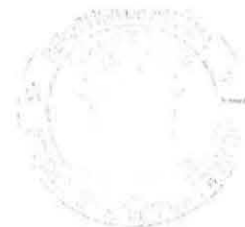
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Ante mí:


LICENCIADO
Jeremías Lutín Castillo
ABOGADO Y NOTARIO



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E AUT
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1054

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

Chris Macleod (LSUC# 45723M)
cmacleod@cambridgellp.com
Tel: 647.346.6696

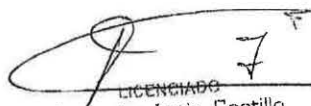
N. Joan Kasozi (LSUC# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent,
Juan Guillermo Gutierrez

ANNEX C

1 de 2


 LICENCIADO
 Jeremías Lutín Castillo
 ABOGADO Y NOTARIO

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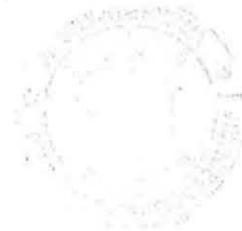
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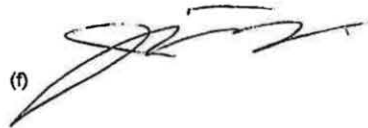


propiedad de XELA ENTERPRISES LTD.; iii) certificado de acción número GI – cero ciento dos (GI-0102) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD.; c) Siendo así, DECLARO que mi representada, la entidad XELA ENTERPRISES LTD, no fue notificada o convocada de ninguna forma para participar en la Asamblea de Accionistas de la entidad GABINVEST, S.A., celebrada el dieciséis de enero de dos mil veinte, mediante la cual se dejó sin efecto los nombramientos de la Junta Directiva reconocida de la entidad GABINVEST, S.A., disponiendo en tal sentido, el nombramiento de una nueva junta directiva, presidida por el señor Alvaro Almengor como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera. Dichas personas no son del conocimiento de mi representada, y tampoco tienen el aval, autorización o mandato para representar a la entidad GABINVEST, S.A., por no ser miembros de Junta Directiva propuestos y electos por el Accionista de la mencionada sociedad; d) asimismo DECLARO, que nunca mi representada, en su calidad de único accionista de la entidad GABINVEST, S.A. ha celebrado Asamblea de Accionistas o ha estado informado de ninguna de sesión de esta naturaleza VÍA TELEFÓNICA celebrada con fecha veintinueve de abril de dos mil veinte, con los señores Alvaro Almengor en su supuesta calidad de Presidente de GABINVEST, S.A.; así como tampoco ha ordenado la modificación del pacto Social de la entidad GABINVEST, S.A. DE NINGUNA FORMA, por lo que cualquier decisión, nombramiento o disposición realizada por los señores Alvaro Almengor como supuesto Presidente, MANUEL CARRASQUILLA como supuesto Secretario y LIDIA RAMOS como supuesta Tesorera de la entidad GABINVEST, S.A., NO TIENE VALOR ALGUNO, y son producto de falsedad en su forma y fondo y cualquier otro delito que corresponda según los actos cometidos. **SEGUNDO:** No habiendo nada más que hacer constar se da por terminada la presente acta notarial en el mismo lugar y fecha cuarenta y cinco minutos después de su

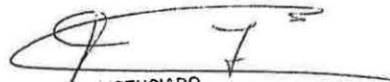


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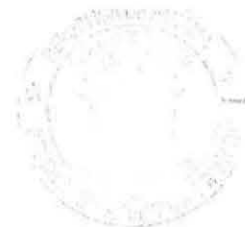
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Ante mí:


LICENCIADO
Jeremías Lutín Castillo
ABOGADO Y NOTARIO



DE REG
PART
DE AUT
MATEM



This is Exhibit "D" referred to in the Affidavit of Juan Guillermo Gutierrez sworn by Juan Guillermo Gutierrez at the City of Toronto, in the Province of Ontario, before me on February 12, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

Amanda Masuku

Subject: FW: Letter re Criminal Complaint
Attachments: (2021-02-11) Letter to Mr. Halls.pdf

From: "jgutierrez@arturos.com" <JGutierrez@arturos.com>
Date: Thursday, February 11, 2021 at 6:44 PM
To: Harald L <H_Johannessen@granadavalley.com>
Cc: Chris MacLeod <cmacleod@cambridgellp.com>
Subject: Letter re Criminal Complaint

Please see attached

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Amanda Masuku

From: Juan Gutierrez <JGutierrez@arturos.com>
Sent: February 11, 2021 6:36 PM
To: Harald Johannessen
Cc: Chris Macleod
Subject: Letter re Criminal Complaint
Attachments: (2021-02-11) Letter to Mr. Halls.pdf

Please see attached letter.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

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

hjohannessen@granadavalley.com

VIA DHL and EMAIL

11 February 2021

Dear Harald:

Attached as Annex A is a copy of an Order entered yesterday by Justice McEwen, the judge presiding over the receivership proceedings in Toronto (the "Order"). The Order calls for withdrawal of the criminal complaint dated 20 January 2021, entitled "QUERELLA PENAL, EN CONTRA DE ALVARO ALMENGOR, MANUEL CARRASQUILLA Y CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE, POR LA SUPUESTA COMISION DEL DELITO CONTRA LA FE PUBLICA (FALSEDAD IDEOLOGICA) EN PERJUICIO DE GABINVEST S.A." (the "Criminal Complaint").

In accordance with the Order, I have today executed an affirmation (the "Affirmation") withdrawing my sworn statement dated 3 December 2020 (the "Sworn Statement") and any reliance upon it in support of the Criminal Complaint. A copy of the Affirmation is attached as Annex B.

The Order also requires you to withdraw the Criminal Complaint. Consequently, I am hereby directing you to take whatever steps are within your power to effect a withdrawal the Criminal Complaint, and to comply in full with those portions of the Order that apply to you.

Thank you for your immediate attention to this matter.



Juan Guillermo Gutierrez

ANNEX A

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

TUESDAY, THE 10TH
DAY OF FEBRUARY , 2021

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

(Withdrawal of Affidavit and Criminal Complaint in Panama)

THIS MOTION for interim relief made by KSV Restructuring Inc. (“KSV”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “Receiver”), without security, of the assets, undertaking and property of Xela Enterprises Ltd. (the “Company”) for an order compelling Juan Guillermo Gutierrez to withdraw a declaration (affirmed in Guatemala) and a criminal complaint (filed against the Receiver’s representatives in Panama), among other things,

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 Motion Record of the Receiver dated February 9, 2021 and the materials filed, and on hearing the submissions of the lawyers for the Receiver and lawyers for Juan Guillermo Gutierrez and in the presence of counsel for the Applicant, counsel for the Avicola Group and certain individuals, counsel for Arturo's Technical Services Ltd. and BDT Investments Inc. and Panamanian counsel for the Receiver,

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

2. **THIS COURT ORDERS** that Harald Johannessen Hals ("Hals") shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021, withdraw the criminal complaint against Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos made to the Public's Prosecutor's Office in Panama (File 20210000361) (the "Criminal Complaint").

3. **THIS COURT ORDERS** that Hals shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021:
 - (a) direct Javier Alcides De Leon Almengor in writing to withdraw the Criminal Complaint;

- (b) execute a written withdrawal of the Criminal Complaint witnessed and affirmed before a Notary Public or commissioner for taking oaths (the “Complaint Withdrawal”);
 - (c) provide the public prosecutor’s office in Panama with a copy of the Complaint Withdrawal; and
 - (d) provide a copy of this Order and the Complaint Withdrawal Javier Alcides de Leon Almengor.
4. **THIS COURT ORDERS** that Hals shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint.
5. **THIS COURT ORDERS** that Hals shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 3 above have been completed, together with copies of all written records of the steps having been taken.
6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez, also known as Juan Guillermo Gutierrez Strauss (“Juan Guillermo Gutierrez”), shall, by 5 p.m. (EST) on Thursday, February 11, 2021:
 - (a) affirm in writing before a Notary Public or commissioner for the taking of oaths that his affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Castillo (the “Affidavit”) is withdrawn and is not to be used to support the Criminal Complaint (the “Withdrawal Affirmation”);
 - (b) provide the public prosecutor’s office in Panama with the Withdrawal Affirmation;

- (c) provide a copy of this Order to the public prosecutor's office in Panama;
- (d) provide a copy of this Order and the Withdrawal Affirmation to Hals and Javier Alcides de Leon Almengor; and
- (e) direct Hals and Javier Alcides de Leon Almengor in writing to withdraw the Criminal Complaint.

7. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Affidavit.

8. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 6 above have been completed, together with copies of all written records of the steps having been taken.

9. **THIS COURT ORDERS** that no person with notice of the Order, including but not limited to Hals and Juan Guillermo Gutierrez, shall take any steps to advance the Criminal Complaint or to participate in any way in the Criminal Complaint or proceedings arising out of the Criminal Complaint and/or any other criminal proceedings against Alvaro Almengor, Manuel Carrasquilla, Lidia Ramos or any other agent or representative of the Receiver without leave of this Court.

10. **THIS COURT ORDERS** that this Order is without prejudice to the right of Hals or Juan Guillermo Gutierrez to return to this Court on at least 4 days notice to seek leave of this Court to file proceedings in Panama.

11. **THIS COURT ORDERS** that this Order shall be in full force in effect immediately once signed without the need to be entered with the Court.

12. **THIS COURT ORDERS** that the costs of this motion for interim relief is reserved to hearing of the balance of the Receiver's motion to be scheduled.

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

A handwritten signature in black ink, appearing to read 'McEwen', is written above a horizontal line.

(Signature of Judge)

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISE LTD. et al.
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

ORDER
(Withdrawal of Affidavit and Criminal Complaint)

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

Barristers

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Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

pgriffin@litigate.com

Tel: (416) 865-2921

Monique J. Jilesen (43092W)

mjilesen@litigate.com

Tel: (416) 865-2926

Derek Knoke (75555E)

dknoke@litigate.com

Tel: (416) 865-3018

AIRD & BERLIS LLP

Brookfield Place

181 Bay Street, Suite 1800

Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

ANNEX B

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

1. I am making this affirmation pursuant to and in compliance with the Order of Justice McEwen of the Ontario Superior Court of Justice dated 10 February 2021 (**the "Order"**). A copy of the Order is attached hereto as **Exhibit "A"**.
2. The Order relates to the criminal complaint in Panama City by Harald Johannessen Hals dated 20 January 2021, entitled "QUERRELLA PENAL, EN CONTRA DE ALVARO ALMENGOR, MANUEL CARRASQUILLA Y CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE, POR LA SUPUESTA COMISION DEL DELITO CONTRA LA FE PUBLICA (FALSEDAD IDEOLOGICA) EN PERJUICIO DE GABINVEST S.A." (the "**Criminal Complaint**").
3. The Order relates to the sworn statement I made on 3 December 2020 (**the "Sworn Statement"**), concerning the Criminal Complaint. A copy of the Sworn Statement is attached hereto as **Exhibit "B"**.

4. In compliance with the Order, I hereby withdraw the Sworn Statement and any reliance that may have been placed upon it in support of the criminal complaint.

SWORN BEFORE ME via video conference at the City of Toronto, in the Province of Ontario, before me on February 11, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO# 70332Q)



JUAN GUILLERMO GUTIERREZ

EXHIBIT A

This is Exhibit "A" referred to in the Affidavit of Juan Guillermo Gutierrez sworn via videoconference on February 11, 2021



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

TUESDAY, THE 10TH
DAY OF FEBRUARY , 2021

B E T W E E N:

(Court Seal)

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH
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CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES
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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 Motion Record of the Receiver dated February 9, 2021 and the materials filed, and on hearing the submissions of the lawyers for the Receiver and lawyers for Juan Guillermo Gutierrez and in the presence of counsel for the Applicant, counsel for the Avicola Group and certain individuals, counsel for Arturo's Technical Services Ltd. and BDT Investments Inc. and Panamanian counsel for the Receiver,

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

2. **THIS COURT ORDERS** that Harald Johannessen Hals ("Hals") shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021, withdraw the criminal complaint against Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos made to the Public's Prosecutor's Office in Panama (File 20210000361) (the "Criminal Complaint").

3. **THIS COURT ORDERS** that Hals shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021:
 - (a) direct Javier Alcides De Leon Almengor in writing to withdraw the Criminal Complaint;

- (b) execute a written withdrawal of the Criminal Complaint witnessed and affirmed before a Notary Public or commissioner for taking oaths (the “Complaint Withdrawal”);
 - (c) provide the public prosecutor’s office in Panama with a copy of the Complaint Withdrawal; and
 - (d) provide a copy of this Order and the Complaint Withdrawal Javier Alcides de Leon Almengor.
4. **THIS COURT ORDERS** that Hals shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint.
5. **THIS COURT ORDERS** that Hals shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 3 above have been completed, together with copies of all written records of the steps having been taken.
6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez, also known as Juan Guillermo Gutierrez Strauss (“Juan Guillermo Gutierrez”), shall, by 5 p.m. (EST) on Thursday, February 11, 2021:
- (a) affirm in writing before a Notary Public or commissioner for the taking of oaths that his affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Castillo (the “Affidavit”) is withdrawn and is not to be used to support the Criminal Complaint (the “Withdrawal Affirmation”);
 - (b) provide the public prosecutor’s office in Panama with the Withdrawal Affirmation;

- (c) provide a copy of this Order to the public prosecutor's office in Panama;
- (d) provide a copy of this Order and the Withdrawal Affirmation to Hals and Javier Alcides de Leon Almengor; and
- (e) direct Hals and Javier Alcides de Leon Almengor in writing to withdraw the Criminal Complaint.

7. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Affidavit.

8. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 6 above have been completed, together with copies of all written records of the steps having been taken.

9. **THIS COURT ORDERS** that no person with notice of the Order, including but not limited to Hals and Juan Guillermo Gutierrez, shall take any steps to advance the Criminal Complaint or to participate in any way in the Criminal Complaint or proceedings arising out of the Criminal Complaint and/or any other criminal proceedings against Alvaro Almengor, Manuel Carrasquilla, Lidia Ramos or any other agent or representative of the Receiver without leave of this Court.

10. **THIS COURT ORDERS** that this Order is without prejudice to the right of Hals or Juan Guillermo Gutierrez to return to this Court on at least 4 days notice to seek leave of this Court to file proceedings in Panama.

11. **THIS COURT ORDERS** that this Order shall be in full force in effect immediately once signed without the need to be entered with the Court.

12. **THIS COURT ORDERS** that the costs of this motion for interim relief is reserved to hearing of the balance of the Receiver's motion to be scheduled.

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

A handwritten signature in black ink, appearing to read 'McEwen', is written above a horizontal line.

(Signature of Judge)

1080

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
(Withdrawal of Affidavit and Criminal Complaint)

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

Barristers

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Tel: (416) 863-1500

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Lawyers for the Receiver

EXHIBIT B

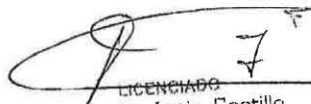
This is Exhibit "B" referred to in the Affidavit of Juan Guillermo Gutierrez sworn via videoconference on February 11, 2021



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

1 de 2


 LICENCIADO
 Jeremías Lutín Castillo
 ABOGADO Y NOTARIO

63631

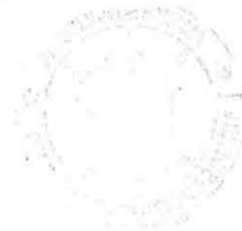


MINISTERIO

ACTA NOTARIAL DE DECLARACIÓN JURADA. En la ciudad de Guatemala, departamento de Guatemala, el tres de diciembre de dos mil veinte, siendo las nueve horas, Yo, **Jeremías Lutín Castillo**, Notario en ejercicio, me encuentro constituido en la sexta (6ª) avenida "A", ocho - cero cero (8-00) de la zona nueve (9), Edificio Centro Operativo, Penthouse B, de la Ciudad de Guatemala, departamento de Guatemala, a requerimiento del señor **Juan Guillermo Gutiérrez Strauss**, quien manifiesta ser de sesenta y cuatro años de edad, casado, ejecutivo, guatemalteco, con domicilio la República de Canadá, y de tránsito por esta ciudad capital, se identifica con el Documento Personal de Identificación con Código Único de Identificación dos mil quinientos diecisiete, veintiséis mil cincuenta y tres, cero ciento uno (2517260530101), extendido por el Registro Nacional de las Personas de la República de Guatemala, a efecto que por la presente **ACTA NOTARIAL DE DECLARACIÓN JURADA**, haga constar lo siguiente: **PRIMERO:** El señor Juan Guillermo Gutiérrez Strauss, enterado de las penas relativas al delito de perjurio, bajo juramento solemne prestado de conformidad con la ley, **DECLARA** lo siguiente: **a)** que actúa en su calidad de Director - Presidente de la entidad XELA ENTERPRISES LTD, entidad constituida e inscrita de conformidad con las leyes de la República de Canadá, Provincia de Ontario, con número de empresa en Ontario un millón doscientos noventa y siete mil quinientos ochenta (1297580); **b)** que su representada, es única accionista de la entidad GABINVEST, S.A., entidad constituida de conformidad con las leyes de la República de Panamá, inscrita en el Registro Público de Panamá, al folio número ciento diecisiete mil quinientos once (117511); dicha participación accionaria está sustentada con: **i)** certificado de acción número GI - cero cien (GI-0100) el cual ampara trescientas cuarenta y ocho (348) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD; y **ii)** certificado de acción número GI - cero ciento uno (GI-0101) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A.,

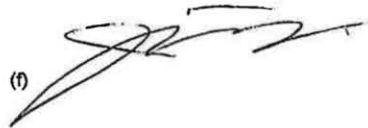


propiedad de XELA ENTERPRISES LTD.; iii) certificado de acción número GI – cero ciento dos (GI-0102) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD.; c) Siendo así, DECLARO que mi representada, la entidad XELA ENTERPRISES LTD, no fue notificada o convocada de ninguna forma para participar en la Asamblea de Accionistas de la entidad GABINVEST, S.A., celebrada el dieciséis de enero de dos mil veinte, mediante la cual se dejó sin efecto los nombramientos de la Junta Directiva reconocida de la entidad GABINVEST, S.A., disponiendo en tal sentido, el nombramiento de una nueva junta directiva, presidida por el señor Alvaro Almengor como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera. Dichas personas no son del conocimiento de mi representada, y tampoco tienen el aval, autorización o mandato para representar a la entidad GABINVEST, S.A., por no ser miembros de Junta Directiva propuestos y electos por el Accionista de la mencionada sociedad; d) asimismo DECLARO, que nunca mi representada, en su calidad de único accionista de la entidad GABINVEST, S.A. ha celebrado Asamblea de Accionistas o ha estado informado de ninguna de sesión de esta naturaleza VÍA TELEFÓNICA celebrada con fecha veintinueve de abril de dos mil veinte, con los señores Alvaro Almengor en su supuesta calidad de Presidente de GABINVEST, S.A.; así como tampoco ha ordenado la modificación del pacto Social de la entidad GABINVEST, S.A. DE NINGUNA FORMA, por lo que cualquier decisión, nombramiento o disposición realizada por los señores Alvaro Almengor como supuesto Presidente, MANUEL CARRASQUILLA como supuesto Secretario y LIDIA RAMOS como supuesta Tesorera de la entidad GABINVEST, S.A., NO TIENE VALOR ALGUNO, y son producto de falsedad en su forma y fondo y cualquier otro delito que corresponda según los actos cometidos. **SEGUNDO:** No habiendo nada más que hacer constar se da por terminada la presente acta notarial en el mismo lugar y fecha cuarenta y cinco minutos después de su

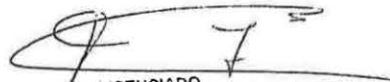


1 de 2.

Inicio, la cual se encuentra contenida en dos hojas de papel simple, útil la primera en ambos lados y la segunda en su anverso, a la que le adhiero un timbre notarial de diez quetzales y un timbre fiscal de cincuenta centavos de quetzal. Leído íntegramente lo escrito al requirente, bien impuesto de su contenido, valor y efectos legales, la ratifica, acepta y firma. DOY FE.

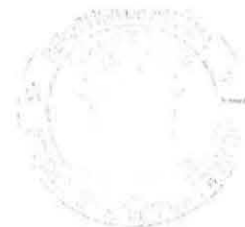
(f) 

Ante mí:


LICENCIADO
Jeremías Lutín Castillo
ABOGADO Y NOTARIO



DE REG
EPART
DE AUT
MATEM



1086

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

Chris Macleod (LSUC# 45723M)
cmacleod@cambridgellp.com
Tel: 647.346.6696
N. Joan Kasozi (LSUC# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent,
Juan Guillermo Gutierrez

This is Exhibit "E" referred to in the Affidavit of Juan Guillermo Gutierrez sworn by Juan Guillermo Gutierrez at the City of Toronto, in the Province of Ontario, before me on February 12, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

Ministerio Público de Panamá
Procuraduría General de la Nación
Edificio Saloon
Avenida Perú y Calle 33 (Ecuador), Frente a la Basílica
Menor Don Bosco
Panamá, Panamá

11 February 2021

Dear Sirs:

Attached as Annex A is a copy of an Order entered yesterday by Justice McEwen, the judge presiding over receivership proceedings in Toronto relating to Xela Enterprises Ltd. (the "Order"). The Order requires withdrawal of the criminal complaint dated 20 January 2021, entitled "QUERRELLA PENAL, EN CONTRA DE ALVARO ALMENGOR, MANUEL CARRASQUILLA Y CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE, POR LA SUPUESTA COMISION DEL DELITO CONTRA LA FE PUBLICA (FALSEDAD IDEOLOGICA) EN PERJUICIO DE GABINVEST S.A." (the "Criminal Complaint").

In accordance with the Order, I have today executed an affirmation (the "Affirmation") withdrawing my sworn statement dated 3 December 2020 (the "Sworn Statement") and any reliance on it in support of the Criminal Complaint. A copy of the Affirmation is attached as Annex B. A copy of the Sworn Statement is attached as Annex C.

Sincerely,



Juan Guillermo Gutierrez

ANNEX A

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

TUESDAY, THE 10TH
DAY OF FEBRUARY , 2021

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

(Withdrawal of Affidavit and Criminal Complaint in Panama)

THIS MOTION for interim relief made by KSV Restructuring Inc. (“KSV”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “Receiver”), without security, of the assets, undertaking and property of Xela Enterprises Ltd. (the “Company”) for an order compelling Juan Guillermo Gutierrez to withdraw a declaration (affirmed in Guatemala) and a criminal complaint (filed against the Receiver’s representatives in Panama), among other things,

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 Motion Record of the Receiver dated February 9, 2021 and the materials filed, and on hearing the submissions of the lawyers for the Receiver and lawyers for Juan Guillermo Gutierrez and in the presence of counsel for the Applicant, counsel for the Avicola Group and certain individuals, counsel for Arturo's Technical Services Ltd. and BDT Investments Inc. and Panamanian counsel for the Receiver,

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

2. **THIS COURT ORDERS** that Harald Johannessen Hals ("Hals") shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021, withdraw the criminal complaint against Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos made to the Public's Prosecutor's Office in Panama (File 20210000361) (the "Criminal Complaint").

3. **THIS COURT ORDERS** that Hals shall, within 24 hours of service of this Order to H_Johannessen@granadavalley.com and harald.johannessen1951@gmail.com and in any event by no later than 5 p.m. (EST) on Friday, February 12, 2021:
 - (a) direct Javier Alcides De Leon Almengor in writing to withdraw the Criminal Complaint;

- (b) execute a written withdrawal of the Criminal Complaint witnessed and affirmed before a Notary Public or commissioner for taking oaths (the “Complaint Withdrawal”);
- (c) provide the public prosecutor’s office in Panama with a copy of the Complaint Withdrawal; and
- (d) provide a copy of this Order and the Complaint Withdrawal Javier Alcides de Leon Almengor.

4. **THIS COURT ORDERS** that Hals shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint.

5. **THIS COURT ORDERS** that Hals shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 3 above have been completed, together with copies of all written records of the steps having been taken.

6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez, also known as Juan Guillermo Gutierrez Strauss (“Juan Guillermo Gutierrez”), shall, by 5 p.m. (EST) on Thursday, February 11, 2021:

- (a) affirm in writing before a Notary Public or commissioner for the taking of oaths that his affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Castillo (the “Affidavit”) is withdrawn and is not to be used to support the Criminal Complaint (the “Withdrawal Affirmation”);
- (b) provide the public prosecutor’s office in Panama with the Withdrawal Affirmation;

- (c) provide a copy of this Order to the public prosecutor's office in Panama;
- (d) provide a copy of this Order and the Withdrawal Affirmation to Hals and Javier Alcides de Leon Almengor; and
- (e) direct Hals and Javier Alcides de Leon Almengor in writing to withdraw the Criminal Complaint.

7. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Affidavit.

8. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 6 above have been completed, together with copies of all written records of the steps having been taken.

9. **THIS COURT ORDERS** that no person with notice of the Order, including but not limited to Hals and Juan Guillermo Gutierrez, shall take any steps to advance the Criminal Complaint or to participate in any way in the Criminal Complaint or proceedings arising out of the Criminal Complaint and/or any other criminal proceedings against Alvaro Almengor, Manuel Carrasquilla, Lidia Ramos or any other agent or representative of the Receiver without leave of this Court.

10. **THIS COURT ORDERS** that this Order is without prejudice to the right of Hals or Juan Guillermo Gutierrez to return to this Court on at least 4 days notice to seek leave of this Court to file proceedings in Panama.

11. **THIS COURT ORDERS** that this Order shall be in full force in effect immediately once signed without the need to be entered with the Court.

12. **THIS COURT ORDERS** that the costs of this motion for interim relief is reserved to hearing of the balance of the Receiver's motion to be scheduled.

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

A handwritten signature in black ink, appearing to read 'McEwen', is written above a horizontal line. The signature is stylized and cursive.

(Signature of Judge)

1095

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
(Withdrawal of Affidavit and Criminal Complaint)

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

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Sam Babe

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Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

ANNEX B

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

1. I am making this affirmation pursuant to and in compliance with the Order of Justice McEwen of the Ontario Superior Court of Justice dated 10 February 2021 (**the "Order"**). A copy of the Order is attached hereto as **Exhibit "A"**.
2. The Order relates to the criminal complaint in Panama City by Harald Johannessen Hals dated 20 January 2021, entitled "QUERRELLA PENAL, EN CONTRA DE ALVARO ALMENGOR, MANUEL CARRASQUILLA Y CUALQUIER OTRA PERSONA QUE RESULTE RESPONSABLE, POR LA SUPUESTA COMISION DEL DELITO CONTRA LA FE PUBLICA (FALSEDAD IDEOLOGICA) EN PERJUICIO DE GABINVEST S.A." (the "**Criminal Complaint**").
3. The Order relates to the sworn statement I made on 3 December 2020 (**the "Sworn Statement"**), concerning the Criminal Complaint. A copy of the Sworn Statement is attached hereto as **Exhibit "B"**.

4. In compliance with the Order, I hereby withdraw the Sworn Statement and any reliance that may have been placed upon it in support of the criminal complaint.

SWORN BEFORE ME via video conference at the City of Toronto, in the Province of Ontario, before me on February 11, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO# 70332Q)



JUAN GUILLERMO GUTIERREZ

EXHIBIT A

This is Exhibit "A" referred to in the Affidavit of Juan Guillermo Gutierrez sworn via videoconference on February 11, 2021



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

TUESDAY, THE 10TH
DAY OF FEBRUARY , 2021

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.

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

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 - (d) provide a copy of this Order and the Complaint Withdrawal Javier Alcides de Leon Almengor.
4. **THIS COURT ORDERS** that Hals shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint.
5. **THIS COURT ORDERS** that Hals shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 3 above have been completed, together with copies of all written records of the steps having been taken.
6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez, also known as Juan Guillermo Gutierrez Strauss (“Juan Guillermo Gutierrez”), shall, by 5 p.m. (EST) on Thursday, February 11, 2021:
- (a) affirm in writing before a Notary Public or commissioner for the taking of oaths that his affidavit attested to on December 3, 2020 before Notary Jeremias Lutin Castillo (the “Affidavit”) is withdrawn and is not to be used to support the Criminal Complaint (the “Withdrawal Affirmation”);
 - (b) provide the public prosecutor’s office in Panama with the Withdrawal Affirmation;

- (c) provide a copy of this Order to the public prosecutor's office in Panama;
- (d) provide a copy of this Order and the Withdrawal Affirmation to Hals and Javier Alcides de Leon Almengor; and
- (e) direct Hals and Javier Alcides de Leon Almengor in writing to withdraw the Criminal Complaint.

7. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Affidavit.

8. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall, by 5 p.m. (EST) on Friday, February 12, 2021, deliver to the Receiver and this Honourable Court an affirmed declaration in writing in the English Language confirming that all the steps in paragraph 6 above have been completed, together with copies of all written records of the steps having been taken.

9. **THIS COURT ORDERS** that no person with notice of the Order, including but not limited to Hals and Juan Guillermo Gutierrez, shall take any steps to advance the Criminal Complaint or to participate in any way in the Criminal Complaint or proceedings arising out of the Criminal Complaint and/or any other criminal proceedings against Alvaro Almengor, Manuel Carrasquilla, Lidia Ramos or any other agent or representative of the Receiver without leave of this Court.

10. **THIS COURT ORDERS** that this Order is without prejudice to the right of Hals or Juan Guillermo Gutierrez to return to this Court on at least 4 days notice to seek leave of this Court to file proceedings in Panama.

11. **THIS COURT ORDERS** that this Order shall be in full force in effect immediately once signed without the need to be entered with the Court.

12. **THIS COURT ORDERS** that the costs of this motion for interim relief is reserved to hearing of the balance of the Receiver's motion to be scheduled.

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

A handwritten signature in black ink, appearing to read 'McEwen', is written above a horizontal line.

(Signature of Judge)

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISE LTD. et al.
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

ORDER
(Withdrawal of Affidavit and Criminal Complaint)

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

Barristers

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Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

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Kyle Plunkett

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Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

EXHIBIT B

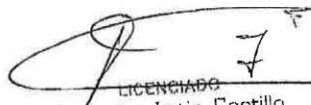
This is Exhibit "B" referred to in the Affidavit of Juan Guillermo Gutierrez sworn via videoconference on February 11, 2021



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO# 70332Q)

1 de 2


 LICENCIADO
 Jeremías Lutín Castillo
 ABOGADO Y NOTARIO

63631

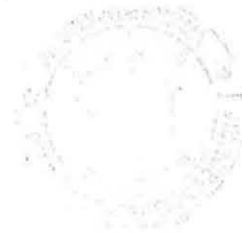


MINISTERIO

ACTA NOTARIAL DE DECLARACIÓN JURADA. En la ciudad de Guatemala, departamento de Guatemala, el tres de diciembre de dos mil veinte, siendo las nueve horas, Yo, **Jeremías Lutín Castillo**, Notario en ejercicio, me encuentro constituido en la sexta (6ª) avenida "A", ocho - cero cero (8-00) de la zona nueve (9), Edificio Centro Operativo, Penthouse B, de la Ciudad de Guatemala, departamento de Guatemala, a requerimiento del señor **Juan Guillermo Gutiérrez Strauss**, quien manifiesta ser de sesenta y cuatro años de edad, casado, ejecutivo, guatemalteco, con domicilio la República de Canadá, y de tránsito por esta ciudad capital, se identifica con el Documento Personal de Identificación con Código Único de Identificación dos mil quinientos diecisiete, veintiséis mil cincuenta y tres, cero ciento uno (2517260530101), extendido por el Registro Nacional de las Personas de la República de Guatemala, a efecto que por la presente **ACTA NOTARIAL DE DECLARACIÓN JURADA**, haga constar lo siguiente: **PRIMERO:** El señor Juan Guillermo Gutiérrez Strauss, enterado de las penas relativas al delito de perjurio, bajo juramento solemne prestado de conformidad con la ley, **DECLARA** lo siguiente: **a)** que actúa en su calidad de Director - Presidente de la entidad XELA ENTERPRISES LTD, entidad constituida e inscrita de conformidad con las leyes de la República de Canadá, Provincia de Ontario, con número de empresa en Ontario un millón doscientos noventa y siete mil quinientos ochenta (1297580); **b)** que su representada, es única accionista de la entidad GABINVEST, S.A., entidad constituida de conformidad con las leyes de la República de Panamá, inscrita en el Registro Público de Panamá, al folio número ciento diecisiete mil quinientos once (117511); dicha participación accionaria está sustentada con: **i)** certificado de acción número GI - cero cien (GI-0100) el cual ampara trescientas cuarenta y ocho (348) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD; y **ii)** certificado de acción número GI - cero ciento uno (GI-0101) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A.,

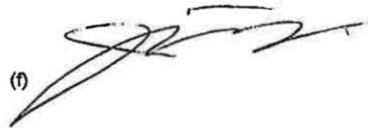


propiedad de XELA ENTERPRISES LTD.; iii) certificado de acción número GI – cero ciento dos (GI-0102) el cual ampara setenta y cinco (75) acciones de la entidad GABINVEST, S.A., propiedad de XELA ENTERPRISES LTD.; c) Siendo así, DECLARO que mi representada, la entidad XELA ENTERPRISES LTD, no fue notificada o convocada de ninguna forma para participar en la Asamblea de Accionistas de la entidad GABINVEST, S.A., celebrada el dieciséis de enero de dos mil veinte, mediante la cual se dejó sin efecto los nombramientos de la Junta Directiva reconocida de la entidad GABINVEST, S.A., disponiendo en tal sentido, el nombramiento de una nueva junta directiva, presidida por el señor Alvaro Almengor como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera. Dichas personas no son del conocimiento de mi representada, y tampoco tienen el aval, autorización o mandato para representar a la entidad GABINVEST, S.A., por no ser miembros de Junta Directiva propuestos y electos por el Accionista de la mencionada sociedad; d) asimismo DECLARO, que nunca mi representada, en su calidad de único accionista de la entidad GABINVEST, S.A. ha celebrado Asamblea de Accionistas o ha estado informado de ninguna de sesión de esta naturaleza VÍA TELEFÓNICA celebrada con fecha veintinueve de abril de dos mil veinte, con los señores Alvaro Almengor en su supuesta calidad de Presidente de GABINVEST, S.A.; así como tampoco ha ordenado la modificación del pacto Social de la entidad GABINVEST, S.A. DE NINGUNA FORMA, por lo que cualquier decisión, nombramiento o disposición realizada por los señores Alvaro Almengor como supuesto Presidente, MANUEL CARRASQUILLA como supuesto Secretario y LIDIA RAMOS como supuesta Tesorera de la entidad GABINVEST, S.A., NO TIENE VALOR ALGUNO, y son producto de falsedad en su forma y fondo y cualquier otro delito que corresponda según los actos cometidos. **SEGUNDO:** No habiendo nada más que hacer constar se da por terminada la presente acta notarial en el mismo lugar y fecha cuarenta y cinco minutos después de su

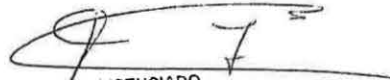


1 de 2.

Inicio, la cual se encuentra contenida en dos hojas de papel simple, útil la primera en ambos lados y la segunda en su anverso, a la que le adhiero un timbre notarial de diez quetzales y un timbre fiscal de cincuenta centavos de quetzal. Leído íntegramente lo escrito al requirente, bien impuesto de su contenido, valor y efectos legales, la ratifica, acepta y firma. DOY FE.

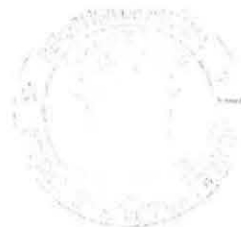
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Ante mí:


LICENCIADO
Jeremías Lutín Castillo
ABOGADO Y NOTARIO



DE REG
EPART
E AUT
MATEM



1112

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

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

Chris Macleod (LSUC# 45723M)
cmacleod@cambridgellp.com
Tel: 647.346.6696

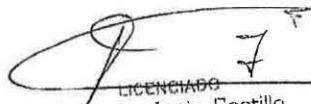
N. Joan Kasozi (LSUC# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent,
Juan Guillermo Gutierrez

ANNEX C

1 de 2


 LICENCIADO
 Jeremías Lutín Castillo
 ABOGADO Y NOTARIO

63631



MINISTERIO

ACTA NOTARIAL DE DECLARACIÓN JURADA. En la ciudad de Guatemala, departamento de Guatemala, el tres de diciembre de dos mil veinte, siendo las nueve horas, Yo, **Jeremías Lutín Castillo**, Notario en ejercicio, me encuentro constituido en la sexta (6ª) avenida "A", ocho - cero cero (8-00) de la zona nueve (9), Edificio Centro Operativo, Penthouse B, de la Ciudad de Guatemala, departamento de Guatemala, a requerimiento del señor **Juan Guillermo Gutiérrez Strauss**, quien manifiesta ser de sesenta y cuatro años de edad, casado, ejecutivo, guatemalteco, con domicilio la República de Canadá, y de tránsito por esta ciudad capital, se identifica con el Documento Personal de Identificación con Código Único de Identificación dos mil quinientos diecisiete, veintiséis mil cincuenta y tres, cero ciento uno (2517260530101), extendido por el Registro Nacional de las Personas de la República de Guatemala, a efecto que por la presente

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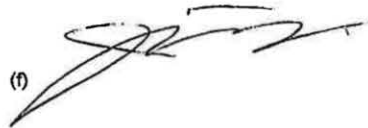


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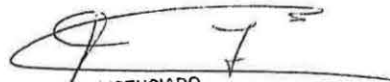


1 de 2.

Inicio, la cual se encuentra contenida en dos hojas de papel simple, útil la primera en ambos laços y la segunda en su anverso, a la que le adhiero un timbre notarial de diez quetzales y un timbre fiscal de cincuenta centavos de quetzal. Leído íntegramente lo escrito al requirente, bien impuesto de su contenido, valor y efectos legales, la ratifica, acepta y firma. DOY FE.

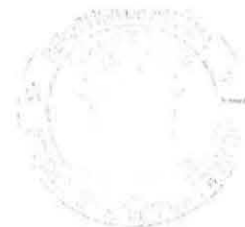
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Ante mí:


LICENCIADO
Jeremías Lutín Castillo
ABOGADO Y NOTARIO



DE REG
PART
E AUT
MATEM





Shipment Receipt

Shipment From

Cambridge LLP
Joan Kasozi
333 Adelaide Street West
6th Floor

M5V1R5 TORONTO ONTARIO
Canada
+16477029117

yyz.servicepoint@dhl.com

Shipment To

Ministerio Publico de Panama
LEYDI NUNEZ
Procuraduria General de la Nacion,
Edificio Saloon, Avenida Peru y Calle 33 (Ecu
Frente a la Basilica
PANAMA PANAMA CITY
Panama
+5075073000

Shipment Details

Shipment Date: 2021-02-11
Waybill Number: 4608518596
Service Type: EXPRESSEASY
Packaging Type: Your Own Package
Number of Pieces: 1
Total Weight: 1.00lbs
Dimensional: 0.00lbs
Chargeable: 1.00lbs
Insured Amount:
Terms of Trade:

International Information

Declared Value:
Duties&taxes acct:
Dutiable Status: Non-Dutiable
Estimated Del date: Wednesday, 17 Feb, 2021
Promo Code:

Billing Information

Payment Type: DHL Account Number
Billing Account: Cash Shipment
Duties&taxes acct:
Charge Breakdown: 79.90 CAD
Special Services:

Charge is estimated until DHL reweigh

Reference Information

Reference: Est.\$83.15 > Express Easy <
Pickup reference nr:

Description of Contents

Documents

1118

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

CAMBRIDGE LLP
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Chris Macleod (LSUC# 45723M)
cmacleod@cambridgellp.com
Tel: 647.346.6696
N. Joan Kasozi (LSUC# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent,
Juan Guillermo Gutierrez

This is Exhibit "X" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprises Ltd et al
Defendant(s)

Case Management Yes No by Judge: McBrien

Counsel	Telephone No:	Facsimile No:
(see attached)		

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

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

I will deal with each below.

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

I previously granted an order to

25 March 21
Date

McBrien
Judge's Signature

Additional Pages 21

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

An impasse has arisen between the Receiver and ATS.

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

I do not agree with ATS.

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

In my view, this is captured

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

I disagree.

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

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

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

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Judges Endorsment Continued

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

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

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

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

These include:

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

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Judges Endorsment Continued

to LISA which is Xelac subsidiary

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

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

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

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

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Judges Endorsment Continued

number of instances, including but not restricted to:

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

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Judges Endorsement Continued

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

Additionally, the history of the
litigation cannot be ignored.

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

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

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Judges Endorsment Continued

Subsequently the Receiver the appointed

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

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

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

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

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Judges Endorsment Continued

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

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

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

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

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Court order to release the information.

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

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

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

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

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Judges Endorsment Continued

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

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

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

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

The Receiver's undertaking is a

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Judges Endorsment Continued

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

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

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

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

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Judges Endorsment Continued

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

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

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

The order beginning at p. A183 of the materials, requesting assistance, appears to accord with this endorsement. I am prepared to sign it unless parties wish to make submission as to form and content.

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

Again I am prepared to sign it

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Judges Endorsment Continued

subject to submissions as to Form and content.

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

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

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

M. J. [Signature]

McEwen, Mr. Justice Thomas John (SCJ)

From: Derek Knoke <dknoke@litigate.com>
Sent: March 22, 2021 2:03 PM
To: McEwen, Mr. Justice Thomas John (SCJ); Anissimova, Alsou (MAG); JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Cc: Monique Jilesen
Subject: Counsel Slip - CV-11-9062-00CL [LS-LSRSGDOCS.FID635496]

Dear Justice McEwen,

The following counsel appeared at the hearing:

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

Derek



Derek Knoke*

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This e-mail may contain legally privileged or confidential information. This message is intended only for the recipient(s) named in the message. If you are not an intended recipient and this e-mail was received in error, please notify us by reply e-mail and delete the original message immediately. Thank you. Lenzner Slaght Royce Smith Griffin LLP.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

RE: Margarita Castillo, Applicant

AND:

Xela Enterprises Ltd., Tropic International Limited, Fresh Quest, Inc., 696096
Alberta Ltd., Juan Guillermo Gutierrez and Carmen S. Gutierrez, as Executor of the
Estate of Juan Arturo Gutierrez, Respondents

BEFORE: The Honourable Justice Thomas J. McEwen

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

HEARD BY ZOOM HEARING: March 22, 2021

ENDORSEMENT

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

Electronic Devices

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

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

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

Computer Servers

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

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

Powers of the Receiver

- [29] The third issue involves the Receiver seeking to expand its powers.
- [30] This requires some discussion about the above noted acrimonious relationship between the Receiver and Juan Guillermo/Xela.
- [31] Juan Guillermo and ATS take the position that the Receiver has acted inappropriately and failed to pursue sensible ways of collecting funds.
- [32] These include:
- Prioritizing the pursuit of LISA dividends
 - Communicating with “the Nephews” who Juan Guillermo accuses of wrongfully withholding dividends owed to LISA, which is Xela’s subsidiary.
 - Preventing LISA from closing a loan which would have satisfied the Castillo Judgment
 - Rejecting the aforementioned BDT proposal
 - Focusing on the Reviewable Transactions which may not result in realizations
 - Generally, inappropriately pursuing Juan and his family, including the scheduled contempt motion.
- [33] In addition to the above Juan Guillermo and (and ATS) make a number of other allegations which I have reviewed.
- [34] The Receiver submits that it has not had any real, legitimate co-operation from Juan Guillermo, Xela or ATS.
- [35] The Receiver points to a number of instances, including but not restricted to:
- Contradictory evidence received from Juan Guillermo and his sons concerning electronic devices/servers
 - Juan Guillermo exercising control over Xela subsidiaries and related companies
 - Suspicious financial dealings involving LISA/Xela/BDT/Arven
 - Juan Guillermo’s brother-in-law (“Hals”) who is the President of Xela’s subsidiary LISA filed a criminal complaint against the Receiver’s agents in Panama when they attempted to implement an order made by me. The complaint was based on a declaration sworn by Juan Guillermo. I subsequently ordered that Juan Guillermo and Hals take steps to withdraw the complaint as being, *prima facie*, a collateral attack on my order.
- [36] Additionally, the history of the litigation cannot be ignored.
- [37] Justice Newbould in his October 2015 decision made substantial findings of oppression in granting judgment to [Ms.] Castillo.
- [38] Subsequently, shares of the Xela subsidiaries BDT & Arven were transferred to a trust (the “EAI Transaction”) benefitting Juan Guillermo’s family. ATS was incorporated as a subsidiary

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

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

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

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

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

Disposition

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

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

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

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

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

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

Foreign Recognition Order

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

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

The Fees of the Receiver and Counsel

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

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

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

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

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

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

Orders Sought

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

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

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

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

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

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

Justice Thomas J. McEwen

Date: March 25, 2021

This is Exhibit "Y" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY , THE 25 TH
)	
JUSTICE MCEWEN	)	DAY OF MARCH , 2021

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 Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property of Xela Enterprises Ltd. (the “**Company**”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

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

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

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

SERVICE

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

INVESTIGATIVE POWERS

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

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

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

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

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

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

IMAGING ORDERS

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

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

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

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

JUAN GUILLERMO DEVICES

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

COMPANY RECORDS

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

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

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

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

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

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

(b) the Reviewable Transactions.

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

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

(b) the Reviewable Transactions.

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

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

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

APPROVAL OF FEES AND DISBURSEMENTS

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

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

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

RECOGNITION BY FOREIGN JURISDICTIONS

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States of America, Republic of Panama, Republic of Guatemala, Barbados, Republic of Colombia or Bolivarian Republic of Venezuela to give effect to this Order and to assist the Receiver and its agents in

carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

A handwritten signature in black ink, appearing to read "McE T.", positioned above a horizontal line.

(Signature of Judge)

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

1157

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

ONTARIO

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

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Receiver

This is Exhibit "Z" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in cursive script, appearing to read "Shane Ramnanan", written in black ink.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 25 TH
)	
JUSTICE MCEWEN	)	DAY OF MARCH, 2021

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 Restructuring Inc. (formerly known as 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, and on hearing the submissions of the lawyers for the Receiver and such other counsel as were present and listed on the Counsel Slip.

WHEREAS the Applicant made an Application for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. This statutory provision empowers a court to appoint a receiver, who is authorized to take possession of and control the assets, business, documents and records of a company with a view to dealing with and recovering them for the benefit of creditors and other stakeholders. The Applicant sought such an order, appointing KSV as Receiver and authorizing the Receiver to, among other things, take control of the assets, undertakings, business, records and company documents of the Company;

WHEREAS this Court heard the submissions of the Applicant and the Respondents and granted an Order Appointing KSV as Receiver of the Company, by way of Order of this Court dated July 5, 2019 (the “**Appointment Order**”),

WHEREAS KSV is duly appointed by this Court as Receiver of the Company and is empowered pursuant to the Appointment Order to act in respect of all the assets, undertakings and properties of the Company including, among other things, the right to exercise any shareholder rights of the Company.

WHEREAS the powers under the Appointment Order include the power to access the records and exercise control (to the exclusion of all others) over the Company’s direct and indirect subsidiaries, including Gabinvest S.A. (“**Gabinvest**”) and Lisa S.A. (“**Lisa**”).

WHEREAS the purpose of these powers is to permit the Receiver to ascertain the Company’s assets and liabilities (including those of its subsidiaries) and to satisfy all of the Company’s financial obligations, including its most significant claim, being the judgment debt owing to the Applicant by the Company.

WHEREAS the Court has issued an Order dated March 24, 2020 approving the Company's exercise of its shareholder rights to replace the directors of Gabinvest and an Order dated March 25, 2021, granting the Receiver the right to investigate and review certain transactions undertaken by Empress Arturo International, BDT Investments Ltd., and Lisa (the "**Reviewable Transactions**") and requiring the directors of Lisa and Gabinvest to provide information and documentation relating to those Reviewable Transactions.

WHEREAS the Receiver is seeking to satisfy the Company's financial obligations and seeking to collect unpaid dividends, which include unpaid dividends owing from the Panamanian Company Villamorey, S.A. ("**Villamorey**") to the Company's subsidiary, Lisa, in the amount of approximately \$44 million USD.

WHEREAS this Court seeks the assistance of the Panamanian Courts to secure the Company's interests, assets and properties to fulfill the Receiver's duties,

REQUEST FOR THE ASSISTANCE OF THE PANAMANIAN COURTS

1. **THIS COURT REQUESTS** the assistance of the Panamanian Courts for the recognition in Panama of KSV as Receiver of the Company, authorizing the Receiver to directly request and/or collect all information from public or private sources, including current and/or previous directors, officers, resident agents and accountants of Gabinvest and Lisa (as direct and indirect wholly owned subsidiaries of the Company), regarding its good standing, stocks and shareholders' composition, assets and/or liabilities.

2. **THIS COURT REQUESTS** the assistance of the Panamanian Courts for the recognition in Panama of the Appointment Order, the Order dated March 24, 2020 and the Order dated March 25, 2021, together with all the rights and powers granted to the Receiver thereunder.

3. **THIS COURT REQUESTS** the assistance of the Panamanian Courts to access information about and take control of the Company's interests, assets and properties, which includes, among other things: its wholly-owned Panamanian-company Gabinvest and Lisa, which is a wholly-owned subsidiary of Gabinvest, both registered to the mercantile section of the Public Registry of Panama.

4. **THIS COURT REQUESTS** the execution of discovery proceedings to obtain copies of corporate documents of Gabinvest and Lisa held by any former or present resident agent(s), including the Panamanian law firm Alfaro, Ferrer & Ramirez Abogados, and any other public or private database which contains information about these companies.

5. **THIS COURT REQUESTS** that, as part of the assistance, the Receiver be authorized to exercise every and all other possible rights, privileges and duties according to Panamanian Law so that it may fulfill its duties and responsibilities as Receiver, as court-appointed receiver of the shareholder of Gabinvest and, indirectly, Lisa.

6. **THIS COURT REQUESTS** the aid and recognition of the Panamanian Courts to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All Panamanian courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.



(Signature of Judge)

MARGARITA CASTILLO
Applicant

-and-
respondents

XELA ENTERPRISE LTD. et al.

1163

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

This is Exhibit "AA" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

NOTICE OF MOTION FOR LEAVE TO APPEAL

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

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

THE MOTION IS FOR

- (a) An Order granting leave to appeal the Order of the Honourable Justice McEwen dated March 25, 2021 (the “**Order**”) expanding the powers of the

Receiver, approving the fees of the receiver and granting access to the Respondent Juan Gutierrez' devices and all of his emails;

- (b) If leave to appeal is granted, a stay of enforcement of the Order pending the hearing of the appeal;
- (c) The Costs of this motion; and,
- (d) such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

Background

- (a) The below proceedings relate to execution of a Judgment (**the "Judgment"**) against (among others) Xela Enterprises Inc. (**"Xela"**) in favor of Margarita Castillo (**"Ms. Castillo"**). Mr. Gutierrez is President of Xela and owns 100% of Xela's outstanding voting shares;
- (b) By Order dated July 5, 2010 (**the "Appointment Order"**) KSV Restructuring Inc. (**"KSV"**) was appointed receiver (**the "Receiver"**) over the undertakings, property and assets of Xela, in accordance with s. 101 of the *Courts of Justice Act* in aid of execution of the Judgment;
- (c) Prior to the appointment of the Receiver, the Judgment was partially satisfied, with approximately \$3.5 million remaining unsatisfied;
- (d) Xela was historically in the agriculture business but is no longer a going concern. The only significant assets held by Xela are Gabinvest S.A., a

wholly owned subsidiary company in Panama (**“Gabinvest”**), and Lisa S.A. (**“LISA”**), a wholly owned Panamanian subsidiary of Gabinvest. LISA holds a 1/3 stake in Villamorey S.A., a Panama company (**“Villamorey”**), which owes LISA unpaid dividends estimated at approximately US\$45 million (**the “Unpaid Dividends”**);

- (e) The Unpaid Dividends – along with an estimated additional US\$350 million in unpaid dividends owed to LISA by a poultry conglomerate located in Guatemala (**the “Avicola Group”**) in which LISA holds a 25% stake – have been withheld improperly from LISA since 1998 by the majority shareholders of Villamorey and the Avicola Group. Those majority shareholders reside in Guatemala and are the heirs of two of the three original founders of the Avicola Group (**collectively the “Nephews”**), while Mr. Gutierrez is the heir of the third founder, who as of 1984 resided in Toronto until his demise in 2016. Villamorey holds 25% of the outstanding shares of the Avicola Group. Both Villamorey and the Avicola Group are controlled and operated by the Nephews;
- (f) The Unpaid Dividends are one of the only viable sources of funds available to Xela to satisfy the Judgment. LISA has been and is pursuing collection of the Unpaid Dividends via civil and criminal proceedings against Villamorey in Panama, which are in advanced stages;
- (g) The Receiver has taken no significant interest in the Unpaid Dividends, asserting without evidentiary support that they are uncollectable.

- (h) Similarly, the Receiver has taken no significant interest in an unpaid \$400,000 promissory note in Xela's favor issued by Ms. Castillo's husband **(the "Gadais Limited Promissory Note")**; or in a US\$4.3 million loan given to Ms. Castillo that may have been collateralized by the Nephews using Unpaid Dividends owed to LISA **(the "Castillo Loan")**; or in a civil conspiracy action by Xela against Ms. Castillo, the Nephews and others – still pending in the Ontario Superior Court of Justice (Commercial List) – that if successful, would more than offset the outstanding amount of the Judgment **(the "Conspiracy Action")**.
- (i) The Receiver's primary focus has been to investigate certain so-called **"reviewable transactions"** between foreign subsidiaries of Xela and other foreign business entities, which the Receiver contends have no legitimate business purpose;
- (j) The Receiver's investigation to date has uncovered more than sufficient information for the Judgment creditor to assess whether to authorize the Receiver to seek to unwind the Reviewable Transactions in the relevant foreign jurisdictions. The Receiver, however, has not sought recognition in any of those foreign jurisdictions, though expressly authorized to do so in the Appointment Order. The Receiver has not indicated how unwinding the Reviewable Transactions could yield any funds to satisfy the Judgment, and the unrefuted evidence is to the contrary;

- (k) The Receiver's investigation into the Reviewable Transactions has included requests to access all personal electronic devices used by Mr. Gutierrez **(the "Personal Devices")**. Mr. Gutierrez himself is not a subject of the Appointment Order. The Personal Devices contain personal and highly confidential information to which the Receiver is not entitled, but which are subject to potential abuse by the Nephews in their ongoing dispute with LISA over the Unpaid Dividends in Panama and other unpaid dividends in Guatemala. On October 27, 2020, the Court issued a consent Order **(the "Consent Order")** containing a framework for the Receiver's computer experts to copy the contents of the Personal Devices, and for Mr. Gutierrez to review that information, make objections, and ultimately to provide the Receiver with any Xela materials that may be properly discoverable;
- (l) After the Consent Order was issued, Mr. Gutierrez learned that the computer expert designated by the Receiver to copy and maintain the contents of the Personal Devices was not the same entity identified in the Consent Order, but was a subsidiary company that had previously been hired by the Nephews to conduct surveillance of Mr. Gutierrez and his family in Toronto, including his children. That discovery was of grave concern, as Ms. Castillo has in the past knowingly disseminated stolen Xela documents to the Nephews for use in failed but costly lawsuits in Guatemala to exclude LISA from the Avicola Group. Consequently, Mr. Gutierrez permitted his Personal Devices to be copied to a locked hard drive maintained by the Receiver's expert, and he requested a duplicate from the Receiver to

conduct his preliminary review and assert objections, such that the hard drive held by the Receiver's agent would remain locked until any discoverability issues could be resolved. The Receiver rejected that request, replaced its computer expert with a new agent to which Mr. Gutierrez had not consented, and filed the subject motion;

- (m) As a consequence of that motion, the Order requires Mr. Gutierrez to permit the content of the Personal Devices to be uploaded to a Relativity database maintained by the Receiver's agent, without any advance opportunity for Mr. Gutierrez and/or his counsel to review the contents for confidentiality, privilege or any other discoverability issues;
- (n) The Order also grants the Receiver unfettered access to all emails sent or received by Mr. Gutierrez through the date of the Order – regardless of the email address to which they may have been forwarded and regardless of whether the email was sent directly to him or it was one on which he was copied – at any email address maintained on servers owned by Arturo's Technical Services Inc. ("**Arturos**"). No provision is made in the Order for any advance review and/or objections by Mr. Gutierrez or his lawyers, despite the absence of any evidence that the subject emails fall within the scope of the Appointment Order;
- (o) The Order grants the Receiver additional broad powers to investigate the Reviewable Transactions outside of Ontario;

- (p) The Order also approves attorneys' fees incurred by the Receiver, which has incurred more than \$1 million in fees and expenses since its appointment without recovering any funds toward satisfaction of the Judgment;
- (q) The Order contains errors of law sufficient to warrant the attention of the Divisional Court and there is good reason to doubt the correctness of the Order.

Errors of Fact and/or Law

- (r) The Motion Judge erred in law by incorrectly interpreting the Appointment Order and the scope of information to which the Receiver is entitled;
- (s) The Motion Judge erred in law by incorrectly applying the jurisprudence with respect to the jurisdiction of an equitable receiver pursuant to s. 101 of the *Courts of Justice Act*;
- (t) The Motion Judge erred in fact and law in finding that Mr. Gutierrez had not been cooperative with the Receiver and/or had not complied with prior court orders as a basis for issuing the Order;
- (u) The Motion Judge erred in fact and law by granting broad additional powers to the Receiver without properly considering the past conduct of the Receiver tending to frustrate the primary purpose of the receivership, including, among other things:

- (i) failing to take interest in collecting the Unpaid Dividends;
- (ii) opposing a loan commitment secured by LISA in December 2019 **(the “LISA Loan”)** that would have satisfied the Judgment and receivership costs in their entirety;
- (iii) taking action in Panama to appoint new directors to the boards of both Gabinvest and LISA, without prior recognition in Panama, preventing the LISA Loan from funding;
- (iv) communicating surreptitiously on an ongoing basis for at least 13 months with counsel for the Nephews – who helped fund the lawsuit against Xela that led to the Judgment, are defendants in the Conspiracy Action, and are improperly withholding the Unpaid Dividends – seemingly on matters of receivership strategy, while refusing to disclose the content thereof;
- (v) failing to take interest in the Gadais Limited Promissory Note given to Xela by Ms. Castillo’s husband, which remains unpaid;
- (vi) failing to take interest in the Castillo Loan, which appears to have been repaid with Unpaid Dividends such that the Judgment may have already been satisfied;
- (vii) failing to take interest in the Conspiracy Action against Ms. Castillo and the Nephews, which remains pending in Ontario and, if successful, would more than offset the Judgment;

- (viii) failing to correct numerous, persistent errors and/or omissions in its various Receiver's reports, casting Mr. Gutierrez in an unfavorable light; and
 - (ix) incorrectly asserting that Mr. Gutierrez has not cooperated with the Receiver.
- (v) The Motion Judge erred in fact and law by requiring Mr. Gutierrez to give the Receiver's agents control over and/or visibility into the content of his personal devices without prior opportunity by Mr. Gutierrez or his counsel to review and challenge the propriety of production and whether the contents are contemplated by the Appointment Order;
- (w) The Motion Judge erred in fact and law by requiring ATS to produce copies of all emails sent and/or received by Mr. Gutierrez that are stored on ATS servers without prior opportunity by Mr. Gutierrez or his counsel to review and challenge the propriety of production and whether such emails are contemplated by the Appointment Order;
- (x) The Motion Judge erred in fact and law by approving counsel fees incurred by the Receiver without analysis as to the reasonableness thereof, some of which were supported solely by billing descriptions that were redacted in their entirety;
- (y) The Motion Judge erred in law by incorrectly applying *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368;

- (z) There are conflicting decisions by another judge or court in Ontario on the matter involved in the proposed appeal and it is desirable that leave to appeal be granted;
- (aa) There is good reason to doubt the correctness of the Order;
- (bb) The proposed appeal raises points of law that are of sufficient importance to merit the attention of the Divisional Court;
- (cc) In the circumstances, leave to Appeal the Order should be granted;
- (dd) Section 19(l)(b) of the *Courts of Justice Act*, R .S.O. 1990, c . C.43, and Rules 1.04, 1.05, 3.02, 61.03 and 62.02 of the *Rules of Civil Procedure*; and
- (ee) Such other grounds as counsel may advise and this Court permit.

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

- (a) The Order and Reasons for Decision of the Honourable Justice McEwen dated March 25, 2021;
- (b) The motion materials before Justice McEwen; and,
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

April 9, 2021

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AS REPRESENTED BY THE MINISTER OF FINANCE**
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**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**PROCEEDING COMMENCED AT
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M5V 1R5**Christopher MacLeod** (LSO# 45723M)cmacleod@cambridgellp.com
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Lawyers for the Respondent
Juan Guillermo Gutierrez

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

B E T W E E N:

MARGARITA CASTILLO

Applicant/Responding Party

- and -

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

Respondents/Moving Parties

NOTICE OF MOTION

The Respondent/Moving Party, Arturo's Technical Services Inc. ("ATS"), will make a motion to a panel of the Divisional Court, in writing, on a date to be fixed by the Registrar, or as soon after that time as the motion can be heard, at the courthouse, 130 Queen Street West, Toronto, Ontario, M5H 2N5, or at such other location as may be directed, in Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing as an opposed motion pursuant to Rule 62.02 of the *Rules of Civil Procedure*.

THE MOTION IS FOR:

- a) An order granting Arturo's Technical Services Inc. leave to appeal paragraph 8 of the order of Justice McEwen (the "**Motion Judge**") dated March 25, 2021 (the "**Order**") to the Divisional Court;

- b) If leave to appeal is granted, an order granting a stay of enforcement of paragraph 8 of the Order pending the hearing of the appeal;
- c) Costs of this motion on a partial indemnity scale; and,
- d) Such further and other relief as counsel may advise and as this Honourable Court may permit.

THE GROUNDS OF THE MOTION ARE:

Background

- a) Castillo is a judgment creditor of Xela Enterprises Ltd. (“**Xela**”), having obtained a monetary judgment (the “**Judgment**”) against the Respondents in the within application;
- b) On July 5, 2019, upon application by the Applicant, Margarita Castillo (“**Castillo**”), KSV Restructuring Inc. (“**KSV**”) was appointed by the Court as receiver (the “**Receiver**”) over the undertaking, property and assets of Xela, pursuant to s. 101 of the *Courts of Justice Act* in aid of execution of the Judgment (the “**Appointment Order**”);
- c) Prior to the Appointment Order, ATS purchased certain assets from Xela relating to its information technology business, including certain computer servers (the “**Blue Network Servers**”);
- d) ATS’ business, part of which was purchased from Xela, includes providing certain information technology and back-end business services to other businesses (“**Clients**”);
- e) As a result, the Blue Network Servers also contain information and data belonging to Clients, which are non-Xela entities and many of which have no presence in Ontario;
- f) The Blue Network Servers were imaged by the Receiver’s information technology consultant (the “**IT Consultant**”), pending agreement by ATS and the Receiver as to appropriate steps to extract the Xela information, or further Court order;

- g) On December 24, 2020, a recommendation was made to the Receiver by the IT Consultant providing options for extracting the Xela information;
- h) However, rather than follow the IT Consultant's recommendation, the Receiver sought an order for unfettered access to all information on the Blue Network Servers;
- i) On March 25, 2021, the Motion Judge granted the Order, which included paragraph 8 authorizing the Receiver and its IT Consultant, without any limitation whatsoever, to access, copy, analyze, and review the Blue Network Servers including any content of the images;
- j) The Order contains errors of fact and law sufficient to warrant the attention of the Divisional Court and there is good reason to doubt the correctness of the Order;

Errors of Law

- k) The Motion Judge erred in law by incorrectly interpreting the Appointment Order and the scope of information to which the Receiver is entitled;
- l) The Motion Judge erred in law by incorrectly applying the jurisprudence with respect to the jurisdiction of an equitable receiver pursuant to s. 101 of the *Courts of Justice Act*;
- m) The Motion Judge erred in fact and law by authorizing the Receiver to access information of non-Xela persons on the basis that the Blue Network Servers “consists of information *regarding* Xela's subsidiaries/customers [emphasis added]”, when the evidence disclosed that the information *belong* to non-Xela persons;
- n) The Motion Judge erred in fact and law in finding that ATS was not adhering to prior orders as a basis for making the Order;
- o) The Motion Judge erred in law by failing to apply a careful balancing of the effect of the Order on all of the parties and others who may be affected by the Order;

- p) The Motion Judge erred in law by incorrectly applying *GE Real Estate v. Liberty Assisted Living*, 2011 ONSC 5471;
- q) The Motion Judge erred in law by incorrectly applying *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368;
- r) There are conflicting decisions by another judge or court in Ontario on the matter involved in the proposed appeal and it is desirable that leave to appeal be granted;
- s) There is good reason to doubt the correctness of the Order;
- t) The proposed appeal raises points of law that are of sufficient importance to merit the attention of the Divisional Court;
- u) In the circumstances, leave to Appeal the Order should be granted;
- v) Section 19(1)(b) of the *Courts of Justice Act*, R .S.O. 1990, c . C.43, and Rules 1.04, 1.05, 3.02, 61.03 and 62.02 of the *Rules of Civil Procedure*; and
- w) Such other grounds as counsel may advise and this Court may permit.

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

- a) The Motion materials before Justice McEwen on the motion below;
- b) Endorsement of Justice McEwen dated March 25, 2021;
- c) Order of Justice McEwen dated March 25, 2021;
- d) Such further and other relief as counsel may advise and as this Honourable Court may permit.

April 8, 2021

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

MARGARITA CASTILLO
Applicant

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

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

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

Proceeding commenced at Toronto

NOTICE OF MOTION

WEIRFOULDS LLP

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Fax: 416-365-1876

**Lawyers for
Arturo's Technical Services Inc./Moving Party**

This is Exhibit "BB" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

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

RE: MARGARITA CASTILLO, Applicant

AND:

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, AS EXECUTOR OF THE ESTATE OF JUAN ARTURO GUTIERREZ, Respondents

BEFORE: McWatt ACJSCJ, Sachs and Penny JJ.

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

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

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

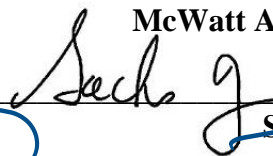
HEARD at Toronto: In writing

ENDORSEMENT

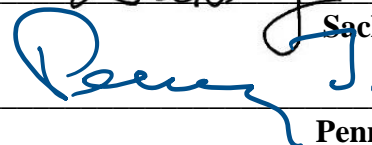
[1] This motion for leave to appeal the Orders of McEwen J. dated March 25, 2021 is dismissed with costs to the Receiver fixed in the amount of \$5000.00, all inclusive.



McWatt ACJSCJ



Sachs J.



Penny J.

Date: July 9, 2021

This is Exhibit "CC" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE)
)
 JUSTICE McEWEN)

WEDNESDAY, THE 28TH
 DAY OF JULY, 2021

B E T W E E N:



MARGARITA CASTILLO

Applicant

and

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

Respondents

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

COSTS ORDER

THIS MOTION, made by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property of Xela Enterprises Ltd. (the “**Company**”) was heard virtually on March 22, 2021 via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

WHEREAS on March 25, 2021, this Court granted the Receiver's motion and made an Order expanding the Receiver's investigative powers and ordering Juan Guillermo Gutierrez ("**Juan Guillermo**") and Arturo's Technical Services Ltd. ("**ATS**") to comply with prior Court Orders,

AND WHEREAS, on March 25, 2021, this Court invited submissions on costs,

ON READING the cost submissions of the Receiver, the responding cost submissions of Juan Guillermo and ATS, and the reply cost submissions of the Receiver,

1. **THIS COURT ORDERS** that, within 60 days of this Order, Juan Guillermo shall pay the Receiver and its counsel the following fees:
 - a. Lenczner Slaght LLP: \$50,000 plus HST; and
 - b. KSV: \$30,000 plus HST.

2. **THIS COURT ORDERS** that, within 60 days of this Order, ATS shall pay the Receiver and its counsel the following fees:
 - a. Lenczner Slaght LLP: \$30,000 plus HST; and
 - b. KSV: \$15,000 plus HST.

3. **THIS COURT ORDERS** that, within 60 days of this Order, Juan Guillermo and ATS, on a joint and several basis, shall pay the Receiver and its counsel the following fees:
 - a. Lenczner Slaght LLP: \$15,000 plus HST;
 - b. KSV: \$7,500 plus HST; and

- c. Hatstone Abogados: \$7,500 plus HST.

- 4. **THIS COURT ORDERS** that, within 60 days of this Order, Juan Guillermo and ATS, on a joint and several basis, shall pay the Receiver \$13,964.93, with Juan Guillermo paying 67% and ATS paying 33%.

THIS ORDER BEARS INTEREST at the rate of 2.0% per year commencing on September 27, 2021.



(Signature of judge, officer or registrar)

This is Exhibit "DD" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprises Ltd. et al
Defendant(s)

Case Management Yes No by Judge: McBwen T

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

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

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

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

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

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

28 July 21
Date

McBwen T
Judge's Signature

Additional Pages thirteen

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

In my view, costs ought to be

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Such as Mine, cannot be ignored without consequence. I do not agree with the position taken by ATS that costs of motion cannot be recovered where fees are provided for in an Appointment order or Juan Guillermo's submission that Receiver's ought not receive costs. If Mine was true in either case it ^{at} would allow parties and stakeholders to ignore Court orders with impunity. Given the failure to comply with clear orders of the Court and my other criticisms contained in the March 25/21 endorsement I am of the view that Mine is one of those rare cases where substantial indemnity costs are warranted. The actions of Juan Guillermo and ATS are worthy of sanction.

With respect to the remaining

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

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

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

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

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

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

I disagree.

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

Similarly, I agree that the

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

have dealt with above.

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

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

Lencner Slayht LLP - \$50,000 plus HST

KSV Restructuring Inc - \$30,000 plus

HST.

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

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

Lenczner Slaght LLP - \$30,000 plus HST

KSV Restructuring Inc - \$15,000 plus HST

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

Lenczner Slaght LLP - \$15,000 plus HST

KSV Restructuring Inc - \$7,500 plus HST

Hatstone - \$7,500 plus HST

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

Given my previous findings in prior endorsements and the within

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

Costs are to be paid within 60 days.

McE...

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

DATE: February 10, 2021

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

RE: Margarita Castillo, Applicant

AND:

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

BEFORE: The Honourable Justice McEwen

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

Chris MacLeod for Juan Guillermo Gutierrez

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

Jeffrey Leon and Jason Woychesyn for Margarita Castillo

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RE: Margarita Castillo, Applicant

AND:

Xela Enterprises Ltd., Tropic International Limited, Fresh Quest, Inc., 696096
Alberta Ltd., Juan Guillermo Gutierrez and Carmen S. Gutierrez, as Executor of the
Estate of Juan Arturo Gutierrez, Respondents

BEFORE: The Honourable Justice Thomas J. McEwen

COUNSEL: (see Counsel Slip)

HEARD IN WRITING

COSTS ENDORSEMENT

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

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

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

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

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

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

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

Disposition

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

- (1) With respect to Juan Guillermo's failure to deliver his electronic devices he shall pay the Receiver, on a substantial indemnity basis, the following fees:
 - a. Lenczner Slaght LLP - \$50,000 plus HST
 - b. KSV Restructuring Inc. - \$30,000 plus HST
- (2) With respect to ATS' failure to allow the Receiver access it shall pay the Receiver, on a substantial indemnity basis, the following fees:
 - a. Lenczner Slaght LLP - \$30,000 plus HST
 - b. KSV Restructuring Inc. - \$15,000 plus HST
- (3) With respect to the Receiver's motion to expand its powers, Juan Guillermo and ATS, on a joint and several basis, shall pay the Receiver the following fees:
 - a. Lenczner Slaght LLP - \$15,000 plus HST
 - b. KSV Restructuring Inc. - \$7,500 plus HST
 - c. Hatstone - \$7,500 plus HST
- (4) Disbursements shall be paid to the Receiver by Juan Guillermo and ATS, on a joint and several basis, with Juan Guillermo paying 67% and ATS paying 33%.

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

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

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

McEwen J.

Date: July 28, 2021

This is Exhibit "EE" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF TARAS VOLGEMUT

I, Taras Volgemut, of the City of Dubai, in the United Arab Emirates, MAKE OATH
AND SAY:

1. I am a 41% shareholder in Trecastle Global Investment LLC, registered in Dubai, which in turn owns 50% shares in Aurum Leasing Ltd, registered in Abu Dhabi, where I served as the CEO and a member of the Board of Directors from inception until September 1, 2021.
2. I was introduced to Juan Guillermo Gutierrez (“**Mr. Gutierrez**”) in March 2021, at which time I learned of an opportunity to invest in litigation for the benefit of BDT Investments Inc. (“**BDT**”) relating to the recovery of at least US\$44.5 million in unpaid dividends (with interest) owed to Lisa, S.A. (“**LISA**”) by Villamorey S.A. (“**Villamorey**”) in Panama, and at least three times said sum in unpaid dividends (with interest) owed to LISA by a group of agricultural companies in Guatemala (the “**Avicola Group**”). I have

since discussed the investment opportunity on multiple occasions with Mr. Gutierrez and with directors of BDT, which owns the rights to the unpaid dividends owed to LISA. Based on those discussions, I invited Mr. Gutierrez to meet with me in person to discuss the background of the dispute and related issues. In late June 2021, I flew Mr. Gutierrez from Toronto to Turkey at my expense, where we conducted face-to-face meetings over the course of four days.

3. I have learned from my due diligence about the progress of both civil and criminal litigation in Panama against Villamorey and its majority shareholders, who are Mr. Gutierrez's cousins (the "**Cousins**"). I also learned about the progress of various legal proceedings in Guatemala to collect LISA's unpaid dividends from the Avicola Group, which is also managed and controlled by the Cousins. Having analyzed those matters, I am committed to fund BDT's global litigation efforts to recover said unpaid dividends. As part of my investment, I am also prepared to pay the unsatisfied portion of the judgment on which this receivership is based, as well as the approved costs of the receivership.

4. In that regard, I understand that there are certain concerns regarding potential unauthorized disclosure of documents sought by the receiver, given the prior theft of Xela documents and their improper use in litigation in Guatemala to impede the collection of unpaid dividends owed to LISA. While the possibility of a similar unauthorized disclosure might be remote in this proceeding, it is a risk that should not be taken given the quantum of my contemplated investment, and the prospect of full satisfaction of the Applicant's judgment and payment of all approved costs of the receivership.

5. I am in the process of making arrangements for the liquidity of the necessary funds to satisfy the judgment and pay the costs of the receivership, which I anticipate will require an additional 60 days' time, approximately. Although I have already initiated that process, the COVID pandemic and related lockdowns have brought about unavoidable delays that have extended the timeline. I am continuing to work diligently to perform the necessary steps to make the requisite cash available to satisfy the judgment and any approved receivership costs.

6. I make this affidavit in support of termination of the receivership and settlement of this proceeding and for no other or improper purpose.

SWORN BEFORE ME VIA VIDEOCONFERENCE by Taras Volgemut in the City of New York, in the United States, before me at the City of Toronto, in the Province of Ontario, on September 16, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO#70332Q)



TARAS VOLGEMUT

1218

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al.
Respondent

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO**

AFFIDAVIT OF TARAS VOLGEMUT

CAMBRIDGE LLP

333 Adelaide Street West
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M5V 1R5

Chris Macleod (LSUC# 45723M)

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Tel: 647.346.6696

N. Joan Kasozi (LSUC# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Applicant
Juan Guillermo Gutierrez

This is Exhibit "FF" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in cursive script, appearing to read "Shane Ramnanan", written in black ink.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo _____
Plaintiff(s)

AND

Xela et al _____
Defendant(s)

Case Management Yes No by Judge: McEWENT

Counsel	Telephone No:	Facsimile No:

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

The contempt motion scheduled
for Oct 6+7 /21 is adj. sine die.
A c.c. will be held on
Dec 2/21 @ 10am for 90 mins.

17 Sept 21
Date

McEWENT
Judge's Signature

Additional Pages _____

This is Exhibit "GG" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

From: [Monique Jilesen](#)
To: [Philip Cho](#); [Michael Ly](#); [Chris Macleod](#); bgreenspan@15bedford.com
Cc: [Derek Knoke](#); [Noah Goldstein](#); [Bobby Kofman \(bkofman@ksvadvisory.com\)](mailto:bkofman@ksvadvisory.com)
Subject: RE: Xela Enterprises Ltd. - Unpaid Costs Order July 28, 2021
Date: Tuesday, September 28, 2021 1:10:09 PM
Attachments: [Xela Costs Order - July 28 2021.docx](#)
[image001.png](#)

Counsel,

We did not receive any payment of costs which were due yesterday pursuant to the costs endorsement of July 28, 2021. Please advise if your clients intend to pay the costs and when we should expect to receive them, having regard to the fact that the payment is now overdue. In addition, please provide your consent to the form and content of the attached order by 10 a.m. October 1, 2021 failing which we will write to Justice McEwen directly to advise him that the costs have not been paid and to ask him to issue the Order.

Regards,

Monique Jilesen



Monique Jilesen*

pronouns: she/her

T 416-865-2926
M 416-407-5034
F 416-865-2851
mjilesen@litigate.com

130 Adelaide St W
Suite 2600
Toronto, ON
Canada M5H 3P5
www.litigate.com

This e-mail may contain legally privileged or confidential information. This message is intended only for the recipient(s) named in the message. If you are not an intended recipient and this e-mail was received in error, please notify us by reply e-mail and delete the original message immediately. Thank you. Lenczner Slaght LLP.

This is Exhibit “HH” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

From: [Philip Cho](#)
To: [Monique Jilesen](#)
Cc: [Bobby Kofman](#); [Michael Ly](#); ngoldstein@ksvadvisory.com; [Derek Knoke](#); [Chris Macleod](#); bgreenspan@15bedford.com
Subject: RE: Xela Enterprises Ltd. [DM-LSDOCS.FID727411]
Date: Thursday, September 30, 2021 11:06:17 AM
Attachments: [image001.png](#)

EXTERNAL MESSAGE

Monique, we can agree to disagree. However, ATS is not in a position to release documents over which Mr. Macleod's client has claimed solicitor-client privilege without a clear order or consent from the party entitled to privilege. The emails are ready and I understand that a protocol was suggested which the Receiver simply rejected, and then it was not dealt with at the case conference.

PHILIP CHO | Partner | T. 416-619-6296 | C. 647-638-7828 | pcho@weirfoulds.com

WeirFoulds LLP

From: Monique Jilesen <mjilesen@litigate.com>
Sent: September 26, 2021 4:14 PM
To: Philip Cho <pcho@weirfoulds.com>
Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Michael Ly <mly@weirfoulds.com>; ngoldstein@ksvadvisory.com; Derek Knoke <dknoke@litigate.com>; Chris Macleod <cmacleod@cambridgellp.com>; bgreenspan@15bedford.com
Subject: RE: Xela Enterprises Ltd. [DM-LSDOCS.FID727411]

[External Message]

Philip –

The relief the Receiver sought was clear and the Order is clear. The Company document and devices referred to in the August 2020 Order included Mr. Gutierrez' emails. This fact was squarely before the Court on the March 2021 Order. If a claim for privilege was being made it should have been made on the motion, not after the order was issued. No one has sought any relief from the Order notwithstanding that it has been in place for six months. There is simply no excuse for failing to comply with the Order.

The Receiver will rely on this correspondence to seek full indemnity costs for any future attendances required to enforce this or any other order.

We look forward to receive the payment of costs of the motion tomorrow.

Monique

From: Philip Cho <pcho@weirfoulds.com>
Sent: September 24, 2021 4:06 PM
To: Monique Jilesen <mjilesen@litigate.com>
Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Michael Ly <mly@weirfoulds.com>;
ngoldstein@ksvadvisory.com; Derek Knoke <DKnoke@litigate.com>; Esther Saint Clair
<eclair@litigate.com>; Chris Macleod <cmacleod@cambridgellp.com>; bgreenspan@15bedford.com
Subject: RE: Xela Enterprises Ltd. [DM-LSDOCS.FID727411]

EXTERNAL MESSAGE

Monique, I have copied Mr. Macleod and Mr. Greenspan as this issue primarily concerns their client.

You are referring to a passage of the ATS factum that set out some of the facts from April 2020 - not something that was at issue and argued before Justice McEwen. The August 28, 2020 order deals with the ability to make claims of privilege against the Receiver over Company documents and devices.

As I understand, the current issue that has been raised is in relation to Mr. Gutierrez's personal privilege claims over emails that are not necessarily Xela documents but to which the Receiver may be entitled. This issue was not expressly raised before Justice McEwen and nothing in the order or the endorsement expressly states that the Receiver is entitled to solicitor-client privileged communications. Particularly in relation to the @Arturos.com emails which would include all of Mr. Gutierrez's emails with his counsel Mr. Greenspan and Mr. Macleod, I cannot see how the Receiver would believe it is entitled to unfettered access to those communications, and why it would undertake this risk without certainty and express authorization.

PHILIP CHO | Partner | T. 416-619-6296 | C. 647-638-7828 | pcho@weirfoulds.com

WeirFoulds LLP

From: Monique Jilesen <mjilesen@litigate.com>
Sent: September 24, 2021 3:15 PM
To: Philip Cho <pcho@weirfoulds.com>
Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Michael Ly <mly@weirfoulds.com>;
ngoldstein@ksvadvisory.com; Derek Knoke <dknoke@litigate.com>; Esther Saint Clair
<eclair@litigate.com>
Subject: RE: Xela Enterprises Ltd. [DM-LSDOCS.FID727411]

[External Message]

Philip,

ATS made the very argument you are now making on the March 22, 2021 motion and did not succeed. Paragraph 15 of your factum in support of the motion says "Juan expressed concern that the servers could contain solicitor-client privileged information and other confidential and protectible information, requiring some review before delivery to the Receiver."

Justice McEwen said in his endorsement "The August 28, 2020 order (which was made on notice to ATS, but ATS did not appear) provided, inter alia, that the Receiver be entitled to conduct forensic examinations of Xela devices, and that no privilege claims could be asserted in respect of any Xela documents or devices. "

You sought leave to appeal the order and did not succeed. The issue has been repeatedly finally determined. ATS is in repeated breach of the various orders of the Court. There is no absolutely no basis for failing to comply with the March 25, 2021 Order.

Regards,

Monique Jilesen

From: Philip Cho <pcho@weirfoulds.com>
Sent: Friday, September 24, 2021 2:36 PM
To: Monique Jilesen <mjilesen@litigate.com>
Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Michael Ly <mly@weirfoulds.com>;
ngoldstein@ksvadvisory.com; Derek Knoke <dknoke@litigate.com>; Esther Saint Clair
<eclair@litigate.com>
Subject: RE: Xela Enterprises Ltd. [DM-LSDOCS.FID727411]

EXTERNAL MESSAGE

Monique, I do not believe the issue of Mr. Guitierrez's privilege on the emails was addressed on the motion. Can you point to where in the endorsement it was addressed?

PHILIP CHO | Partner | T. 416-619-6296 | C. 647-638-7828 | pcho@weirfoulds.com

WeirFoulds LLP

From: Monique Jilesen <mjilesen@litigate.com>
Sent: September 24, 2021 2:31 PM
To: Philip Cho <pcho@weirfoulds.com>

1227

Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Michael Ly <mly@weirfoulds.com>; ngoldstein@ksvadvisory.com; Derek Knoke <dknoke@litigate.com>; Esther Saint Clair <eclair@litigate.com>

Subject: RE: Xela Enterprises Ltd. [DM-LSDOCS.FID727411]

[External Message]

Mr. Cho –

The clear direction of the Court is in the order. Claims of privilege were made on the motion. The Court nevertheless ordered that the emails should be produced. No relief has been sought from the order. ATS' continuing failure to produce the emails in accordance with the order is a breach of the order.

Regards,

Monique Jilesen

From: Philip Cho <pcho@weirfoulds.com>

Sent: Friday, September 24, 2021 2:21 PM

To: Monique Jilesen <mjilesen@litigate.com>

Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Michael Ly <mly@weirfoulds.com>; ngoldstein@ksvadvisory.com; Derek Knoke <dknoke@litigate.com>; Esther Saint Clair <eclair@litigate.com>

Subject: RE: Xela Enterprises Ltd. [DM-LSDOCS.FID727411]

EXTERNAL MESSAGE

Monique, I am advised that the other set of emails to and from Juan Gutierrez at the @arturos.com email address have been compiled for the Receiver. I am also advised that apart from the @xela.com and @arturos.com emails, no other email addresses for Mr. Gutierrez are on the ATS servers.

As you know, Mr. Macleod's client has asserted privilege claims over some of the emails in ATS' possession. The case conference was requested to deal specifically with this issue as we understood from your July 30, 2021 email, and in the email exchange between you and Mr. Macleod on August 3, 2021 (copies attached). However, you did not inform Justice McEwen of this issue as the reason for the delay in providing this information to the Receiver. As a result, these issues were not addressed at the case conference as anticipated and much time was spent dealing with the contempt hearing and the Receiver's lack of funding instead. Given the privilege claim made by Mr. MacLeod and his client, ATS is not prepared to release these emails to the Receiver and breach another party's privilege without further clear direction from the court.

I have reminded my client about the costs award and the timing.

WeirFoulds LLP

From: Esther Saint Clair <eclair@litigate.com>

Sent: September 21, 2021 4:12 PM

To: Philip Cho <pcho@weirfoulds.com>; Michael Ly <mly@weirfoulds.com>

Cc: Bobby Kofman <bkofman@ksvadvisory.com>; ngoldstein@ksvadvisory.com; Monique Jilesen <mjilesen@litigate.com>; Derek Knoke <dknoke@litigate.com>

Subject: Xela Enterprises Ltd. [DM-LSDOCS.FID727411]

[External Message]

Good afternoon. Please see the attached correspondence from Monique Jilesen.



Esther Saint Clair

Assistant to William McDowell, Monique Jilesen and Alessa Dassios
T 416-865-9500 Ext. 502
F 416-865-9010
eclair@litigate.com

130 Adelaide St W
Suite 2600
Toronto, ON
Canada M5H 3P5
www.litigate.com

This is Exhibit "II" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

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

NOTICE OF EXAMINATION

TO: Juan Guillermo Gutierrez

YOU ARE REQUIRED TO ATTEND, on Tuesday, November 9, 2021, at 2 pm by video conference via Zoom through the office of Neesons Court Reporting, 77 King Street West, Suite 2020, Toronto, ON M5K 1A2 for an examination in aid of execution.

If you object to the method of attendance, you must notify the other parties or their lawyers. If you and the other parties cannot come to an agreement on the method of attendance, one of the parties must request a case conference for the court to make an order under Rule 1.08(8).

YOU ARE REQUIRED TO PRODUCE at the examination the following documents and things:

1. **Corporate Records:** any and all corporate records of any corporation of which you are or have been an officer or director, including, but not limited to, share registers, minute books, and a record of all current and former officers and directors of such corporations;
2. **Financial Records:** any and all financial records, including, but not limited to, all bank statements, canceled cheques, chequebooks, chequebook registers, tax returns and assessments, and payroll records in relation to your affairs within the five years immediately preceding the date of this notice;
3. **Securities:** all evidence and all certificates of any and all stocks, bonds, securities and annuities belonging to you or in which you have or have had any interest whatsoever, either alone or jointly with any person(s), entity, or entities, for the five years immediately preceding the date of this notice;
4. **Safe Deposit Boxes:** location of any and all safe deposit boxes wherever situated, whether privately maintained or in any bank or credit union or similar association, belonging to you or in which you have or have had any interest whatsoever, either alone or jointly with any other person(s), entity, or entities, for the five years immediately preceding the date of this notice;
5. **Life Insurance Policies:** a copy of all life insurance policies for your life, or naming you as a beneficiary;
6. **Other Insurance Policies:** property, fire, burglary, and extended coverage or similar insurance policies now in force upon any real estate or personal property (including copies of insurance inventories) owned by you or in which you have or have had any interest whatsoever, either alone or jointly with any other person(s), entity, or entities, for the five years immediately preceding the date of this notice;
7. **Contracts, etc.:** contracts, notes, money orders, drafts, promissory notes, negotiable instruments, mortgages, pledge agreements, and/or receivables payable to you, for your benefit, or held in trust for you, whether or not the same be now due and/or payable, within the five years immediately preceding the date of this notice;
8. **Real Property:** a list of any real property owned, purchased, or being purchased or sold, by you or in which you have had any interest whatsoever, either alone or jointly with any other person(s), entity or entities, together with copies of all titles, deeds, or contracts of sale for same;
9. **Personal Property:** titles, bills of sale, or contracts of sale upon, including but not limited to, automobiles, boats, household goods, miscellaneous furniture, computers, and fixtures belonging to you or in which you have or have had any interest whatsoever, either alone or jointly with any other person(s), entity, or entities, for the five years immediately preceding the date of this notice;

10. **Property Assessments:** all property tax assessment notices issued to you within the five years immediately preceding the date of this notice;
11. **Trusts:** a copy of each trust, revocable or irrevocable, in which you are named as a Settlor, Trustee, or Beneficiary; and
12. **Other:** any other documents evidencing any loans, leases, business transactions, security interests, or property holdings to which you are a party.

October 27, 2021

LENCZNER SLAGHT LLP

Barristers

130 Adelaide Street West, Suite 2600

Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

pgriffin@litigate.com

Tel: (416) 865-2921

Monique J. Jilesen (43092W)

mjilesen@litigate.com

Tel: (416) 865-2926

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dknoke@litigate.com

Tel: (416) 865-3018

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181 Bay Street, Suite 1800

Toronto, ON M5J 2T9

Kyle Plunkett

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Sam Babe

sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

TO: **JUAN GUILLERMO GUTIERREZ**
212-47 York Mills Road
Toronto, ON M2P 1B6

AND TO: **GREENSPAN HUMPHREYS WEINSTEIN LLP**
15 Bedford Road
Toronto ON M5R 2J7

Brian Greenspan
bgreenspan@15bedford.com
Tel: (416) 868-1755 Ext. 4222
Fax: (416) 868-1990

Lawyers for the Respondent, Juan Guillermo Gutierrez

AND TO: **CAMBRIDGE LLP**
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Toronto, ON M5V 1R5

Christopher MacLeod (45723M)
Tel: 647.346.6696 (Direct Line)
cmacleod@cambridgellp.com

N. Joan Kasozi (70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent, Juan Guillermo Gutierrez

1234

MARGARTIA CASTILLO et al.
Applicants

-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

NOTICE OF EXAMINATION

LENCZNER SLAGHT LLP

Barristers

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

Peter H. Griffin (19527Q)

pgriffin@litigate.com

Tel: (416) 865-2921

Monique J. Jilesen (43092W)

mjilesen@litigate.com

Tel: (416) 865-2926

Derek Knoke (75555E)

dknoke@litigate.com

Tel: (416) 865-3018

AIRD & BERLIS LLP

Brookfield Place

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

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

This is Exhibit "JJ" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

**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.

NOTICE OF EXAMINATION

TO: Juan Andres Gutierrez or Thomas Gutierrez on behalf of Arturo's Technical Services Ltd.
("ATS")

YOU ARE REQUIRED TO ATTEND, on Tuesday, November 9, 2021, at 10 a.m., by video conference via Zoom through the office of Neesons Court Reporting, 77 King Street West, Suite 2020, Toronto, ON M5K 1A2 for an examination in aid of execution.

If you object to the method of attendance, you must notify the other parties or their lawyers. If you and the other parties cannot come to an agreement on the method of attendance, one of the parties must request a case conference for the court to make an order under Rule 1.08(8).

YOU ARE REQUIRED TO PRODUCE at the examination the following documents and things:

1. **Corporate Records:** any and all corporate records including, but not limited to, share registers, minute books, and a record of all current and former officers and directors of such corporations;
2. **Financial Records:** any and all financial records, including, but not limited to, all bank statements, canceled cheques, chequebooks, chequebook registers, tax returns and assessments, and payroll records in relation to your affairs within the five years immediately preceding the date of this notice;
3. **Securities:** all evidence and all certificates of any and all stocks, bonds, securities, and annuities belonging to ATS or in which ATS has or has had any interest whatsoever, either alone or jointly with any person(s), entity, or entities, for the five years immediately preceding the date of this notice;
4. **Safe Deposit Boxes:** location of any and all safe deposit boxes wherever situated, whether privately maintained or in any bank or credit union or similar association, belonging to ATS or in which ATS has or has had any interest whatsoever, either alone or jointly with any other person(s), entity, or entities, for the five years immediately preceding the date of this notice;
5. **Insurance Policies:** occupier's liability, property, fire, burglary, and extended coverage or similar insurance policies now in force upon any real estate or personal property (including copies of insurance inventories) owned by ATS or in which ATS has or has had any interest whatsoever, either alone or jointly with any other person(s), entity, or entities, for the five years immediately preceding the date of this notice;
6. **Contracts, etc.:** contracts, notes, money orders, drafts, promissory notes, negotiable instruments, mortgages, pledge agreements, and/or receivables payable to ATS, for ATS' benefit, or held in trust for ATS, whether or not the same be now due and/or payable, within the five years immediately preceding the date of this notice;
7. **Real Property:** a list of any real property owned, purchased, or being purchased or sold, by ATS or in which ATS has had any interest whatsoever, either alone or jointly with any other person(s), entity, or entities, together with copies of all titles, deeds, or contracts of sale for same;
8. **Personal Property:** titles, bills of sale, or contracts of sale upon, including but not limited to, automobiles, boats, goods, miscellaneous furniture, computers, and fixtures belonging to ATS or in which ATS has or has had any interest whatsoever, either alone or jointly with any other person(s), entity, or entities, for the five years immediately preceding the date of this notice;
9. **Property Assessments:** all property tax assessment notices issued to ATS within the five years immediately preceding the date of this notice;

10. **Trusts:** a copy of each trust, revocable or irrevocable, in which ATS is named as a Settlor, Trustee, or Beneficiary;
11. **Other:** any other documents evidencing any loans, leases, business transactions, security interests, or property holdings to which ATS is a party.

October 27, 2021

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

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pgriffin@litigate.com

Tel: (416) 865-2921

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mjjilesen@litigate.com

Tel: (416) 865-2926

Derek Knoke (75555E)

dknoke@litigate.com

Tel: (416) 865-3018

AIRD & BERLIS LLP

Brookfield Place

181 Bay Street, Suite 1800

Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

TO: **ARTURO'S TECHNICAL SERVICES LTD.**

100 Leek Crescent, Unit 3

Richmond Hill, ON L4B 3E6

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

Philip Cho
Email: pcho@weirfoulds.com
Michael Ly
Email: mly@weirfoulds.com

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

Lawyers for Arturo's Technical Services Ltd.

1240

MARGARTIA CASTILLO et al.
Applicants

-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

NOTICE OF EXAMINATION

LENCZNER SLAGHT LLP

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Brookfield Place

181 Bay Street, Suite 1800

Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver

This is Exhibit “KK” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Delivered by email

November 4, 2021

Monique Jilesen
Lenzner Slaght
130 Adelaide Street West
Suite 2600
Toronto, Ontario
M5H 3P5

Dear Ms. Jilesen:

Re: Notice of Examination

I am responding to your service on Mr. Gutierrez of a Notice of Examination in Aid of Execution which you have scheduled for November 9, 2021. I must admit that I am both perplexed and concerned by your Notice.

We are all aware that the Receiver initiated two contempt motions, placing Mr. Gutierrez liberty at risk. Both motions were adjourned *sine die* at the instance of the Receiver. The last adjournment was purportedly based on the representation to Mr. Justice McEwan that there were insufficient funds available to continue with the contempt process. Nevertheless, the Receiver did not abandon the contempt proceedings but insisted that the motions be adjourned. Meanwhile, Mr. Gutierrez continues to face the threat of possible imprisonment without having had the opportunity to confront his accuser, the Receiver.

In these circumstances, we find the Receiver's steps to conduct two examinations in aid of execution inconsistent with the limited resources ostensibly available to him. The Receiver, as an officer of the court must act in good faith and if he has funds to advance these proceedings, he should first resolve the contempt motion before commencing an examination which benefits only the Receiver and his counsel. The enforcement of a relatively small cost award in the context of the costs of the receivership should not take priority over the pending contempt motions.

It should also be noted that Mr. Gutierrez attended an Examination in Aid of Execution in 2019. It was exhaustive and he was responsive to every query. A further examination is unlikely to result in any information which is not currently in your possession. Mr. Gutierrez' financial circumstances have not improved. As a result, we question the *bona fides* of the attempt to examine Mr. Gutierrez and a representative of ATS. We would request a fulsome explanation as to the rationale underlying the Receiver's belief that it is appropriate to expend its limited resources in this fashion.

Yours sincerely,
Greenspan Humphrey Weinstein LLP

A handwritten signature in black ink that reads "Brian H. Greenspan". The signature is written in a cursive, flowing style.

Brian H. Greenspan

/BHG:ma

Cc: Chris MacLeod
Philip Cho
Joan Kasozi
Juan Gutierrez
Bobby Kofman
Noah Goldstein
Derek Knoke

This is Exhibit "LL" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

November 5, 2021

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

VIA EMAIL

Brian H. Greenspan
Greenspan Humphrey Weinstein LLP
15 Bedford Rd.
Toronto, ON M5R 2J7

Dear Mr. Greenspan:

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

I write in response to your letter of November 4, 2021.

On July 28, 2021 Justice McEwen ordered that Juan Guillermo and ATS pay the Receiver and its counsel costs in relation to the motion decided on March 25, 2021. We have demanded payment of the costs and have received no substantive response from counsel for Juan Guillermo or ATS. The notices delivered represent the Receiver acting in good faith to pursue those costs and for no other purpose.

As we indicated at the case conference before Justice McEwen the Receivership is not currently being funded. That remains the case. Whether or not the Receivership is being funded and regardless of what motions are outstanding, the Receiver has the right to pursue the payment of costs from Mr. Guillermo and ATS in order to have those costs paid.

Although Mr. Guillermo was examined in 2019, there is nothing that prevents him from being examined in 2021. We have no information as to whether his circumstances have changed. In any event, as you know, an examination in aid of execution is permitted once every 12 months in the same proceeding. This is the first examination in aid of execution in this proceeding.

In addition, ATS is responsible for its own costs and joint and severally for certain of the costs. An independent notice has been served on ATS, a company which is separately represented and presumably has separate resources to pay the costs order. It is unclear what basis you could have to object to an examination of ATS.

You have asked for an explanation as to the rationale for the examinations in aid of execution. The rationale, as indicated above, is to collect the costs owing to the Receiver pursuant to the July 28, 2021 Order. We will be proceeding with the examinations on November 9, 2021 as scheduled.

Yours truly,



Monique Jilesen

MJ

- c. Peter Griffin/Derek Knoke, *Lenczner Slaght LLP*
Christopher Macleod/N. Joan Kasozi, *Cambridge LLP*
Philip Cho, *Weir Foulds LLP*
Bobby Kofman/Noah Goldstein, *KSV Advisory*

This is Exhibit “MM” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

MARGARITA CASTILLO

Applicant

-and-

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

Respondents

AFFIDAVIT OF TARAS VOLGEMUT

I, Taras Volgemut, of the City of Dubai, in the United Arab Emirates, MAKE OATH
AND SAY:

1. I refer to my affidavit dated September 16, 2021, wherein I expressed my commitment to fund the global litigation efforts of BDT Investments Ltd. (“**BDT**”) to recover unpaid dividends owed to LISA, S.A. (“**LISA**”), including my commitment to pay the unsatisfied portion of the judgment on which the above-entitled receivership is based, together with approved costs. In my previous affidavit I also indicated that I was in the process of arranging for the liquidity of the necessary funds to satisfy the judgment and approved costs, and that I anticipated completing that process within 60 days.
2. I can report that I have completed the requisite arrangements, and that funding is now in place. As part of that funding, I have today directed my bank to transfer the sum

of CAN\$189,114.93 to Cambridge LLP in Toronto for payment of the following items in accordance with the Costs Order issued by this Court on September 27, 2021:

- a. For Lenczner Slaght: CAN\$95,000 plus HST;
- b. For KSV: CAN\$52,500 plus HST;
- c. For Hatstone: CAN\$7,500 plus HST; and
- d. For Disbursements: CAN\$13,964.93.

3. My bank in Dubai follows a 24-hour know-your-client protocol before transferring funds to any new beneficiary, and I therefore cannot yet provide a copy of a SWIFT wire transfer confirmation of the payment. However, I can confirm that the transfer has been initiated, and I will provide Cambridge LLC with a copy of the confirmation as soon as it becomes available.

4. While funds are now available to satisfy the outstanding portion of Ms. Margarita Castillo's judgment, it has recently come to my attention that a Panamanian court has determined: (a) that Ms. Castillo received the sum of US\$4,350,000 in 2010; (b) that said sum was paid from the dividends owed to LISA by Villamorey, S.A. ("**Villamorey**") in Panama, without the consent of LISA; and (c) that the Panamanian court has reduced its judgment in LISA's favor by the amount corresponding to the payment received by Ms. Castillo, such that the judgment against Villamorey in favor of LISA – which had previously been for the sum of US\$44,050,594 (after an offset in Villamorey's favor of US\$869,318) – is now for the lesser amount of US\$39,700,594.

5. If it is true that Ms. Castillo was paid the sum of US\$4,350,000 in 2010 from unpaid dividends owed by Villamorey to LISA (which is an indirect subsidiary of the Respondent Xela) without LISA's or Xela's consent, that payment would be applicable to reduce Ms. Castillo's judgment, such that said judgment would, in effect, already have been satisfied, either by way of setoff or otherwise, at the time Ms. Castillo petitioned the Court to impose this receivership in 2019. If so, any further payment to Ms. Castillo on account of her judgment would constitute an unjust windfall in her favor, as well as an improper impairment of my investment in the litigation to collect LISA's unpaid dividends.

6. I am willing to cause one of the corporations that I control to provide security in the form of a cash payment to the court (whether by bond, letter or credit or some other instrument) necessary to satisfy: (a) the outstanding portion of Ms. Castillo's judgment with interest; (b) the total fees of the Receiver and its counsel approved by the Court; and (c) the reasonable fees of the Receiver and its counsel that have been incurred by not yet approved by the Court, pending a judicial determination whether Ms. Castillo in fact received the aforementioned payment such that her judgment has already been fully satisfied. I have performed some preliminary research into the question of security, and it is my belief that I could make the necessary arrangements within 60 days hereof, taking into consideration the intervening holidays.

7. I make this affidavit in support of a suspension and ultimate termination of the receivership and settlement of this proceeding and for no other or improper purpose.

SWORN BEFORE ME VIA VIDEOCONFERENCE by Taras Volgemut in the City of Dubai, in the United Arab Emirates, before me at the City of Toronto, in the Province of Ontario, on December 1, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

}



Commissioner for Taking Affidavits
(or as may be)

N. JOAN KASOZI (LSO#70332Q)



TARAS VOLGEMUT

1252

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al.
Respondent

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO**

AFFIDAVIT OF TARAS VOLGEMUT

CAMBRIDGE LLP

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

Chris Macleod (LSUC# 45723M)

cmacleod@cambridgellp.com

Tel: 647.346.6696

N. Joan Kasozi (LSUC# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Applicant
Juan Guillermo Gutierrez

This is Exhibit "NN" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo

Plaintiff(s)

AND

Xela Enterprises et al

Defendant(s)

Case Management Yes No by Judge: McEwen

Counsel	Telephone No:	Facsimile No:

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

Motion regarding the sales process will be heard by me on March 2/22 for 13 hours commencing at 10a.m.

I will also conduct a case conference on Jan 24/22 for 1 hour at 10a.m.

2 Dec 21

Date

McEwen

Judge's Signature

Additional Pages _____

This is Exhibit "OO" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**



AFFIDAVIT OF TRANSLATION

I, JONATHAN WHITESIDE, of the city of Toronto, Province of Ontario, Dominion of Canada, MAKE OATH AND SAY AS FOLLOWS:

I am fluent in both the English and Spanish languages. I hereby state that the translation of the following is a complete and accurate translation from the Spanish to English language.

- **Interview of JUAN MIGUEL GUTIERREZ STRAUSS taken by the Attorney General's Office for Investigation and Monitoring of Fraud, Unit for Crimes Against the Public Trust of the Republic of Panama.**

I make this solemn declaration conscientiously believing it to be true and for no other improper purpose, knowing it is of the same force and effect as if made under Oath.

Jonathan Whiteside, Translator
1377 Weston Rd, Suite 1.,
Toronto, ON. M6M 4S1
416-244-4831

SWORN in the
City of Toronto
in the Province of Ontario
this February 23rd, 2022.

WILLIAM H. ROBERTS, NOTARY
Barrister & Solicitor
203A, 881A Jane St.
Toronto, Ont. M6N 4C4





REPUBLIC OF PANAMA
INTERVIEW FORM

Province PANAMA	District PANAMA	Town CALIDONIA	Date 14/12 /2021	Time: 2:30 p.m.
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Pursuant to Articles 16 and 320 of the Code of Criminal Procedure, this proceeding is initiated.

1. Unique Case Number:

2	0	2	1	0	0	0	0	0	0	6	1	1
Year												

Prosecutor ordering the proceeding

Office	OFFICE FOR INVESTIGATION AND MONITORING OF FRAUD, UNIT FOR CRIMES AGAINST THE PUBLIC TRUST.	Prosecutor's Name	Jossira Rojas
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I. INTERVIEWEE'S INFORMATION:

First Name:	JUAN	MIGUEL			
First Surname:	GUTIERREZ	Second Surname: STRAUSS			
Identity Document:	C.I.P:	PASSPORT: HM1 7861 3	OTHER:		
Alias:					
Age:	65 YEARS OLD				
Gender:	FEMALE:	MALE:	XXXX		
Date of Birth:	DAY: 01	MONTH: MARCH	YEAR: 1956		
Place of Birth:	GUATEMALA, GUATEMALA				
Civil Status:	MARRIED				
Schooling Level:	UNDERGRADUATE				
Residence Address:	47 YORK MILLS, RD, 212, TORONTO, ONTARIO CANADA, ZIP CODE M2P1B6	TELEPHONE:	647 296 2488		
Mobile Number	647 296 2488	E-mail	jgutierrez@arturos.com		
COUNTRY:	PANAMA	PROVINCE	PANAMA	DISTRICT	PANAMA
Work address:	47 YORK MILLS, RD, APTO 212, TORONTO ONTARIO, CANADA, ZIP CODE M2P1B6	TELEPHONE:	647 296 2488		
Profession:	BUSINESSMAN	Occupation:	BUSINESSMAN		





REPUBLIC OF PANAMA
INTERVIEW FORM



Relationship with the victim:	HE IS THE VICTIM		
Relationship to the accused party:	NO		
Wears Glasses :		YES X	NO :

II. NARRATIVE ACCOUNT.

(Informed about warnings pursuant to Article 320 of Law 63 of 2008). Statement of the facts of the current investigation:

This office informs that Mr. Juan Gutierrez, with passport No. HM178613, appeared at the Consulate of the Republic of Panama in Toronto, Canada, to participate in a virtual interview, via Microsoft Team. He was informed of the content of Articles 320 of the Criminal Procedures Code and 385 of the Criminal Code. Likewise, it was recorded that attorney Maria del Carmen Guevara, consul, was present at the consulate offices. She received passport No. HM178613 and verified that it was Mr. Juan Gutierrez with passport No. HM178613. Likewise, it is also recorded that Mr. Javier de Leon participated in this virtual interview. He is the applicant of this interview and the attorney-in-fact of Mr. Gutierrez. After having been informed about the articles indicated at the beginning of this interview, the interviewee stated the following: The situation of the facts is the result of the changes made in the Panamanian company GAVISMENTS, S.A., of which I am the beneficiary. I am the shareholder in the Canadian company XELA ENTRERPRISES LTD, which is the shareholder of GAVISMENTS, S.A. As a shareholder, I have been affected by the events that took place. This case involves the company that I manage in Canada. A commercial judge in the province of Ontario issued an order limiting me from participating or carrying out further proceedings in this case, which makes me feel like a judicial hostage, because, even though I am a victim and plaintiff, this order prohibits me from participating or carrying out further proceedings in this case. My name is directly mentioned as a participant on the changes made in the GAVISMENT company. However, I was not present at that meeting. GAVISMENT's articles of incorporation state that all meetings must be attended in person or represented by all shareholders. In this case, I was neither summoned nor invited to the meeting. I state for the record that I personally did not participate in that meeting. I must state that 100% of the GAVISMENTS shares belong to XELA INTERPRISES, the company I represent, and the share certificates are under the administration of GAVISMENT S.A. and XELA INTERPRISES. The books of shares are registered by the management of GAVISVEMTS, S.A. This office proceeded to ask the interviewee about the proceedings for which the company XELA INTERPRISES is under judicial administration. The interviewee replied: It is a court order for payment to a lady who is my sister. The proceeding is ongoing in a commercial court in the province of Ontario to agree on the payment arrangements. This proceeding is not related to GAVISMENT.



REPUBLIC OF PANAMA
INTERVIEW FORM



As representative and shareholder of GAVISMENT, what has been the consequences that you have suffered as a result of the shareholder's meeting to which you were not summoned to attend? The interviewee replied: Concerning the question, I am currently under a court order from the authorities in Canada, so I am not authorized to reply. The interviewee reiterated what he stated at the beginning of the interview regarding the fact that he was not summoned to participate in the shareholders' meeting. This is all. This office states for the record that the interview concluded at 3:36 p.m. today, December 14, 2021.

	NO		YES	X	Which one	COMPUTER
--	----	--	-----	---	-----------	----------

Signature:

Interviewee's signature		Signature
Name:		Name: [Signature]
IDENTITY CARD		Paula Ramos
	interviewee's right index	ATTORNEY GENERAL'S OFFICE, OFFICE FOR INVESTIGATION AND MONITORING OF FRAUD, UNIT FOR CRIMES AGAINST THE PUBLIC TRUST.
		Institution.



REPUBLICA DE PANAMA
FORMULARIO ENTREVISTA



Provincia PANAMA	Distrito PANAMA	Corregimiento CALIDONIA	Fecha 14/12 /2021	Hora: 2:30 p.m.
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Conforme a lo establecido el artículo 16 y 320 del C.P.P., se da inicio a la presente diligencia.

1. Numero Único de Caso:

2	0	2	1	0	0	0	0	3	6	1	1
Año											

Fiscal que ordena la diligencia

Despacho	SECCIÓN DE INVESTIGACIÓN Y SEGUIMIENTO DE CAUDA, UNIDAD DE DELITOS CONTRA LA FE PÚBLICA.	Nombre Fiscal	Jossira Rojas
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I. DATOS DEL ENTREVISTADO:

Primer Nombre:	JUAN	MIGUEL	
Primer Apellido:	GUTIERREZ	Segundo Apellido: STRAUSS	
Documento de Identidad:	C.I.P:	PASAPORTE: HM1 7861 3	OTRO:
Alias:			
Edad:	65 AÑOS		
Género:	FEMENINO:	MASCULINO:	XXXX
Fecha de Nacimiento:	DÍA: 01	MES: MARZO	AÑO: 1956
Lugar de Nacimiento:	GUATEMALA, GUATEMALA		
Estado Civil:	CASADO		
Nivel Educativo:	LICENCIATURA		
Dirección de Residencia:	47 YORK MILLS, RD, APTO 212, TORONTO ONTARIO, CANADA, APARTADO POSTAL M2P1B6	TELÉFONO:	647 296 2488
No. Celular	647 296 2488	Correo electrónico	jgutierrez@arturos.com
	PAÍS: PANAMA	PROV INCIA: PANAMA	DISTRITO: PANAMA
Dirección de trabajo:	47 YORK MILLS, RD, APTO 212, TORONTO ONTARIO, CANADA, APARTADO POSTAL M2P1B6	TELÉFONO:	647 296 2488
Profesión:	EMPRESARIO	Oficio:	EMPRESARIO



REPUBLICA DE PANAMA
FORMULARIO ENTREVISTA



Relación con la víctima:	ES LA VÍCTIMA						
Relación con el Indiciado:	NO						
Usa Anteojos:					SI:	X	NO
						:	

II. RELATO.

(Realizar advertencias previstas en el artículo 320 Ley 63 de 2008). Relación de los hechos con relación a la presente investigación:

El Despacho hace del conocimiento que compareció al consulado de la República de Panamá en Toronto, Canadá, con la finalidad de rendir entrevista el señor Juan Gutiérrez, con pasaporte **HM178613**, de forma virtual, Microsoft Team, a quien se le pone en conocimiento el contenido del artículo y 320 del Código Procesal Penal y 385 del Código Penal. De igual forma se deja constancia que en las oficinas del consulado se encuentra presente la Licenciada María del Carmen Guevara, cónsul, quien recibe el documento de pasaporte **HM178613** y constata que se trata del señor Juan Gutiérrez con pasaporte **HM178613**, de igual forma se deja constancia que participa de esta reunión virtual el Licenciado Javier De León quien es el solicitante de esta entrevista y apoderado legal del señor Gutiérrez. Una vez puesto en conocimiento de los artículos indicados al inicio de esta entrevista, el entrevistado manifiesta lo siguiente: La situación de los hechos se da en los cambios efectuados en las sociedades panameñas GAVISMENTS, S.A., la cual yo soy el beneficiario y soy accionista de una empresa canadiense XELA ENTRERPRISES LTD, que a su vez es el accionista de GAVISMENTS, S.A, y como accionista me veo afectado de los hechos que se dieron. Por un caso que involucra a la empresa que yo dirijo en Canadá, una Juez Mercantil de la provincia de Ontario emitió una orden limitándome a participar o avanzar este caso, cosa que me hace sentir como secuestrado judicialmente, ya que a pesar de ser víctima y querellante dicha orden me prohíbe participar o avanzar en este caso. Ya que en los cambios que efectuaron en la sociedad GAVISMENT, directamente se menciona mi nombre como participante, sin embargo, no estuve presente en dicha asamblea. El pacto social de GAVISMENT ordena que todas las reuniones deben ser presenciales o representadas por los accionistas, en este caso no fue convocado, ni invitado a la celebración de esa asamblea. Dejo constancia que yo personalmente no participe en esa asamblea. Quiero indicar que el 100% de las acciones GAVISMENTS le pertenece a XELA INTERPRISES, empresa a la cual yo representó. Y que los certificados de acciones están bajo de la administración de GAVISMENT S.A. Y XELA INTERPRISES. Los libros de acciones lo mantienen la administración de GAVISVEMTS, S.A. El despacho procede a preguntarle al entrevistado el tipo de proceso por la cual se encuentra bajo administración judicial la empresa XELA INTERPRISES. Contestó el entrevistado: Se trata de una orden judicial de pago a una señora que es mi hermana. El proceso se encuentra, en un Juzgado Comercial de la Provincia de Ontario, en la posición de buscar los mecanismos de pago. Este proceso no



REPUBLICA DE PANAMA
FORMULARIO ENTREVISTA



guarda relacionado con GAVISMENT. Diga el entrevistado cuál ha sido el perjuicio que ha tenido como representante y accionista de GAVISMENT producto de la reunión de junta de accionista a la cual no fue convocado: Contestó el entrevistado: con respecto a lo preguntado, ahora mismo mantengo una orden Judicial por parte de las autoridades en Canadá por lo que no estoy facultado para responder. El entrevistado reitera lo indicado al inicio de la entrevista, en cuanto que no fue convocado para participar a la reunión de Junta de Accionistas. Eso es todo. El despacho deja constancia que se da por terminada la entrevista siendo las 3:36 p.m. del día de hoy 14 de diciembre de 2021.

	NO		SI	X	Cuál	COMPUTADORA
--	----	--	----	---	------	-------------

Firmas:

Firma entrevistado		Firma
Nombre:		Nombre Paula Ramos
		Paula Ramos
CEDULA		
	Índice derecho del entrevistado	MINISTERIO PÚBLICO, SECCION DE INVESTIGACION Y SEGUIMIENTO DE CAUSAS, UNIDAD CONTRA LA FE PÚBLICA.
		Entidad.

This is Exhibit "PP" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo Plaintiff(s)

AND

Xela Enterprises Ltd et al Defendant(s)

Case Management Yes No by Judge: McEWENT

Counsel	Telephone No:	Facsimile No:

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

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

I will conduct another case conference on Feb 7/22 @ 9:30 a.m.

24 Jan 22
Date

McEwent
Judge's Signature

Additional Pages _____

This is Exhibit “QQ” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

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

AND

Defendant(s)

Case Management Yes No by Judge: McBwen

Counsel	Telephone No:	Facsimile No:
(see counsel slip)		

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

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

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

2 March 22
Date

McBwen
Judge's Signature

Additional Pages two

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

McCourt

This is Exhibit "RR" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written in a cursive style.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

1269

From: [Philip Cho](#)
To: [Monique Jilesen](#); [Chris Macleod](#)
Cc: [Joan Kasozi](#); [Michael Ly](#); [Derek Knoke](#); [Bobby Kofman \(bkofman@ksvadvisory.com\)](#); [Noah Goldstein](#)
Subject: RE: Xela [DM-LSDOCS.FID727411]
Date: Tuesday, March 8, 2022 11:29:02 AM
Attachments: [image001.png](#)

EXTERNAL MESSAGE

Monique, apologies for the delay as I was away between Friday to Monday. I thought that Chris' response was self-explanatory in relation to ATS delivering the emails, but based on the recently delivered supplement to the Fifth Report, it appears not to be the case.

To be clear, because the emails in question are the emails for which Juan is claiming privilege, ATS is not in a position to deliver them to the Receiver given Juan's consideration of appeal rights in relation to the order made by Justice McEwen.

PHILIP CHO (he/him/his) | Partner | T. 416-619-6296 | C. 647-638-7828 | pcho@weirfoulds.com

WeirFoulds LLP

From: Monique Jilesen <mjilesen@litigate.com>
Sent: March 4, 2022 6:27 PM
To: Chris Macleod <cmacleod@cambridgellp.com>
Cc: Joan Kasozi <jkasozi@cambridgellp.com>; Philip Cho <pcho@weirfoulds.com>; Michael Ly <mly@weirfoulds.com>; Derek Knoke <dknoke@litigate.com>; Bobby Kofman (bkofman@ksvadvisory.com) <bkofman@ksvadvisory.com>; Noah Goldstein <ngoldstein@ksvadvisory.com>
Subject: Re: Xela [DM-LSDOCS.FID727411]

[External Message]

Hi Chris - we will be proceeding with our request for the case conference. I take it there is no update on the funds?

Monique

Sent from my iPhone

On Mar 4, 2022, at 6:02 PM, Chris Macleod <cmacleod@cambridgellp.com> wrote:

EXTERNAL MESSAGE

Monique-

Juan is considering an Appeal of the endorsement of Justice McEwan based on the receiver obtaining his emails prior to a contempt motion.

I will need a few days to firm up those instructions when Brian Greenspan returns from overseas.

Regards,
Chris

From: Monique Jilesen <mjilesen@litigate.com>
Date: Friday, March 4, 2022 at 8:55 AM
To: Chris MacLeod <cmacleod@cambridgellp.com>, Joan Kasozi <jkasozi@cambridgellp.com>, Philip Cho <pcho@weirfoulds.com>, "mly@weirfoulds.com" <mly@weirfoulds.com>
Cc: Derek Knoke <dknoke@litigate.com>, "bkofman@ksvadvisory.com" <bkofman@ksvadvisory.com>, "ngoldstein@ksvadvisory.com" <ngoldstein@ksvadvisory.com>
Subject: RE: Xela [DM-LSDOCS.FID727411]

Hi Chris and Phillip,

Just following up on my note below, from which I have received no response. If I do not have the information below from you today, we will ask Justice McEwen for an urgent attendance next week.

Monique

From: Monique Jilesen
Sent: Wednesday, March 2, 2022 12:06 PM
To: Chris MacLeod <cmacleod@cambridgellp.com>; Joan Kasozi <jkasozi@cambridgellp.com>; Philip Cho <pcho@weirfoulds.com>; mly@weirfoulds.com
Cc: Derek Knoke <DKnoke@litigate.com>; Bobby Kofman (bkofman@ksvadvisory.com) <bkofman@ksvadvisory.com>; Noah Goldstein <ngoldstein@ksvadvisory.com>
Subject: Xela

Chris and Phillip,

Further to our attendance this morning and the endorsement of Justice McEwen, please immediately, and in accordance with the Orders of the Court:

- (i) Provide the password(s) to Mr. Gutierrez' devices;

- (ii) Provide the Receiver with an electronic copy of the emails of Mr. Gutierrez maintained by ATS to the date of the Order, together with any passwords used to secure the emails.

Please advise when you will comply. We expect to have them from you no later than the end of the day on Friday

Monique

	<p><u>Monique Jilesen*</u></p> <p><i>pronouns: she/her</i> mjilesen@litigate.com</p> <p>130 Adelaide St W Suite 2600 Toronto, ON Canada M5H 3P5 www.litigate.com</p>
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This e-mail may contain legally privileged or confidential information. This message is intended only for the recipient(s) named in the message. If you are not an intended recipient and this e-mail was received in error, please notify us by reply e-mail and delete the original message immediately. Thank you. Lenczner Slaght LLP.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

This is Exhibit "SS" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprises et al
Defendant(s)

Case Management Yes No by Judge: McBEN

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

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

I conducted another case conference today, on an urgent basis, at the request of the Receiver.

The previous endorsement of March 2/22 that I made has not been complied with.

For the purposes of clarity, the undertaking referred to in the March 2/22 endorsement (counsel

9 March 22
Date

McBEN
Judge's Signature

Additional Pages three

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

agree) stem from my previous orders dated Oct 27/20 and March 25/21.

A dispute has now arisen about solicitor / client disclosure as mentioned in my previous endorsement.

As I advised counsel today I expect all answers, except those arguably involving sol / client issues to be provided immediately.

Notwithstanding the provisions of my aforementioned earlier orders, given the contempt motion I am prepared to hear submissions from Mr. Gutierrez / ATIS on the issue of sol / client privilege.

The C.L. office will contact counsel with a date for the next case conference - within 2 weeks the case conference will be

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

conducted.

In the interim counsel for Gutierrez/ATS and the Receiver shall co-operate to ensure the smooth flow of documents occurs.

Given the long outstanding nature of the productions Gutierrez/ATS are to give the Receiver their full cooperation, keeping in mind the limitation concerning sol/client privilege.

[Handwritten signature]

This is Exhibit "TT" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in cursive script, appearing to read "Shane Ramnanan", written in black ink.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo

Plaintiff(s)

AND

Xela Enterprises et al

Defendant(s)

Case Management Yes No by Judge: McEwen

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

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

I held another case conference today with respect to the issue of compliance with my previous orders of Aug 28/20, Oct 27/20 (2 orders) and March 25/21.

The first three orders were granted on consent. The last order resulted from a contested motion and leave to appeal was denied.

17 March 22

Date

McEwen

Judge's Signature

Additional Pages three

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

since the granting of the order various disputes concerning compliance have arisen.

I do not propose to describe them, but suffice it to say that the ordered production and ancillary relief have not occurred.

After hearing submissions I have ordered that the following occur :-

- ① Farthworth, Gutierrez will provide the passwords to his devices to Epig so the images can be fully accessed (see para 3 of Oct 27/20 order re: Devices)
- ② AIS emails contained on their servers will also be provided to Epig Farthworth
- ③ Subsequently, the protocol contained in my Oct 27/20 order will be followed and specifically para 10

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

with respect to Mr Gutierrez accessing the Platform, and not the Receiver or its agents.

As I advised counsel, nothing in this endorsement alters or amends my previous order. I am merely resolving the long-existing deadlock over how the data, emails etc. shall be dealt with.

Costs of this dispute are reserved to a later date

M. J. S.

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

DATE: March 17, 2022

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RE: Margarita Castillo, Plaintiff

AND:

Xela Enterprises Ltd., Tropic International Limited, Fresh Quest, Inc., 696096 Alberta Ltd., Juan Guillermo Gutierrez and Carmen S. Gutierrez, as Executor of the Estate of Juan Arturo Gutierrez, Defendants

BEFORE: The Honourable Justice Thomas J. McEwen

COUNSEL: (see Counsel Slip)

ENDORSEMENT

- [1] I held another case conference today with respect to the issue of compliance with my previous orders of Aug. 28/20, Oct. 27/20 (2 orders) and March 25/21.
- [2] The first three orders were granted on consent. The last order resulted from a contested motion and leave to appeal was denied. Since the granting of the orders various disputes concerning compliance have arisen.
- [3] I do not propose to describe them, but suffice it to say that the ordered production and ancillary relief have not occurred.
- [4] After hearing submissions, I have ordered that the following occur:
- (1) Forthwith, Gutierrez will provide the passwords to his devices to Epiq so the images can be fully accessed (see para. 3 of Oct. 27/20 order, re: Devices).
 - (2) ATS emails contained on their servers, will also be provided to Epiq forthwith.

- (3) Subsequently, the protocol contained in my Oct. 27/20 order will be followed and specifically para. 10 with respect to Mr. Gutierrez accessing the platform, and not the Receiver or its agents.
- [5] As I advised counsel, nothing in this endorsement alters or amends my previous orders. I am merely resolving the long-existing deadlock over how the data, emails etc. shall be dealt with.
- [6] Costs of this dispute are reserved to a later date.

McEwen J.

This is Exhibit "UU" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in cursive script, appearing to read "Shane Ramnanan", written in black ink.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

**CASE CONFERENCE BRIEF OF THE RESPONDENT, JUAN GUILLERMO
GUTIERREZ**

March 25, 2022

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

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cmacleod@cambridgellp.com
N. Joan Kasozi (LSO# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
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Lawyers for the Respondent
Juan Guillermo Gutierrez

TO: **BENNETT JONES LLP**

Barristers and Solicitors
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Lawyers for the Applicant
Margarita Castillo

AND TO: Lenczner Slaght Royce Smith Griffin LLP
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M5H 3P5

Monique Jilesen (LSO 43092W)
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Derek Knoke (LSO 75555E)
jknoke@litigate.com

Lawyers for the Receiver

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

**CASE CONFERENCE BRIEF OF THE RESPONDENT, JUAN GUILLERMO
GUTIERREZ**

1. The Court's Orders call for Mr. Gutierrez to permit the data on his personal devices to be uploaded to a Relativity platform hosted by Epiq, the IT consultant engaged by the Receiver. The data is to be reviewed on that platform solely by Mr. Gutierrez and his counsel, and any production issues are to be resolved by this Court in advance of any disclosure to the Receiver. Once uploaded to the Relativity platform, the Court will have the ability to resolve any disputes and, where appropriate, order Epiq to provide disclosure to the Receiver without any further digital locking mechanism in place. However, no additional copies of the data on the hard drive are permitted pursuant to the Order.

2. The Receiver is refusing to permit the hard drive containing the image of Mr. Gutierrez's personal devices to be secured after the data are uploaded to Relativity, thereby subjecting the data remaining on the hard drive – which is highly sensitive – to an unwarranted security risk, without

any justification. There is no rational basis to refuse a request to re-lock the hard drive after the data is uploaded to the Relativity platform and under Epiq's control.

3. Promptly after the last case conference on March 17, 2022, Teel Tech Canada (“TTC”) – Mr. Gutierrez’s IT consultant – engaged with Epiq to suggest a protocol for Mr. Gutierrez to unlock the hard drive to permit the data to be uploaded to Epiq’s Relativity platform under TTC’s supervision, whereafter Mr. Gutierrez would re-lock the hard drive to safeguard the data while the hard drive remained in Epiq’s possession. Once uploaded to Relativity, any data from Mr. Gutierrez’s personal devices determined by this Court to be subject to disclosure would be fully accessible by Epiq for delivery to the Receiver. The *only* new assurance requested by TTC was that the sensitive personal data remaining on the hard drive after the upload process was complete would not be exposed to risk of loss or compromise, either: (a) by allowing Mr. Gutierrez to re-lock the hard drive, leaving it with Epiq; or (b) by allowing Mr. Gutierrez to take the hard drive with him. A complete copy of the imaged data, however, would remain under Epiq’s control in the Relativity database. Copies of the relevant email communications are attached collectively at Tab 1. A copy of TTC’s proposal for ensuring the security of the data remaining on the hard drive after the upload is attached at Tab 2.

4. Before providing a response to TTC’s proposal, and without any attempt to discuss the substance of the TTC proposal, or even to acknowledge the legitimacy of Mr. Gutierrez’s privacy concerns, the Receiver’s counsel followed its now-familiar pattern of complaining to the Court. Subsequently, at 7:13pm on March 23, 2022 – well after the Receiver’s counsel reported Mr. Gutierrez’ purported non-compliance – Epiq rejected the TTC proposal on the grounds that COVID concerns precluded Mr. Gutierrez from appearing physically to unlock the hard drive,

supervise the upload to Relativity, and re-lock the hard drive. No counter-proposal was made to address Mr. Gutierrez's security concerns. A copy of the Epiq response is attached as Tab 3.

5. The Receiver has employed similarly heavy-handed tactics with ATS. Mid-morning on Wednesday, March 23, 2022, counsel for ATS met with the Receiver's counsel, as they had agreed in advance. Counsel for Mr. Gutierrez was not present. During that meeting, they discussed a suitable protocol for the transfer of the @xela.com and @arturos.com emails on the ATS servers to Epiq, for upload to Epiq's Relativity platform. Because the emails are subject Mr. Gutierrez' privilege claims, ATS promptly notified Mr. Gutierrez's counsel of Epiq's proposed methodology for the transfer. Mr. MacLeod did not receive that communication until the end of the business day on Wednesday, owing to attendance at a funeral. Before he could even discuss the issue with Mr. Gutierrez, the Receiver's counsel reported to the Court that ATS was non-compliant with the production Order. All of the foregoing occurred within the span of a single day.

6. The manner in which the Receiver reported these events to the Court brings into focus the Receiver's continuous pattern of biased reporting of the facts to this Court in order to cast Mr. Gutierrez as non-cooperative. The Receiver supplied none of the foregoing context to this Court, which should give rise to serious questions about this Receiver's objectivity and suitability for the role.

7. The Receiver's cavalier attitude toward Mr. Gutierrez's privacy rights, as described herein, is cause for grave concern that his digital data might be compromised for illicit purposes, and that no protocol calling for them to maintained on a platform fully accessible to the Receiver's agent is adequate to protect them. Those concerns have been exacerbated this week by advancements in the criminal proceedings against the Majority Shareholders in Panama relating to the alleged theft

of the unpaid dividends, such that Mr. Gutierrez is submitting concurrently herewith a motion for interlocutory injunction to temporarily suspend the Receiver's discovery efforts in order to safeguard Mr. Gutierrez's data while the third-party loan from Mr. Volgemut clears the international banking system.


8. In light of these recent developments, Mr. Gutierrez believes it important to highlight for the Court that following the Receiver's posting of a copy of the SWIFT confirmation of the most recent wire transfer of funds sufficient to pay out substantially all amounts owing, the third-party lender was subject to lengthy questioning and compliance checks resulting in the present delay to the flow of funds. There is no reason for the Receiver to have posted this detailed banking information on its website, particularly when the identity of the lender had been made public when an affidavit had been filed to demonstrate the good faith efforts being made by Mr. Gutierrez to pay the Judgment which the Receiver is appointed to enforce.

9. Perhaps the clearest example of misrepresentation is the manner in which the Receiver reported Mr. Gutierrez's sworn statement to the Prosecutor in Panama. While Mr. Gutierrez's affirmation that he had not authorized a Gabinvest shareholder meeting might have inadvertently run afoul of the Receiver's Appointment Order, the Receiver completely omitted the relevant context, which is that the Receiver had authorized counsel in Panama to engage in conduct that resulted in the submitting of inaccurate information to the Public Registry, while knowing that the Receiver's appointment and authority had not been recognized in Panama. Neither should it be forgotten that the instruction had the effect of preventing a third-party loan commitment from funding, which would have satisfied the Castillo judgment and all authorized receivership costs in January 2020. Far from engaging in activities to collect funds to satisfy the judgment herein, the Receiver's strategy is seemingly to prevent the receivership from being discharged.

10. Similarly, the Receiver’s reports have failed to acknowledge the influence in these proceedings of the decades-long multi-jurisdictional dispute over the non-payment of hundreds of millions of U.S. dollars in dividends owed to LISA. Neither has the Receiver acknowledged the relationship between Ms. Castillo – who instructs the Receiver – and the majority shareholders who have improperly withheld those dividends (the “**Majority Shareholders**”), or the role Ms. Castillo has played in helping the Majority Shareholders avoid payment. Indeed, Ms. Castillo herself supplied stolen documents from Xela’s computer servers to the Majority Shareholders some ten years ago by attaching them wholesale to the complaint that led to this judgment, which documents were then used by the Majority Shareholders as a foundation for baseless, fig-leaf lawsuits in Guatemala to delay the payment of the dividends, which lawsuits have only recently been resolved. Billing records submitted by the Receiver reflect ongoing strategic discussions between the Receiver’s counsel and lawyers for those same Majority Shareholders, but the Receiver has made no effort to provide this Court with any rational basis for such coordination.

11. In all of the circumstances, Mr. Gutierrez submits that no data should be uploaded to Relativity pending a determination of his motion for urgent injunctive relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of March, 2022.



Chris MacLeod

March 25, 2022

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

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

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

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

Jason Woycheshyn
woycheshynJ@bennettjones.com
Jeffrey Leon
LeonJ@bennettjones.com

Tel: 416.863.1200
Fax: 416.863.1716

Lawyers for the Applicant
Margarita Castillo

1291

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

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

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

Lawyers for the Receiver

TAB 1

From: [Derek Knoke](#)
To: [Chris Macleod](#); [Joan Kasozi](#); bgreenspan@15bedford.com
Cc: [Bobby Kofman \(bkofman@ksvadvisory.com\)](mailto:Bobby.Kofman@ksvadvisory.com); [Noah Goldstein \(ngoldstein@ksvadvisory.com\)](mailto:Noah.Goldstein@ksvadvisory.com); [Monique Jilesen](#); [Sarah Millar](#); [Grygier, David](#); [Burt-Gerrans, Harold](#)
Subject: RE: Passwords [DM-LSDOCS.FID727411]
Date: March 21, 2022 3:34:51 PM
Attachments: [image001.png](#)
[Re Margarita Castillo v. Xela Enterprises Ltd. et al - file # 31421 LS-LSDOCS.FID635496.msg](#)

Chris and Brian,

Please see the attached email where you confirmed that Mr. Greenspan has the passwords. Please provide David (at Epiq) with the passwords.

Furthermore, we note that Bob Elder (your IT person) called David (at Epiq) to suggest that your client (Mr. Gutierrez) and Dave Burton (another one of your IT people) attend at Epiq's office. You do not need physical access to the Phantom Hard-Drive to provide Epiq with the passwords. David (at Epiq) is willing to setup a Teams' videoconference call for Mr. Greenspan or Mr. Gutierrez to provide the passwords, but no parties are to attend at Epiq's office.

If Epiq does not have the passwords by 9 am tomorrow, we will contact the court to request an urgent appearance.

Derek

From: bob.elder@teeltechcanada.com <bob.elder@teeltechcanada.com>
Sent: Monday, March 21, 2022 1:54 PM
To: 'Chris Macleod' <cmacleod@cambridgellp.com>; Derek Knoke <dknoke@litigate.com>; 'Joan Kasozi' <jkasozi@cambridgellp.com>; bgreenspan@15bedford.com
Cc: Monique Jilesen <mjilesen@litigate.com>; 'Bobby Kofman' <bkofman@ksvadvisory.com>; 'Noah Goldstein' <ngoldstein@ksvadvisory.com>; 'Grygier, David' <David.Grygier@epiqglobal.ca>; 'Burt-Gerrans, Harold' <Harold.Burt-Gerrans@epiqglobal.ca>; Dave Burton <dave.burton@teeltechcanada.com>; Frank Corkery <frank.corkery@teeltechcanada.com>
Subject: RE: Passwords [DM-LSDOCS.FID727411]

EXTERNAL MESSAGE

Hi All, sorry for the delay in getting back to everyone, combination of West Coast time zone and a busy Monday start after the weekend.

I made contact with Dave Burton who was out boots on the ground during the imaging and securing of the hard drive in question, and in looking back at our instructions for this process, no one from Teel Tech Canada has the password to this locked drive, the only person that has the password for this drive is Juan himself, he is the one that input the password to secure it and Dave was not privy to the password.

Let me now if you have any questions on this, I am around for the rest of the day/week to assist further.

1294

Sincerely,

Bob

Bob Elder

CEO

Teel Technologies Canada

bob.elder@teeltechcanada.com

www.teeltechcanada.com

<https://groups.google.com/group/physical-mobile-forensics>

Partner

Sanderson Forensics

<https://sqliteforensictoolkit.com/>

bob.elder@sandersonforensics.ca

<https://groups.google.com/d/forum/sanderson-forensics>

Office: 250-893-6125

Special Constable (WSE) - Saanich Police Department/Central Saanich Police/Victoria Police Department

Detective Constable (Retired) - Victoria Police Department

From: Chris Macleod <cmacleod@cambridgellp.com>

Sent: Monday, March 21, 2022 4:28 AM

To: Derek Knoke <dknoke@litigate.com>; Joan Kasozi <jkasoz@cambridgellp.com>; bgreenspan@15bedford.com

Cc: Monique Jilesen <mjilesen@litigate.com>; Bobby Kofman (bkofman@ksvadvisory.com) <bkofman@ksvadvisory.com>; Noah Goldstein (ngoldstein@ksvadvisory.com) <ngoldstein@ksvadvisory.com>; Grygier, David <David.Grygier@epiqglobal.ca>; Burt-Gerrans, Harold <Harold.Burt-Gerrans@epiqglobal.ca>; bob.elder@teeltechcanada.com

Subject: Re: Passwords [DM-LSDOCS.FID727411]

Thank you. I will introduce Bob Elder at Teel Tech Canada under separate cover to David and Harald to coordinate. I will include Derek by cc.

1295

Chris

From: Derek Knoke <dknoke@litigate.com>
Date: Friday, March 18, 2022 at 3:30 PM
To: Chris MacLeod <cmacleod@cambridgellp.com>, Joan Kasozi <jkasozi@cambridgellp.com>, "bgreenspan@15bedford.com" <bgreenspan@15bedford.com>
Cc: Monique Jilesen <mjilesen@litigate.com>, "bkofman@ksvadvisory.com" <bkofman@ksvadvisory.com>, "ngoldstein@ksvadvisory.com" <ngoldstein@ksvadvisory.com>, "Grygier, David" <David.Grygier@epiqglobal.ca>, "Burt-Gerrans, Harold" <Harold.Burt-Gerrans@epiqglobal.ca>
Subject: RE: Passwords [DM-LSDOCS.FID727411]

Hi Chris,

Please contact David Grygier at Epiq. I have cc'd him and his colleague, Harald Burt-Gerrans, here. They are ready to speak with you as soon as possible.

Derek

From: Chris Macleod <cmacleod@cambridgellp.com>
Sent: Friday, March 18, 2022 9:39 AM
To: Derek Knoke <dknoke@litigate.com>; Joan Kasozi <jkasozi@cambridgellp.com>; bgreenspan@15bedford.com
Cc: Monique Jilesen <mjilesen@litigate.com>; Bobby Kofman (bkofman@ksvadvisory.com) <bkofman@ksvadvisory.com>; Noah Goldstein (ngoldstein@ksvadvisory.com) <ngoldstein@ksvadvisory.com>
Subject: Re: Passwords [DM-LSDOCS.FID727411]

EXTERNAL MESSAGE

Derek-

Please send us the Epiq contact information and we will coordinate directly.

Regards,
Chris

From: Derek Knoke <dknoke@litigate.com>
Date: Thursday, March 17, 2022 at 5:38 PM
To: Chris MacLeod <cmacleod@cambridgellp.com>, Joan Kasozi <jkasozi@cambridgellp.com>, "bgreenspan@15bedford.com" <bgreenspan@15bedford.com>
Cc: Monique Jilesen <mjilesen@litigate.com>, "bkofman@ksvadvisory.com"

1296

<bkofman@ksvadvisory.com>, "ngoldstein@ksvadvisory.com" <ngoldstein@ksvadvisory.com>

Subject: Passwords [DM-LSDOCS.FID727411]

Chris,

Please provide us today with the passwords necessary to unlock and access the data on the DataShield Fantom Drive.

Derek



Derek Knoke*

T 416-865-3018
M 647-272-0714
F 416-865-2876
dknoke@litigate.com

130 Adelaide St W
Suite 2600
Toronto, ON
Canada M5H 3P5
www.litigate.com

This e-mail may contain legally privileged or confidential information. This message is intended only for the recipient(s) named in the message. If you are not an intended recipient and this e-mail was received in error, please notify us by reply e-mail and delete the original message immediately. Thank you. Lenzner Slaght LLP.

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From: [Chris Macleod](#)
To: [Derek Knoke](#); [Joan Kasozi](#); [bgreenspan@15bedford.com](#)
Cc: [Monique Jilesen](#); [Bobby Kofman \(bkofman@ksvadvisory.com\)](#); [Noah Goldstein \(ngoldstein@ksvadvisory.com\)](#)
Subject: Re: Passwords [DM-LSDOCS.FID727411]
Date: March 18, 2022 9:38:34 AM
Attachments: [image001.png](#)

Derek-

Please send us the Epiq contact information and we will coordinate directly.

Regards,
Chris

From: Derek Knoke <dknoke@litigate.com>
Date: Thursday, March 17, 2022 at 5:38 PM
To: Chris MacLeod <cmacleod@cambridgellp.com>, Joan Kasozi <jkasozi@cambridgellp.com>, "bgreenspan@15bedford.com" <bgreenspan@15bedford.com>
Cc: Monique Jilesen <mjilesen@litigate.com>, "bkofman@ksvadvisory.com" <bkofman@ksvadvisory.com>, "ngoldstein@ksvadvisory.com" <ngoldstein@ksvadvisory.com>
Subject: Passwords [DM-LSDOCS.FID727411]

Chris,

Please provide us today with the passwords necessary to unlock and access the data on the DataShield Fantom Drive.

Derek



Derek Knoke*

T 416-865-3018
M 647-272-0714
F 416-865-2876
dknoke@litigate.com

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Toronto, ON
Canada M5H 3P5
www.litigate.com

This e-mail may contain legally privileged or confidential information. This message is intended only for the recipient(s) named in the message. If you are not an intended recipient and this e-mail was received in error, please notify us by reply e-mail and delete the original message immediately. Thank you. Lenczner Slaght LLP.

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TAB 2

1300

From: [Chris Macleod](#)
To: [Derek Knoke](#); [Monique Jilesen](#); [Brian Greenspan](#); [Philip Cho](#); [Joan Kasozi](#)
Subject: Letter
Date: March 22, 2022 8:21:18 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[TTC Secured Drives.pdf](#)

Monique and Derek-

Please see attached letter from our IT expert on how best to upload to relativity and begin the protocol set out in the October 27, 2020 Order. We will have Bob Elder and Dave Burton at Teel Tech Canada communicate this as they are already in touch with Epiq.

Regards,
Chris

Chris Macleod

Partner, Cross-Border Litigation & Business Litigation Groups

333 Adelaide Street West, 4th Floor

Toronto, ON, M5V 1R5

Phone: [\(416\) 477 7007 Ext. 303](tel:(416)4777007)

Direct: [\(647\) 346 6696](tel:(647)3466696)

Email: cmacleod@cambridgellp.com

Website: www.cambridgellp.com





Teel Technologies Canada
B1-759 Vanalman Ave.
Victoria, BC V8Z 7E7
Canada

250.213.1637
www.teeltechcanada.com
bob.eder@teeltechcanada.com

To Whom it may concern:

March 21, 2022

RE: Recommendations for uploading secure data to Relativity:

The goal of this event is to be able to upload the data contained on a secured Phantom hard drive where the password is only known to one person, Juan Gutierrez. The security of the data on this Phantom hard drive must be maintained before and after the event to ensure that it cannot be misplaced, lost, unknowingly provided to another party, accessed in any way by any person and/or used for any other purpose.

The request is to have the data on this secured drive uploaded to the Relativity tool in order to be processed and once the data is uploaded to this source, no password is required at any time to review the data. This secured Phantom Hard drive is currently located at the Epiq office in Toronto.

In order to ensure that the data remaining on the Phantom hard drive is secured, we strongly recommend that either it is returned to Juan Gutierrez after upload to Relativity, or if it is to remain in the possession of Epiq, that it is password protected again by Juan Gutierrez as it was in the first place. To ensure that this is done in a manner that provides Juan Gutierrez confidence that his data will not be shared in any way, we at Teel Technologies Canada are requesting the following process take place:

- Juan Gutierrez is to attend the Epiq location with Dave Burton of Teel Technologies Canada who will provide oversight and answer any questions Juan Gutierrez may have during the process.
- That Juan Gutierrez will privately unlock the secured Phantom drive allowing access to the data for the Epiq representative to upload the data from the Devices to the Relativity tool.

- Once the data is all uploaded, Juan Gutierrez and Dave Burton will ensure that the Phantom hard drive is either returned to Juan Gutierrez, or if remaining in the possession of Epiq, re-secured with the existing password or a new one.
- The data that was uploaded to the Relativity platform will not be password protected allowing full access to the team at Epiq to administer and maintain this data on the Relativity Platform, provided that such access is only for the purposes of administration and maintenance but not for review by any person, except in accordance with the Order.
- This process is consistent with the previous process used to forensically image and store the data from Juan Gutierrez's devices.

We feel that this process would be in the best interest of both parties as it will ensure that the data stored on the secured Phantom will remain secured and not accessible to anyone but Juan Gutierrez but at the same time, the data will be on the Relativity platform to be dealt with in accordance with the Order.

Please do not hesitate to contact us if you have any questions or concerns,

Sincerely Yours,

A handwritten signature in blue ink, appearing to read 'Bob Elder', with a horizontal line underneath.

Bob Elder – CEO

Teel Technologies Canada

TAB 3

From: [Joan Kasozi](mailto:Joan.Kasozi)
To: [Joan Kasozi](mailto:Joan.Kasozi)
Subject: FW: Transfer of data to Epiq from Mr. Juan Gutierrez
Date: March 24, 2022 10:21:12 PM
Attachments: [image001.png](#)

From: dave.burton@teeltechcanada.com
Date: March 23, 2022 at 7:36:44 PM EDT
To: Chris Macleod <cmacleod@cambridgellp.com>
Subject: Fwd: Transfer of data to Epiq from Mr. Juan Gutierrez

Hi Chris,

I just received this from David Grygier from Epiq.

It appears that they have no intention of allowing us to attend their offices at this time.

Regards,

Dave Burton
dave.burton@teeltechcanada.com



Begin forwarded message:

From: "Grygier, David" <David.Grygier@epiglobal.ca>
Subject: RE: Transfer of data to Epiq from Mr. Juan Gutierrez
Date: March 23, 2022 at 7:13:17 PM EDT
To: "dave.burton@teeltechcanada.com"
<dave.burton@teeltechcanada.com>
Cc: DL-LNZ0005 <LNZ0005@epiglobal.com>

Hi Mr. Burton,

It is Epiq's position and the position of the Receiver that the passwords can be provided to Epiq via videoconferencing call as initially suggested to your client. A physical attendance at Epiq's office is neither recommended nor available at this time for a number of reasons. The Receiver has advised the judge of those reasons, and the judge has directed counsel to attend tomorrow at 1:30, where we expect to receive further direction.

If a further response from me is necessary following the court attendance

tomorrow, I will reach out to you then.

Thank you,

David Grygier, CEDS • RCU
Project Manager, Client Services
Epiq | eDiscovery

Cell : 416-705-6071
David.grygier@epiqglobal.com

People. Partnership. Performance.
www.epiqglobal.com

From: dave.burton@teeltechcanada.com <dave.burton@teeltechcanada.com>

Sent: March 23, 2022 5:43 PM

To: Grygier, David <David.Grygier@epiqglobal.ca>

Subject: Transfer of data to Epiq from Mr. Juan Gutierrez

CAUTION: This email originated from outside of Epiq. Do not click links or open attachments unless you recognize the sender and know the content is safe. Report phishing by using the "Phish Alert Report" button above.

Hi Mr. Grygier,

I just wanted to follow up with you about Mr. Gutierrez and myself attending Epiq offices to facilitate the transfer of data. As I stated in my email on the 22nd March, I have previously arranged commitments both tomorrow and Friday and will be unavailable. Perhaps we can speak on Monday to arrange something for possibly Tuesday or Wednesday of next week? Unfortunately I leave Thursday morning for a short trip not returning until the weekend, so if next week does not accommodate your schedule we can look toward the future.

Please let me know the best way to reach you so we can speak Monday, if this is convenient.

Regards,

Dave Burton
dave.burton@teeltechcanada.com



1306

open attachments unless you recognize the sender and know the content is safe.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

This is Exhibit “VV” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

p)

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

**NOTICE OF MOTION
[Injunctive Relief]**

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

PROPOSED METHOD OF HEARING: The Motion is to be heard

By video conference.

at the following location

THE MOTION IS FOR

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

r)

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

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

THE GROUNDS FOR THE MOTION ARE:

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

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

n)

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

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

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

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

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

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

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

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

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

n)

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

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

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

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

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

March 25, 2022

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

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

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

n)

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

n)

1321

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al.
Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Lawyers for the Respondent
Juan Guillermo Gutierrez

a)

b)

DRAFT

This is Exhibit “WW” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprises et al
Defendant(s)

Case Management Yes No by Judge: McBrent

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

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

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

As I have previously noted the first three orders were

25 March 22
Date

McBrent
Judge's Signature

Additional Pages twelve

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

I made the above order for a number of reasons.

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

this Court.

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

particularly with respect to the initiation of a criminal complaint in Panama against the Receiver's agents which I ordered be withdrawn. Mr Gutierrez's involvement in the Panama matter was initiated without his Canadian solicitor's knowledge and I was of the view that the criminal complaint was a prima facie attack on my previous order in which specific rights were granted to the Receiver concerning the Panamanian company Gabinvest S.A. Seventh, it was only today that Mr Gutierrez raised the issue of an injunction, after previous attempts to restrict Epic's access failed. None of the issues raised in the draft Notice of Motion

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

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

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

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

occur:

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

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

Me

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

DATE: March 25, 2022

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RE: Margarita Castillo, Plaintiff

AND:

Xela Enterprises Ltd., Tropic International Limited, Fresh Quest, Inc., 696096 Alberta Ltd., Juan Guillermo Gutierrez and Carmen S. Gutierrez, as Executor of the Estate of Juan Arturo Gutierrez, Defendants

BEFORE: The Honourable Justice Thomas J. McEwen

COUNSEL: (see Counsel Slip)

ENDORSEMENT

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

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

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

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

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

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

McEwen J.

This is Exhibit "XX" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
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PO7510**



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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE)
)
 JUSTICE McEWEN)

FRIDAY, THE 25TH
 DAY OF MARCH, 2022

B E T W E E N:

(Court Seal)

MARGARITA CASTILLO

Applicant

and

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

Respondents

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

ORDER

THIS CASE CONFERENCE, called by McEwen J. following an email report dated March 23, 2022 (the “**Email Report**”) by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings, and property of Xela Enterprises Ltd. (the “**Company**”) was heard virtually on March 25, 2022 via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario.

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

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

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

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

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

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

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

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

1344

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

Court File No./N° du dossier du greffe: CV-11-00009062-00CL

-4-

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

(Signature of judge, officer or registrar)

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

Applicant

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

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

20 May 22

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

McE T.

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

PROCEEDING COMMENCED AT TORONTO

ORDER

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Lawyers for the Receiver

This is Exhibit “YY” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

NOTICE OF MOTION

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

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

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

THE MOTION IS FOR

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

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

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

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

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

The Production Orders

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

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

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

Events Giving Rise to Heightened Concerns

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

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

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

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

March 25, 2022 Case Conference

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

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

Leave to Appeal

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

Need for a Stay

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

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

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

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

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

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

March 28, 2022

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Bosch Gutierrez, Dionisio Gutierrez
Mayorga, and Juan Jose Gutierrez
Moyorga

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Lawyers for the Respondent

This is Exhibit "ZZ" referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Division Court File No. 189/22
Court File No. CV-11-9062-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

NOTICE OF MOTION FOR LEAVE TO APPEAL

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

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

THE MOTION IS FOR

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

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

THE GROUNDS FOR THE MOTION ARE:

Background

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

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

The Production Orders

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

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

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

Events Giving Rise to Heightened Concerns

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

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

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

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

March 25, 2022 Case Conference

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

Leave to Appeal

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

Need for a Stay

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

- (gg) Rules 62.02 and 63.02 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended.
- (hh) Such further and other grounds as the lawyers may advise.

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

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

March 30, 2022

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Tel: 647.346.6696

N. Joan Kasozi (LSO# 70332Q)

jkasozi@cambridgellp.com

Tel: 416.477.7007

Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

This is Exhibit “AAA” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

From: [Chris Macleod](#)
To: [Div Court Schedule](#); [Derek Knoke](#); [Nanda Singh](#)
Cc: "[leonj@bennettjones.com](#)"; "[zweigs@bennettjones.com](#)"; "[bortolinw@bennettjones.com](#)"; [kplunkett@airdberlis.com](#); [sbabe@airdberlis.com](#); [shena-ann.ince@clarkes.com.bb](#); [alvaro.almengor@hatstone.com](#); [carl.oshea@hatstone.com](#); [jwoychesyn@stewartmckelvey.com](#); [Joan Kasozi](#); [bhg@15bedford.com](#); [Diane.Winters@justice.gc.ca](#); [KKay@stikeman.com](#); [Peter Griffin](#); [Monique Jilesen](#); [Grace Tsakas](#); [Bobby Kofman \(bkofman@ksvadvisory.com\)](#); [Noah Goldstein \(ngoldstein@ksvadvisory.com\)](#); [Sarah Millar](#); [AKreaden@stikeman.com](#); [robert.madden@alexandriabancorp.com](#); [Debbie.McDonald@alexandriatrust.com](#); [Groeneveld, Steven \(MOF\)](#); [maclaw@bellnet.ca](#); [pdoig@bdtinvestments.com](#); [pcho@weirfoulds.com](#); [mly@weirfoulds.com](#); [jcngrimas@gmail.com](#); [lopezalfaro@afra.com](#); [harald.johannessen1951@gmail.com](#); [H_Johannessen@granadavalley.com](#); [cal@calshields.com](#); [kevin.boyce@clarkes.com.bb](#); [Darren Frank](#)
Subject: Re: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]
Date: Friday, April 29, 2022 9:08:32 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

EXTERNAL MESSAGE

Good morning:

The moving party is abandoning the Motion for leave to Appeal.

Regards,
Chris MacLeod

From: Div Court Schedule <DivCourtSchedule@ontario.ca>
Date: Thursday, April 28, 2022 at 1:04 PM
To: Chris MacLeod <cmacleod@cambridgellp.com>, 'Derek Knoke' <dknoke@litigate.com>, Nanda Singh <nsingh@cambridgellp.com>
Cc: "leonj@bennettjones.com" <leonj@bennettjones.com>, "zweigs@bennettjones.com" <zweigs@bennettjones.com>, "bortolinw@bennettjones.com" <bortolinw@bennettjones.com>, Kyle Plunkett <kplunkett@airdberlis.com>, sam Babe <sbabe@airdberlis.com>, "shena-ann.ince@clarkes.com.bb" <shena-ann.ince@clarkes.com.bb>, "alvaro.almengor@hatstone.com" <alvaro.almengor@hatstone.com>, "carl.oshea@hatstone.com" <carl.oshea@hatstone.com>, "jwoychesyn@stewartmckelvey.com" <jwoychesyn@stewartmckelvey.com>, Joan Kasozi <jkasoz@cambridgellp.com>, Brian Greenspan <bhg@15bedford.com>, "Diane.Winters@justice.gc.ca" <Diane.Winters@justice.gc.ca>, "KKay@stikeman.com" <KKay@stikeman.com>, Peter Griffin <pgriffin@litigate.com>, Monique Jilesen <mjjilesen@litigate.com>, Grace Tsakas <gtsakas@litigate.com>, "bkofman@ksvadvisory.com" <bkofman@ksvadvisory.com>, "ngoldstein@ksvadvisory.com" <ngoldstein@ksvadvisory.com>, Sarah Millar <smillar@litigate.com>, "AKreaden@stikeman.com" <AKreaden@stikeman.com>, "robert.madden@alexandriabancorp.com" <robert.madden@alexandriabancorp.com>, "Debbie.McDonald@alexandriatrust.com" <Debbie.McDonald@alexandriatrust.com>,"

1380

"Groeneveld, Steven (MOF)" <Steven.Groeneveld@ontario.ca>, "maclaw@bellnet.ca" <maclaw@bellnet.ca>, "pdoig@bdtinvestments.com" <pdoig@bdtinvestments.com>, Philip Cho <pcho@weirfoulds.com>, "mly@weirfoulds.com" <mly@weirfoulds.com>, "jcngrimas@gmail.com" <jcngrimas@gmail.com>, "lopezalfaro@afra.com" <lopezalfaro@afra.com>, "harald.johannessen1951@gmail.com" <harald.johannessen1951@gmail.com>, Harald L <H_Johannessen@granadavalley.com>, "cal@calshields.com" <cal@calshields.com>, "kevin.boyce@clarkes.com.bb" <kevin.boyce@clarkes.com.bb>, Darren Frank <dfrank@cambridgellp.com>
Subject: RE: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]

Good afternoon,

Reminder:

The hearing date for the above-cited matter is fast approaching and you are therefore reminded that your materials **must** be uploaded to CaseLines, per the Notice to Professions, and or, direction provided by a judge of this court.

Thank you,

Pearla Badio | Divisional Court

A/Assistant Scheduling Panel Coordinator

Osgoode Hall *City of Toronto* M5H2N5

P: 416-327-5100

F: 416-327-5549

E: scj-csj.divcourtmail@ontario.ca

From: Div Court Schedule <DivCourtSchedule@ontario.ca>

Sent: April 12, 2022 12:24 PM

To: 'Chris Macleod' <cmacleod@cambridgellp.com>; 'Derek Knoke' <dknoke@litigate.com>; Nanda Singh <nsingh@cambridgellp.com>

Cc: 'leonj@bennettjones.com' <leonj@bennettjones.com>; 'zweigs@bennettjones.com' <zweigs@bennettjones.com>; 'bortolinw@bennettjones.com' <bortolinw@bennettjones.com>; kplunkett@airdberlis.com; sbabe@airdberlis.com; shena-ann.ince@clarkes.com.bb; alvaro.almengor@hatstone.com; carl.oshea@hatstone.com; jwoycheshyn@stewartmckelvey.com; Joan Kasozi <jkasozi@cambridgellp.com>; bhg@15bedford.com; Diane.Winters@justice.gc.ca; KKay@stikeman.com; Peter Griffin <pgriffin@litigate.com>; Monique Jilesen <mjilesen@litigate.com>; Grace Tsakas <gtsakas@litigate.com>; Bobby Kofman (bkofman@ksvadvisory.com) <bkofman@ksvadvisory.com>; Noah Goldstein (ngoldstein@ksvadvisory.com) <ngoldstein@ksvadvisory.com>; Sarah Millar <smillar@litigate.com>; AKreaden@stikeman.com; robert.madden@alexandriabancorp.com; Debbie.McDonald@alexandriatrust.com; Groeneveld, Steven (MOF) <Steven.Groeneveld@ontario.ca>; maclaw@bellnet.ca; pdoig@bdtinvestments.com; pcho@weirfoulds.com; mly@weirfoulds.com; jcngrimas@gmail.com; lopezalfaro@afra.com;

1381

harald.johannessen1951@gmail.com; H_Johannessen@granadavalley.com; cal@calshields.com;
kevin.boyce@clarkes.com.bb; Darren Frank <dfrank@cambridgellp.com>

Subject: RE: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]

Good afternoon everyone,

The motion for leave to appeal will be considered in writing by a panel of the Divisional Court during the **week of May 2, 2022**, or soon thereafter.

The parties will receive an invitation to upload their materials to CaseLines. Parties are to upload their materials to CaseLines by no later than four weeks before the matter is scheduled to be considered or by the last date for service of materials, whichever date comes latest. Materials are to be uploaded in accordance with section D4 of the February 18, 2021 Notice to the Profession -- Divisional Court. The parties are also required to file their materials with the Court electronically and pay filing fees in accordance with the section D5 of the Notice to the Profession:

<https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/div-ct-feb2021/>

The parties are reminded to hyperlink the indexes to all documents uploaded to Caselines.

The parties are reminded that materials must include a signed and entered order from the decision below.

The parties are also reminded to upload any agreement on costs or their costs outlines the week before the matter is scheduled to be considered.

Regards,

*Donna Greson,
Divisional Court, Panel Coordinator.*

From: Baweja, Saurabh S. (JUD) <Saurabh.Baweja@ontario.ca>

Sent: April 8, 2022 11:12 AM

To: 'Chris Macleod' <cmacleod@cambridgellp.com>; 'Derek Knoke' <dknoke@litigate.com>; Nanda Singh <nsingh@cambridgellp.com>; SCJ-CSJ Div Court Mail (JUD) <scj-csj.divcourtmail@ontario.ca>

Cc: 'leonj@bennettjones.com' <leonj@bennettjones.com>; 'zweigs@bennettjones.com' <zweigs@bennettjones.com>; 'bortolinw@bennettjones.com' <bortolinw@bennettjones.com>; kplunkett@airdberlis.com; sbabe@airdberlis.com; shena-ann.ince@clarkes.com.bb; alvaro.almengor@hatstone.com; carl.oshea@hatstone.com; jwoycheshyn@stewartmckelvey.com; Joan Kasozi <jkasozi@cambridgellp.com>; bhg@15bedford.com; Diane.Winters@justice.gc.ca; KKay@stikeman.com; Peter Griffin <pgriffin@litigate.com>; Monique Jilesen <mjilesen@litigate.com>; Grace Tsakas <gtsakas@litigate.com>; Bobby Kofman <bkofman@ksvadvisory.com>; Noah Goldstein <ngoldstein@ksvadvisory.com>; Sarah Millar <smillar@litigate.com>; AKreaden@stikeman.com; robert.madden@alexandriabancorp.com;

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<Steven.Groeneveld@ontario.ca>; maclaw@bellnet.ca; pdoig@bdtinvestments.com;
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kevin.boyce@clarkes.com.bb; Darren Frank <dfrank@cambridgellp.com>

Subject: RE: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]

Good Morning,

I am writing as I have been directed to advise the respondents that they are to serve and file responding materials by April 27th, 2022 and the court will try to put the leave motion before a panel during the week of May 2nd, 2022.

Sincerely,
Saurabh Baweja

From: Chris Macleod <cmacleod@cambridgellp.com>
Sent: April 8, 2022 10:02 AM
To: Baweja, Saurabh S. (JUD) <Saurabh.Baweja@ontario.ca>; 'Derek Knoke' <dknoke@litigate.com>; Nanda Singh <nsingh@cambridgellp.com>; SCJ-CSJ Div Court Mail (JUD) <scj-csj.divcourtmail@ontario.ca>
Cc: 'leonj@bennettjones.com' <leonj@bennettjones.com>; 'zweigs@bennettjones.com' <zweigs@bennettjones.com>; 'bortolinw@bennettjones.com' <bortolinw@bennettjones.com>; kplunkett@airdberlis.com; sbabe@airdberlis.com; shena-ann.ince@clarkes.com.bb; alvaro.almengor@hatstone.com; carl.oshea@hatstone.com; jwoycheshyn@stewartmckelvey.com; Joan Kasozi <jkasozi@cambridgellp.com>; bhg@15bedford.com; Diane.Winters@justice.gc.ca; KKay@stikeman.com; Peter Griffin <pgriffin@litigate.com>; Monique Jilesen <mjilesen@litigate.com>; Grace Tsakas <gtsakas@litigate.com>; Bobby Kofman (<bkofman@ksvadvisory.com>) <bkofman@ksvadvisory.com>; Noah Goldstein (<ngoldstein@ksvadvisory.com>) <ngoldstein@ksvadvisory.com>; Sarah Millar <smillar@litigate.com>; AKreaden@stikeman.com; robert.madden@alexandriabancorp.com;
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kevin.boyce@clarkes.com.bb; Darren Frank <dfrank@cambridgellp.com>
Subject: Re: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Dear Registrar of the Divisional Court-

The moving party will serve our factum and complete the motion materials for the leave motion on Tuesday April 18th 2022.

Regards,

Chris MacLeod

From: "Baweja, Saurabh S. (JUD)" <Saurabh.Baweja@ontario.ca>
Date: Wednesday, April 6, 2022 at 12:35 PM
To: 'Derek Knoke' <dknoke@litigate.com>, Nanda Singh <nsingh@cambridgellp.com>, "SCJ-CSJ Div Court Mail (JUD)" <scj-csj.divcourtmail@ontario.ca>
Cc: "leonj@bennettjones.com" <leonj@bennettjones.com>, "zweigs@bennettjones.com" <zweigs@bennettjones.com>, "'bortolinw@bennettjones.com'" <bortolinw@bennettjones.com>, Kyle Plunkett <kplunkett@airdberlis.com>, sam Babe <sbabe@airdberlis.com>, "shena-ann.ince@clarkes.com.bb" <shena-ann.ince@clarkes.com.bb>, "alvaro.almengor@hatstone.com" <alvaro.almengor@hatstone.com>, "carl.oshea@hatstone.com" <carl.oshea@hatstone.com>, "jwoycheshyn@stewartmckelvey.com" <jwoycheshyn@stewartmckelvey.com>, Chris MacLeod <cmacleod@cambridgellp.com>, Joan Kasozi <jkasoz@cambridgellp.com>, Brian Greenspan <bhg@15bedford.com>, "Diane.Winters@justice.gc.ca" <Diane.Winters@justice.gc.ca>, "KKay@stikeman.com" <KKay@stikeman.com>, Peter Griffin <pgriffin@litigate.com>, Monique Jilesen <mjilesen@litigate.com>, Grace Tsakas <gtsakas@litigate.com>, "bkofman@ksvadvisory.com" <bkofman@ksvadvisory.com>, "ngoldstein@ksvadvisory.com" <ngoldstein@ksvadvisory.com>, Sarah Millar <smillar@litigate.com>, "AKreaden@stikeman.com" <AKreaden@stikeman.com>, "robert.madden@alexandriabancorp.com" <robert.madden@alexandriabancorp.com>, "Debbie.McDonald@alexandriatrust.com" <Debbie.McDonald@alexandriatrust.com>, "Groeneveld, Steven (MOF)" <Steven.Groeneveld@ontario.ca>, "maclaw@bellnet.ca" <maclaw@bellnet.ca>, "pdoig@bdtinvestments.com" <pdoig@bdtinvestments.com>, Philip Cho <pcho@weirfoulds.com>, "mly@weirfoulds.com" <mly@weirfoulds.com>, "jcngrimas@gmail.com" <jcngrimas@gmail.com>, "lopezalfaro@afra.com" <lopezalfaro@afra.com>, "harald.johannessen1951@gmail.com" <harald.johannessen1951@gmail.com>, Harald L <H_Johannessen@granadavalley.com>, "cal@calshields.com" <cal@calshields.com>, "kevin.boyce@clarkes.com.bb" <kevin.boyce@clarkes.com.bb>, Darren Frank <dfrank@cambridgellp.com>
Subject: RE: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]

Good Afternoon,

I am writing as I have been directed to advise the parties as follows:

“The moving party is directed to advise of the date by which he will serve his factum and hereby complete his motion materials for the leave motion.”

Sincerely,
Saurabh Baweja

From: Derek Knoke <dknoke@litigate.com>

Sent: April 6, 2022 12:24 PM

To: Baweja, Saurabh S. (JUD) <Saurabh.Baweja@ontario.ca>; Nanda Singh <nsingh@cambridgellp.com>; SCJ-CSJ Div Court Mail (JUD) <scj-csj.divcourtmil@ontario.ca>

Cc: 'leonj@bennettjones.com' <leonj@bennettjones.com>; 'zweigs@bennettjones.com' <zweigs@bennettjones.com>; 'bortolinw@bennettjones.com' <bortolinw@bennettjones.com>; kplunkett@airdberlis.com; sbabe@airdberlis.com; shena-ann.ince@clarkes.com.bb; alvaro.almengor@hatstone.com; carl.oshea@hatstone.com; jwoycheshyn@stewartmckelvey.com; cmacleod@cambridgellp.com; jkasoz@cambridgellp.com; bhg@15bedford.com; Diane.Winters@justice.gc.ca; KKay@stikeman.com; Peter Griffin <pgriffin@litigate.com>; Monique Jilesen <mjilesen@litigate.com>; Grace Tsakas <gtsakas@litigate.com>; Bobby Kofman (<bkofman@ksvadvisory.com>) <bkofman@ksvadvisory.com>; Noah Goldstein (<ngoldstein@ksvadvisory.com>) <ngoldstein@ksvadvisory.com>; Sarah Millar <smillar@litigate.com>; AKreaden@stikeman.com; robert.madden@alexandriabancorp.com; Debbie.McDonald@alexandriatrust.com; Groeneveld, Steven (MOF) <Steven.Groeneveld@ontario.ca>; maclaw@bellnet.ca; pdoig@bdtinvestments.com; pcho@weirfoulds.com; mly@weirfoulds.com; jcngrimas@gmail.com; lopezalfaro@afra.com; harald.johannessen1951@gmail.com; H_Johannessen@granadavalley.com; cal@calshields.com; kevin.boyce@clarkes.com.bb; Darren Frank <dfrank@cambridgellp.com>

Subject: RE: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Good afternoon,

Embedded below is a link to our sharefile where you can find the Responding Motion Record of the Receiver. Also, attached is the affidavit of service.

- Link: <https://litigate.sharefile.com/d-se9b2178ecf70411e8d5fd4cca51d4395>

The Receiver is able to deliver a factum seven days after the day that the court orders Mr. Gutierrez to deliver a factum.

Derek

From: Baweja, Saurabh S. (JUD) <Saurabh.Baweja@ontario.ca>

Sent: Tuesday, April 5, 2022 3:54 PM

To: Derek Knoke <dknoke@litigate.com>; Nanda Singh <nsingh@cambridgellp.com>

Cc: 'leonj@bennettjones.com' <leonj@bennettjones.com>; 'zweigs@bennettjones.com' <zweigs@bennettjones.com>; 'bortolinw@bennettjones.com' <bortolinw@bennettjones.com>; kplunkett@airdberlis.com; sbabe@airdberlis.com; shena-ann.ince@clarkes.com.bb; alvaro.almengor@hatstone.com; carl.oshea@hatstone.com; jwoycheshyn@stewartmckelvey.com;

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Subject: RE: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]

EXTERNAL MESSAGE

Good Afternoon,

I have been directed to advise the parties as follows:

In the opinion of the court, the fastest and most expeditious way in which to address the Receiver's motion to dismiss is to hear and decide the motion for leave to appeal as soon as possible. That motion is conducted in writing, and all of the arguments for dismissal are probative on the leave motion.

Responding parties are asked to advise of the date by which they can provide responding materials for the leave motion, the hearing of which will be expedited faster than the stay motion can be heard.

The orders below are not stayed pending determination of the leave motion.

Sincerely,
Saurabh Baweja

From: Derek Knoke <dknoke@litigate.com>

Sent: April 5, 2022 3:08 PM

To: SCJ-CSJ Div Court Mail (JUD) <scj-csj.divcourtmal@ontario.ca>; Nanda Singh
<nsingh@cambridgellp.com>; Baweja, Saurabh S. (JUD) <Saurabh.Baweja@ontario.ca>

Cc: 'leonj@bennettjones.com' <leonj@bennettjones.com>; 'zweigs@bennettjones.com'
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kplunkett@airdberlis.com; sbabe@airdberlis.com; shena-ann.ince@clarkes.com.bb;
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harald.johannessen1951@gmail.com; H_Johannessen@granadavalley.com; cal@calshields.com;
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Subject: #189/22 - Xela Enterprises Ltd., et al ats. Castillo [DM-LSDOCS.FID727411]

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Dear Registrar of the Divisional Court,

Embedded below is a link to our sharefile where you can find the Motion Record of the Receiver to dismiss the two motions of Mr. Juan Gutierrez (namely, a motion for a stay pending a motion for leave to appeal, and a motion for leave to appeal) as frivolous, vexatious, and an abuse of process.

- Link: <https://litigate.sharefile.com/d-s7939a745a91b42ac9c8f9591466b0b86>

For your convenience, the following are attached to this email:

- The Notice of Motion;
- The Second Supplement to the Receiver's Fifth Report (dated April 4, 2022); and
- The Affidavit of Service (serving the entire Motion Record).

Both the Notice of Motion and the Second Supplement to the Receiver's Fifth Reports (along with many other supporting documents) can be found in the Motion Record contained in our sharefile.

I have also attached an email from Saurabh Baweja, who advised (on March 29, 2022) on behalf of Corbett J., that McEwen J.'s endorsement was not stayed. Despite Corbett J.'s direction, the parties have not complied with McEwen J.'s endorsement.

We ask that the motion be heard as soon as possible and request a court-ordered timetable for same.

Thank you very much in advance.

Derek

From: SCJ-CSJ Div Court Mail (JUD) <scj-csj.divcourtmail@ontario.ca>

Sent: Tuesday, March 29, 2022 10:43 AM

To: Nanda Singh <nsingh@cambridgellp.com>; SCJ-CSJ Div Court Mail (JUD) <scj-csj.divcourtmail@ontario.ca>

Cc: 'leonj@bennettjones.com' <leonj@bennettjones.com>; 'zweigs@bennettjones.com' <zweigs@bennettjones.com>; 'bortolinw@bennettjones.com' <bortolinw@bennettjones.com>; 'jwoycheshyn@stewartmckelvey.com' <jwoycheshyn@stewartmckelvey.com>; Peter Griffin <pgriffin@litigate.com>; Monique Jilesen <mjilesen@litigate.com>; Derek Knoke <dknoke@litigate.com>; 'pcho@weirfoulds.com' <pcho@weirfoulds.com>; 'mly@weirfoulds.com' <mly@weirfoulds.com>; 'kplunkett@airdberlis.com' <kplunkett@airdberlis.com>;

'sbabe@airdberlis.com' <sbabe@airdberlis.com>; 'kevin.boyce@clarkes.com.bb' <kevin.boyce@clarkes.com.bb>; 'shena-ann.ince@clarkes.com.bb' <shena-ann.ince@clarkes.com.bb>; 'carl.oshea@hatstone.com' <carl.oshea@hatstone.com>; 'bhg@15bedford.com' <bhg@15bedford.com>; 'Diane.Winters@justice.gc.ca' <Diane.Winters@justice.gc.ca>; 'alvaro.almengor@hatstone.com' <alvaro.almengor@hatstone.com>; 'KKay@stikeman.com' <KKay@stikeman.com>; 'AKreaden@stikeman.com' <AKreaden@stikeman.com>; Chris Macleod <cmacleod@cambridgellp.com>; Joan Kasozi <jkasoz@cambridgellp.com>; Darren Frank <dfrank@cambridgellp.com>

Subject: RE: Xela Enterprises Ltd., et al ats. Castillo; Court File No. CV-11-9062-00CL

EXTERNAL MESSAGE

Hello,

Your document is deemed to be filed/issued on March 29th, 2022. The file number assigned is 189/ 22.

This email serves as your formal notice of the commencement of your appeal.

Payments can be made by sending us a cheque or money order via regular mail. The Cheque should be made to the Minister of Finance and should include a cover letter, a copy of the Notice filed, or a copy of the email confirmation from the Court that identifies the style of cause/file number. Otherwise you may attend at our office during our reduced hours to make payments between 9a.m-11a.m and 2p.m-4p.m.

Regards,

Nizhane Para

Ministry of the Attorney General Ontario
Divisional Court, Osgoode Hall
130 Queen Street West Unit 174
Toronto, Ontario M5H 2N5

From: Nanda Singh <nsingh@cambridgellp.com>

Sent: March 28, 2022 5:20 PM

To: SCJ-CSJ Div Court Mail (JUD) <scj-csj.divcourtmail@ontario.ca>

Cc: 'leonj@bennettjones.com' <leonj@bennettjones.com>; 'zweigs@bennettjones.com' <zweigs@bennettjones.com>; 'bortolinw@bennettjones.com' <bortolinw@bennettjones.com>; 'jwoycheshyn@stewartmckelvey.com' <jwoycheshyn@stewartmckelvey.com>; 'pgriffin@litigate.com' <pgriffin@litigate.com>; 'mjilesen@litigate.com' <mjilesen@litigate.com>; 'dknoke@litigate.com' <dknoke@litigate.com>; 'pcho@weirfoulds.com' <pcho@weirfoulds.com>; 'mly@weirfoulds.com' <mly@weirfoulds.com>; 'kplunkett@airdberlis.com' <kplunkett@airdberlis.com>; 'sbabe@airdberlis.com' <sbabe@airdberlis.com>; 'kevin.boyce@clarkes.com.bb' <kevin.boyce@clarkes.com.bb>; 'shena-ann.ince@clarkes.com.bb' <shena-ann.ince@clarkes.com.bb>; 'carl.oshea@hatstone.com' <carl.oshea@hatstone.com>; 'bhg@15bedford.com' <bhg@15bedford.com>; 'Diane.Winters@justice.gc.ca' <Diane.Winters@justice.gc.ca>; 'alvaro.almengor@hatstone.com' <alvaro.almengor@hatstone.com>; 'KKay@stikeman.com' <KKay@stikeman.com>; 'AKreaden@stikeman.com' <AKreaden@stikeman.com>; Chris Macleod

1388

<cmacleod@cambridgellp.com>; Joan Kasozi <jkasozi@cambridgellp.com>; Darren Frank <dfrank@cambridgellp.com>

Subject: Xela Enterprises Ltd., et al ats. Castillo; Court File No. CV-11-9062-00CL

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Registrar
Ontario Superior Court of Justice – Divisional Court
Toronto

Dear Sir/Madam:

I attach the following documents for filing with the Court:

1. Filing Request form;
2. Affidavit of Service; and
3. Notice of Motion.

A copy of the Endorsement of the Hon. Justice McEwen dated March 25, 2022 is attached for your reference.

Yours very truly

Nanda Singh

Law Clerk

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

Phone: [\(416\) 477 7007 ext. 203](tel:(416)4777007)

Email: nsingh@cambridgellp.com

Website: www.cambridgellp.com



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CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

This is Exhibit “BBB” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xda et al
Defendant(s)

Case Management Yes No by Judge: McEwen

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

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

I conducted another case conference in this matter on May 20/22. Counsel agreed on the form and content of the order concerning my March 25/22 endorsement. I signed the order and provided it to counsel that day. The Receiver also sought an order/endorsement confirming its

25 May 22
Date

McEwen
Judge's Signature

Additional Pages Four

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

authority to review documents in accordance with the terms of my March 25/21 order. Normally such an endorsement would be unnecessary, but given Mr Gutierrez's Counsel's correspondence to the Receiver that access to the data (by the Receiver) on the Blue Servers would "suggest intentional misconduct" I am prepared to grant the endorsement to provide clarity that this is not the case.

My orders of March 25/21 and March 25/22 are clear and unequivocal. They must be complied with.

Mr Gutierrez also sought that further language be incorporated into the two orders and I declined to do so. The order

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

resulted from contested hearings I am not prepared to allow for revisions as Mr Gutierrez seeks today and has in the past.

No new legitimate concerns have been raised and the concerns could have been raised at the hearings (or sought on appeal).

Last, Mr. Gutierrez seeks to schedule a motion to replace the Receiver. I advised the parties that once the Commercial List schedule was finalized for the fall a date would be set.

Upon reflection, however, I question whether the motion should be allowed to proceed whilst Mr Gutierrez has not complied with the aforementioned two orders.

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

I am not convinced this is proper in the circumstances of the case.

I wish to hear submissions on this point at a further 30 minute case conference.

The parties will obtain a date from the Commercial List office.

In the interim, the issue of the motion to replace the Receiver will not, in any way, affect or impede the Receiver's powers.

McE...

1394

COUNSEL SLIP

COURT FILE

May 202022

NO.: CV 11009062 CL

DATE: _____

NO. ON LIST _____

TITLE OF
PROCEEDING

Castillo v Xela etal

COUNSEL FOR:

APPLICANT(S)

Monique Jilesen – mjilesen@litigate.com
Derek Knoke – dknoke@litigate.com
Carl O’Shea – carl.oshea@hatstone.com
Alvaro Almengot – alvaro.almengor@hatstone.com

PHONE _____

FAX _____

EMAIL _____

COUNSEL FOR:

RESPONDENT(S)

Chris Macleod – cmacleod@cambridgellp.com
Joan Kasozi – jkasozi@cambridgellp.com
Brian Greenspan – BHG@15bedford.com
 Jeffrey Leon – jwoycheshyn@stewartmckelvey.com
Jason Woycheshyn – leonj@bennettjones.com
Philip Cho – pcho@weirfoulds.com
Michael Ly – mly@weirfoulds.com
Katherine Kay – kkay@stikeman.com
Aaron Kreadon – akreaden@stileman.com

PHONE _____

FAX _____

EMAIL _____

JUDICIAL NOTES:

This is Exhibit “CCC” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

From: Brian Greenspan <BHG@15bedford.com>
Sent: July 19, 2022 4:09 PM
To: Monique Jilesen; Derek Knoke
Cc: Michelle Biddulph; Chris Macleod; Michelle L. Agoston
Subject: Letter to H. Hals
Attachments: GUTIERREZ.20220706.L.BHG to H. Hals.Re.Juan Guillermo Gutierrez.pdf

EXTERNAL MESSAGE

Dear Monique and Derek:

Further to Mr. Gutierrez' efforts to ensure that his "Declaration" to the Notary, made in Guatemala on December 3, 2020 be withdrawn and that it not be used or relied upon in support of the Hals criminal complaint, I attach a letter sent to Mr. Hals on July 6, 2022. Although we have not received a clear response to our request, it is our understanding that the issues in Panama remain unresolved.

We have provided this correspondence to the parties involved in the contempt proceeding and the letter should not be circulated to the wider distribution list.

Best
Brian

Brian H. Greenspan

T 416.868.1755 x4222
F 416.868.1990
E bgreenspan@15bedford.com
www.15bedford.com



This email may contain information that is privileged, confidential and/or exempt from disclosure. No waiver whatsoever is intended by sending this e-mail which is intended only for the named recipient(s). Unauthorized use, dissemination or copying is prohibited. If you receive this email in error, please notify the sender and destroy all copies of this email.

Delivered by email: harald.johannessen1951@gmail.com

July 6, 2022

Mr. Harald Johannessen Hals
6 Av 'A' 8-00, Zona 9
Edificio Centro Operativo, Penthouse B
Guatemala, Guatemala

Dear Mr. Hals:

Re: Juan Guillermo Gutierrez

As I trust you will recall, on February 10, 2021 an order was entered by Justice McEwen in the Ontario Superior Court of Justice in relation to a criminal complaint made to the Public Prosecutor's Office in Panama which you had initiated against Alvaro Almengor, Manuel Carrasquilla and Lidia Ramos.

In addition to several directives to you, the Court ordered that Juan Guillermo Gutierrez affirm the withdrawal of his Affidavit attested to on December 3, 2022 in Guatemala and that the Affidavit not be used to support the above noted criminal complaint. Mr. Gutierrez was also required to provide the Public Prosecutor's Office in Panama with the withdrawal affirmation and furthermore to direct you and Javier Alcides de Leon Almengor to withdraw the criminal complaint.

On February 11, 2021 Mr. Gutierrez fully complied with the directive of Justice McEwen and executed an affirmation withdrawing his statement of December 3, 2020 and any reliance placed upon it to support the criminal complaint. Furthermore, he provided these materials to the Public Prosecutor's Office and wrote to you and Mr. Alcides de Leon directing you to take whatever steps that were within your power to effect a withdrawal of the criminal complaint and to comply in full with those portions of the order that applied to you.

Your response to the directive of Justice McEwen and your refusal to withdraw the criminal complaint were received and provided to the court in the Receivership proceedings.

Despite Mr. Gutierrez' compliance with Justice McEwen's February 10, 2021 order, the Receiver proceeded with a motion that Mr. Gutierrez be found in contempt of court, in part, for a breach of the order appointing

the Receiver dated July 5, 2019 which contained broad powers in favour of the Receiver to act in respect of the business activities of Xela Enterprises Ltd. It was alleged that Mr. Gutierrez' declaration which was the sole evidence tendered in support of the criminal complaint that you initiated in Panama was in breach of the Appointment Order.

The motion brought to find Mr. Gutierrez in contempt was heard before Justice Conway of the Ontario Superior Court of Justice on May 30th and 31st and on June 2nd and 16th, 2022. On June 29, 2022 Justice Conway released her Reasons for Decision finding Mr. Gutierrez guilty of intentionally breaching the Appointment Order when he swore the declaration in Guatemala on December 3, 2020. I attach a copy of the Judgment of Justice Conway and draw particular attention to the conclusion which she reached at paragraphs 61 and 62 of the judgment.

Although Justice Conway limited her findings to the civil contempt of the Appointment Order and refused to make a declaration of criminal contempt, we must now arrange to schedule the sentencing phase of the contempt proceeding. Although Mr. Gutierrez took the remedial steps as required by Justice McEwen to purge the contempt, he must now face the consequences of the adverse finding made against him.

I have been requested by Mr. Gutierrez to renew his clear and unequivocal request to you, in his letter 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 as an evidentiary foundation for any proceeding against the Receiver or his agents in Panama. It is Mr. Gutierrez' fervent hope that you will reconsider your previous position and abandon any existing or proposed investigation or prosecution which places any reliance upon his statement of December 3, 2020 or his subsequent interview at the Panamanian Consulate in Toronto on December 14, 2021.

Yours sincerely,
Greenspan Humphrey Weinstein LLP

A handwritten signature in black ink that reads "Brian H. Greenspan". The signature is written in a cursive, flowing style.

Brian H. Greenspan

/BHG:ma

This is Exhibit “DDD” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

**CASE CONFERENCE BRIEF OF THE RESPONDENT, JUAN GUILLERMO
GUTIERREZ**

July 21, 2022

CAMBRIDGE LLP

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M5V 1R5

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Juan Guillermo Gutierrez

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jknok@litigate.com

Lawyers for the Receiver

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

**CASE CONFERENCE BRIEF OF THE RESPONDENT, JUAN GUILLERMO
GUTIERREZ**

1. Since this receivership was authorized in 2019, KSV Restructuring Inc. (“**KSV**” or the “**Receiver**”) has incurred more than a million dollars in costs and expenses without recovering a single penny in satisfaction of the Margarita Castillo judgment (the “**Castillo Judgment**”). As the Court knows, Mr. Gutierrez has complained bitterly at every step that KSV was not seriously engaged in an attempt to satisfy the Castillo Judgment, but was instead using its court-sanctioned authority to harass Mr. Gutierrez in collusion with Ms. Castillo and the majority shareholders that have improperly withheld hundreds of millions of dollars in dividends from the Toronto branch of the Gutierrez family. KSV’s foray into Panama, for example, has never been reasonably explained or justified, nor has KSV ever identified the reasonable basis upon which it objected to a third-party loan that would have satisfied the Castillo Judgment in its entirety. Instead, the Receiver moved for a contempt

citation against Mr. Gutierrez for allegedly advancing criminal proceedings in Panama against the Receiver's agent in that country.¹

2. The ostensible basis for KSV's so-called investigatory work in this receivership have been certain "reviewable transactions" identified by the Receiver as potentially questionable (the "**Reviewable Transactions**"). In that regard, the Receiver has used its extraordinary powers as a Court Officer to demand access to the wide spectrum of documents from Mr. Gutierrez and from third parties – including documents that are conceded to be potentially unrelated, personal, confidential and/or privileged – by placing them in their entirety onto a database maintained by an agent of the Receiver before review by Mr. Gutierrez. Such an onerous discovery protocol is not appropriate in ordinary civil litigation in Toronto, and is available to KSV solely as a consequence of its status as an Officer of the Court. Indeed, this Court has consistently cited that status in deferring to KSV's investigative strategy.
3. Nevertheless, events during the past three weeks now have further eroded the lack of confidence of Mr. Gutierrez and other stakeholders in KSV and its ability to fulfil its mandate effectively. Specifically, on 30 December 2021, KSV commenced a civil lawsuit in Toronto against the entire Toronto branch of the Gutierrez family, alleging a civil conspiracy to harm Xela in connection with the same Reviewable Transactions that undergird KSV's investigative activities (the "**KSV Lawsuit**"). The defendants include Arturo's Technical Services, all of the beneficiaries of the ArtCarm Trust in Barbados (*i.e.*, Mr. Gutierrez's mother, his wife and his four children), Mr. Gutierrez himself, and others. A copy of the Statement of Claim in the KSV Lawsuit is attached hereto as Exhibit A. KSV's decision to commence the KSV Lawsuit necessarily signifies that KSV believed that it had sufficient factual information in December 2021 to form a good-faith basis to allege that the Reviewable Transactions are part of a conspiracy amongst the various defendants to injure Xela.

¹ Justice Conway acquitted Mr. Gutierrez of any alleged criminal contempt. Her finding of civil contempt will be subject to appeal for various reasons.

4. Notably, KSV failed to disclose the pendency of the KSV Lawsuit until it was forced to serve the Claim on the Defendants when the six-month limitation on serving an originating process was set to expire. Meanwhile, KSV continued to pursue aggressive document production from Mr. Gutierrez and ATS in a manner inconsistent with civil discovery rules, all under the guise that the Reviewable Transactions was somehow warranted. In other words, KSV was at one time wearing “two hats” – one as a court-appointed officer, the other as a litigant in a lis against Mr. Gutierrez, ATS and many other individuals. Without disclosing its interest as a litigant, KSV continued to aggressively demand broad disclosure of documents and information from defendants in the KSV Lawsuit.

5. This latest development reaffirms Mr. Gutierrez’s belief that KSV has been acting in a manner inconsistent with its statutory duties as a receiver and further undermines any confidence in KSV’s impartiality and ability to effectively fulfil its mandate. Under the circumstances, it is not only appropriate but essential for the Court to hear Mr. Gutierrez’s Motion to replace KSV with a receiver that will have the confidence of all stakeholders to better fulfill the mandate given by the Court.

1405

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al.
Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**CASE CONFERENCE BRIEF OF THE RESPONDENT,
JUAN GUILLERMO GUTIERREZ**

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

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

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

This is Exhibit “EEE” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", written in a cursive style.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**



SUPERIOR COURT OF JUSTICE

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

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

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

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

ENDORSEMENT OF JUSTICE MCEWEN:

25 July 22

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

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

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



This is Exhibit “FFF” referred to in the Affidavit of Robert Kofman sworn at the City of Kelowna, in the Province of British Columbia, before me, on September 8, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "Shane Ramnanan", with a long horizontal flourish extending to the right.

Commissioner for Taking Affidavits (or as may be)

**SHANE RAMNANAN
LICENSED PARALEGAL
PO7510**



Guatemala, julio 25 de 2022

SEÑORES:

KSV ADVISORY INC.

ATN. BOBBY KOFMAN y/o ALVARO ALMENGOR

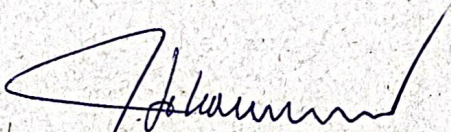
150 KING STREET WEST, SUITE 2308

TORONTO, ONTARIO, MSH 1J9

Respetado Señor, en gracia de discusión, realizamos un comité con el equipo jurídico y adjunto a este documento encontrará suficiente soporte fáctico que demuestra que más allá de cualquier duda razonable, existen suficientes elementos judiciales que demuestran que las acciones adelantadas por HATSTON, van en contra del ordenamiento jurídico de la República De Panamá.

Por otro lado quiero contarle un poco de mi persona: soy una persona de 70 años, con una amplia trayectoria empresarial. Dirigí en Guatemala una importantísima empresa del sector de café , hasta que me vinculé a la multinacional Noruega YARA. Posteriormente Juan Arturo Gutierrez me vinculó a su organización empresarial. Por lo menos, resulta injurioso de su parte afirmar sin prueba alguna que Juan G. Gutierrez me manipula en las decisiones que tomó en la sociedad LISA S.A. Todas y cada una de mis acciones están íntimamente relacionadas a mis deberes corporativos.

Sin otro Particular,



Harald Johannessen Hals

LISA s.a.

Guatemala, July 25, 2022

SIRS:

KSV ADVISORY INC.

ATT'N BOBBY KOFMAN and/or ALVARO ALMENGOR

150 KING STREET WEST, SUITE 2308

TORONTO, ONTARIO, M5H 1J9

Dear Sir. Pursuant to the discussion, we have formed a committee with the legal team and attached to this document you will find sufficient factitive support demonstrating that beyond any reasonable doubt, there exist sufficient legal elements demonstrating that the shares forwarded by HATSON, go against the legal system of the Republic of Panama.

As well, I would like to tell you a little about myself: I am 70 years old, with a long business career. In Guatemala I directed a very important company in the coffee industry; I even associated myself with the Norwegian multinational "YARA". Afterward, Juan Arturo Gutierrez associated me to his business organization. At the very least, it is libelous on your part to affirm with any evidence that Juan G. Gutierrez manipulated mi in the decisions which he took in the company, LISA S.A. Each and every of my actions are intimately related to my corporate duties.

With no other matter at hand,

[Signature]

Harld Johannessen Hals

MARGARTIA CASTILLO et al.
Applicants

-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

**Affidavit of Robert Kofman
(sworn September 8, 2022)**

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-and-
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XELA ENTERPRISE LTD. et al.

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

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

PROCEEDING COMMENCED AT
TORONTO

**FURTHER SUPPLEMENTARY MOTION RECORD
OF THE RECEIVER**
(Contempt - Penalty Hearing returnable September 14, 2022)

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