

Court File No. CV-11-9062-00CL  
Divisional Court File No. 703/22

**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

**MOTION RECORD ON BEHALF OF  
THE RESPONDENT JUAN GUILLERMO GUTIERREZ  
(*Motion for leave to appeal*)**

**VOLUME 2 OF 2**

January 23, 2023

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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

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 DAVE BURTON**

I, Dave Burton, of Georgetown (A/K/A Halton Hills, Regional Municipality of Halton), in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a Digital Forensic Investigator with Teel Technologies Canada Inc. (“**Teel**”), a position I have held since December 2020. Prior to joining Teel, I served with the Peel Regional Police in various capacities for more than 30 years, retiring in May 2020. During my last 16 years with the Peel Regional Police, I held the position of Digital Forensic Services Investigator Detective Constable. In that capacity, my primary responsibility involved the analysis of electronic devices containing evidence of potential value to criminal investigations.
  
2. As part of my law enforcement duties, I provided support to various bureaus within the organization and conducted regular lectures and training for both internal and external



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events. I have been a Certified Electronic Evidence Collection Specialist since 2002 and a Certified Forensic Computer Examiner since 2003. I have completed numerous digital forensic training courses, including iPhone forensics and Cellebrite certification, and have performed and supervised digital data recovery and analysis on the full range of digital devices available to consumers. A true copy of my *curriculum vitae* is attached hereto and marked as **Exhibit “A.”**

3. Teel was retained to assist counsel for Mr. Juan Guillermo Gutierrez in connection with a production request by the receiver herein (the “**Receiver**”) for certain personal electronic devices owned by Mr. Gutierrez, namely one iPhone and one iPad (collectively the “**Personal Devices**”).<sup>1</sup> Teel assigned me to assist with the engagement, and as a result I was physically present with Mr. Gutierrez at the offices of the Receiver’s IT consultant, which at the time was Duff & Phelps/Kroll, when the Personal Devices were imaged and copied to a password-protected hard drive (the “**Original Hard Drive**”).

4. I was also directly involved in monitoring (to the extent allowed) the subsequent unlocking and extraction of the data on the Original Hard Drive by the Receiver’s replacement IT consultant, Epiq Global (“**Epiq**”), the purpose of which, I was informed, was to set in motion the process for Mr. Gutierrez and/or his counsel to review the data using Epiq’s Relativity platform, in advance of any potential production of documents on the Original Hard Drive to the Receiver. As such, I have knowledge of the matters contained in this affidavit.

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<sup>1</sup> The Receiver also requested production of a second iPad of Mr. Gutierrez, but that device was damaged and non-functional such that its data could not be viewed or extracted.

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5. In advance of the extraction, I participated in a Teams virtual meeting on August 25, 2022, with Ms. Laura Clewley, a Project Manager for Epiq (the “**August 25 Meeting**”), during which we discussed the specific steps Epiq would take with the data on Original Hard Drive once counsel for Mr. Gutierrez provided Epiq with the password to unlock the drive. During that Teams meeting, Ms. Clewley indicated that the extraction process could take multiple days, which gave me pause. I therefore asked whether the data would be copied from the Original Hard Drive and then ingested directly into Relativity, or whether Epiq would first conduct a conversion process. I made that inquiry because, if the data were to be ingested directly into Relativity, the process would be unlikely to require multiple days’ time. In response, Ms. Clewley informed me that the data would indeed be converted from the UFDR format used by Cellebrite (which had been used to create the original images of the Personal Devices) into the format used by Relativity, which explained the estimated duration of the process.

6. Later that day, Ms. Clewley sent me an email outlining our discussions during the August 25 Meeting and the anticipated workflow, which email included the following statement: “Epiq will copy the data off the drive to allow for processing of the data for review in Relativity.” A true copy of Ms. Clewley’s email is attached hereto and marked as **Exhibit “B.”** No other technical treatment of the data was discussed during the August 25 Meeting or in Ms. Clewley’s follow-up email.

7. Based on everything stated during the August 25 Meeting as well as the content of Exhibit B, I understood that – once Mr. Gutierrez’s counsel supplied the passcode to unlock the Original Hard Drive – Epiq would do nothing more than convert the data into a format compatible with Relativity and thereupon immediately upload it to the Relativity

platform for review. At no point did Ms. Clewley state or imply that Epiq in fact would *not* upload the data to Relativity, or that Epiq would perform other technical processes with the data.

8. On August 30, 2022, I participated in a Zoom virtual teleconference with Ms. Clewley and Mr. Gutierrez's counsel, Brian Greenspan. During that teleconference, we reiterated the agreed workflow Epiq would follow with the data – for the benefit of Mr. Greenspan, who held the passcode – as per the discussions during the August 25 meeting and Epiq's follow-up email. We further agreed that I would travel to Epiq's offices in three days' time to relock the Original Hard Drive using a new passcode. Ms. Clewley agreed to contact me for that purpose if the workflow process could be completed sooner. On that basis, Mr. Greenspan provided Ms. Clewley with the passcode to the Original Hard Drive, whereupon Ms. Clewley confirmed that she had successfully unlocked the Original Hard Drive. Three days later, having not heard from Ms. Clewley, I travelled to Epiq's offices and relocked the Original Hard Drive with a new passcode, as agreed.

9. On or about October 11, 2022, I was provided with a copy of a letter dated October 5, 2022, from the Receiver's counsel to counsel for Mr. Gutierrez (the "**October 5 Letter**"). A true copy of the October 5 Letter is attached hereto and marked as **Exhibit "C."** The October 5 Letter indicates that, contrary to my understanding of the anticipated workflow from my discussions with Ms. Clewley prior to the extraction, Epiq had not uploaded the data from the Original Hard Drive to the Relativity platform. Instead, Epiq had used a tool known as FTK Imager to create two new images of the Original Hard Drive, stored them on two separate external hard drives, and placed them into Epiq's "secure evidence locker." The use of FTK Imager to image the entire locked Original

Hard Drive was not included in the agreed workflow discussed during the August 25 Meeting or in Ms. Clewley's follow-up email.

10. Further, given the relatively small amount of data on the Original Hard Drive, the process of imaging it would have required no more than a few hours' time. Thus, it appears that Epiq retained the Original Hard Drive in its unlocked status after imaging it, without alerting me to relock it, despite having agreed to contact me if the process required less than three days. That fact raises serious security concerns in that there is no accounting for the whereabouts of the unlocked Original Hard Drive during that period, nor do we know who had access or whether further copies were made.

11. Moreover, it is unclear from the October 5 Letter who has access to Epiq's evidence locker, whether key card access is logged, whether the access is compartmentalized, or when the vault is accessible. It is similarly unclear whether Epiq's key logging system would record access to the specific hard drives containing the FTK images of the Original Hard Drive by reference to make, model and serial number of the new hard drives. Those issues also raise serious security concerns.

12. The October 5 Letter also states that one of the two FTK images created by Epiq was opened and the data was extracted and moved to Epiq's servers, where it was parsed using Cellebrite Physical Analyzer to "ensure the integrity of the data." That task was not discussed during the August 25 Meeting or in Ms. Clewley's follow-up email.

13. Further, it is my understanding that the data remains on Epiq's server unencrypted, without any password protection. It is unclear from the October 5 Letter whether Epiq employs a file auditing system on their servers that would record whether

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any of the files were copied, moved or in any way accessed. It is also unclear whether Epiq's server network is closed to outside access or can be remotely accessed from other Epiq offices and/or the Internet. Additionally, while I learned during the process of relocking the Original Hard Drive that Epiq employs a chain of custody documentation system for physical devices in Epiq's custody, it does not appear that its chain of custody system applies to images stored on Epiq's servers. All these issues raise serious security concerns.

14. Lastly, the October 5 Letter indicates that the new FTK images are no longer loaded into Physical Analyzer, implying that they can no longer be reviewed. However, that implication is misleading because, although the new acquisitions do require software to interpret the data, various tools exist that can perform that function. Therefore, even though the data might not be viewable in their original state, available tools would enable anyone with access to the Physical Analyzer acquisitions to access the data. This issue also raises serious security concerns.

15. I make this affidavit for the purpose of assisting the Court with respect to the motion for security for costs and for no other or improper purpose.

**SWORN** by Dave Burton at the Town of Georgetown, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 22, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as may be)

**DARREN FRANK (LSO# 81700U)**



\_\_\_\_\_  
**DAVE BURTON**

This is Exhibit "A" referred to in the Affidavit of Dave Burton sworn by Dave Burton of the Town of Georgetown, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 22, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

*Commissioner for Taking Affidavits (or as may be)*

**DARREN FRANK**

**(LSO# 81700U)**

**Dave Burton**  
**Teel Technologies Canada**  
[dave.burton@teeltechcanada.com](mailto:dave.burton@teeltechcanada.com)

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## **WORK HISTORY**

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### **CAREER OVERVIEW:**

**December 2020 – Current**

**Teel Technologies Canada**

***Teel Technologies Team Member***

- Manage office operations at the Ontario location of Teel Technologies Canada.
- Conduct training sessions for courses offered by Teel Technologies Canada.
- Conduct analysis on devices submitted to Teel Technologies Canada for examination.

**March 2004 – May 2020 (Retired)**

**Digital Forensic Services**

***Digital Forensic Services Investigator Detective Constable***

***Peel Regional Police***

- Conduct analysis of electronic devices capable of storing data having evidentiary value to an investigation.
- Assigned to the analysis of Mobile devices including cellular phones, smart phones, tablet technology and GPS units.
- Provide support to various bureaus within the organization for search warrant assistance.
- Provide expert witness testimony in court as to the analysis of devices and provide the results in an easy to understand format.
- Conduct regular lectures and training sessions for both internal and external events. Present to the GIT courses held at Peel Regional Police with regards to the role of the Technological Crimes Unit. Have provided training on several occasions to the Canadian Police College with regards to technology for investigators
- Coordinated many courses for the Technological Crimes Unit members with outside and private sector companies. These courses have included;
  - Thomas Rude Linux Forensics
  - Jonathan Zdziarski IOS Forensics
  - MFI 101 Workshop
  - MFI 202 Workshop
  - VIA Forensics Advanced IOS and Blackberry
  - Advanced Smartphone Forensics
  - Access Data Boot Camp

- Magnet Forensics
- UFED Mobile Device Examiners Course
- UFED Physical Examiners Course
- Cell Phone Repair and JTAG Course
- Forensic Video Analysis Course
- In System Programming for Mobile Devices
- Advanced Chip-Off Forensics Course
- Advanced Blackberry Forensics Course
- X-Ways Forensics
- BlackBag Forensics

**January 2004 – March 2004**

**21 Division ‘B’ Platoon**

***Uniform Patrol***

***Peel Regional Police***

- Uniformed patrol including response to calls for service, response to emergency calls, traffic enforcement and criminal investigation.
- Prepare Crown briefs for various criminal cases.
- Experiences testifying in Provincial, Criminal and District levels of court.

**January 2003 – March 2004**

**Global System Solutions**

***Partner at Global System Solutions***

- Left Peel Regional Police to pursue a Partner position at Global System Solutions.
- Providing Apple certified Sales and technical support to large and smaller corporate clients with predominantly Apple infrastructure.
- Consult on integration of Apple products and services into their workflow.
- Oversee and assist with large installation projects.
- Provide onsite technical support services.

**December 2000 – January 2003**

**Technological Crimes Unit**

***Technological Crimes Unit Investigator***

***Peel Regional Police***

- Conduct analysis of electronic devices capable of storing data having evidentiary value to an investigation.
- Assigned to the analysis of computers including desktop and portable platforms.
- Provide support to various bureaus within the organization for search warrant assistance.
- Provide expert witness testimony in court as to the analysis of devices and provide the results in an easy to understand format.
- Conduct regular lectures and training sessions for both internal and external events. Present to the GIT courses held at Peel Regional Police with regards to the role of the Technological Crimes.



**July – November, 2000**

**Professional Standards**

***Audit Bureau***

***Peel Regional Police***

- Conduct audits of bureaus within the organization to ensure compliance with all applicable policies, procedures and legislation.
- Prepare reports and present to the Chiefs Management Group, compliance audit reports including recommendations to improve compliance or efficiencies where required.

**Apr. – July, 2000**

**O.A.C.P. Planning Office**

***Conference Planning***

***Peel Regional Police***

- Planning for the Ontario Association of Chief's of Police conference to be hosted by Peel Regional Police in June 2001 reporting directly to the Chief of Police.
- Design Web informational Web page for 2001 conference.
- Design letterhead, theme logo and other graphic design materials for the conference.
- Prepare promotional video to be presented at the Peterborough conference in June 2000 promoting 2001.
- Organize sponsorships to support the conference.
- Co-ordinate and liaise with vendors to appear at the trade show portion of the conference.

**Jan. – Apr., 2000**

**11 Division C.I.B.**

***C.I.B. Investigator***

***Peel Regional Police***

- Gained experience in the investigation and prosecution of various criminal code offences including robbery, assault, threatening and attempted murder charges.
- Draft affidavits in support of search and arrest warrants. The obtaining of tele-warrants and experience before a Justice of the Peace obtaining search warrants.
- Conduct videotaped interviews with victims, witnesses and accused persons.
- Gather and prepare information for a potential Coroner's Inquest for a sudden death case.

**Dec. 1998 – Jan. 2000**

**11 Division 'B' Platoon**

***Uniform Patrol***

***Peel Regional Police***

- Respond to general calls for service, emergency calls and traffic enforcement.
- Experience in criminal investigation, video taped interviews and preparing of court packages for bail hearings.
- Utilized as platoon training officer assisting with the training of several new recruits as a coach officer.

**May 1998 – Dec. 1998**

**Neighborhood Policing Unit**

***N.P.U. Officer***

***Peel Regional Police***

- Worked as N.P.U. officer assigned to Meadowvale Reporting Centre.
- Identify and resolve problem areas in the Meadowvale area.
- Liaison with Meadowvale Secondary school providing policing support and performing presentations on Policing related issues.
- Plain-clothes assignments on special projects in conjunction with officers from the Criminal Investigations Bureau or Break and Enter Investigators.

**Feb. 1995 – May 1998**

**Meadowvale Reporting Centre**

***Community Patrol Officer***

***Peel Regional Police***

- Provide a policing presence and sub-office to the Meadowvale area.
- Performed general uniformed patrol duties including criminal investigations and traffic enforcement.
- Provided presentations and speaking engagements to various community groups and organizations in relation to aspects of policing and crime prevention.

**Internet Steering Committee**

- ◆ Requested to sit on the Peel Regional Police steering committee as a committee member.
- ◆ Complete research as to the use of and impact of the Internet on the Peel Regional Police.
- ◆ Provide information to be presented to the P.S.B. and C.M.G. on Internet and computer related issues.

**Feb. 1989 – Feb. 1995**

**11 Division 'A' Platoon**

***Uniformed Patrol***

***Peel Regional Police***

- Uniformed patrol including response to calls for service, response to emergency calls, traffic enforcement and criminal investigation.
- Prepare Crown briefs for various criminal cases.
- Experiences testifying in Provincial, Criminal and District levels of court.
- Opportunities performing the station duty function, for a period of which working on a intake officer pilot project. During this project would complete all paperwork for criminal court packages for the platoon.

**11 Division Crime Analyst**

- ◆ Four month temporary transfer as the 11 Division Crime Analyst.
- ◆ Providing statistical analysis of crime trends within 11 Division.

- ◆ Prepare information reports for divisional bureaus, Inspector and Superintendent.

## **Training**

### 2019            **Embedded Hardware Acquisition & Analysis**

*Teel Technologies*

- The analysis and processing of various IoT (Internet of Things) devices

### 2018            **Semantics 21 Software Training**

*Semantics 21*

- Two days training in the use of Semantics 21 forensic software training

### 2018            **Certified Forensic Computer Examiner**

*I.A.C.I.S.*

- Successfully completed the 2018-2021 International Association of Computer Investigative Specialists re-certification process. (Recertification required every 3 years)

### 2018            **Advanced JTAG 2.0 Forensics**

*Teel Technologies*

- Advanced level methods in acquiring data from locked mobile devices new processes for modern devices

### 2018            **Advanced BGA Chip-Off 2.0 Forensics**

*Teel Technologies*

- Advanced level methods of BGA chip-removal for modern cell phones. Cold removal techniques that do not cause excessive damage to sensitive advanced chips.

### 2015            **Certified Forensic Computer Examiner**

*I.A.C.I.S.*

- Successfully completed the 2015-2018 International Association of Computer Investigative Specialists re-certification process. (Recertification required every 3 years)

### 2014            **X-Ways Forensics**

*X-Ways*

- Instructed on the use of the X-Ways forensics software

### 2013            **Advanced SiQuest Software**

*SiQuest*

- Course in the use of the SiQuest software suite

- 2013            **Advanced Blackberry Forensic Analysis**  
*Teel Technologies*
- Advanced level forensic analysis course focusing on Blackberry Technologies
- 2013            **BGA Chip-Off Forensics**  
*Teel Technologies*
- Advanced level memory chip removal and forensic analysis
- 2013            **Cell Phone Repair and JTAG**  
*Teel Technologies*
- Cell Phone repair and hardware level JTAG course for mobile devices
- 2012            **Certified Forensic Computer Examiner**  
*I.A.C.I.S.*
- Successfully completed the 2012-2015 International Association of Computer Investigative Specialists re-certification process. (Recertification required every 3 years)
- 2012            **Cellebrite UFED Physical Examiner Certification**  
*Root 9B*
- Successfully completed the UFED Physical Software Course
- 2012            **Cellebrite UFED Mobile Examiners Certification**  
*Root 9B*
- Successfully completed the UFED Touch Hardware Course
- 2012            **Cell Phone Repair Course**  
*3G Tech Electronics*
- Comprehensive cell phone disassembly and repair course
- 2011            **In System Programming**  
*Teel Technologies*
- Advanced level methods in acquiring data from locked mobile devices
- 2011            **Advanced Internet Forensics**  
*SiQuest*
- Advanced level Internet forensics and analysis course
- 2011            **Advanced Smartphone Forensics**  
*Teel Technologies*
- Advanced level smart phone forensics and analysis course

- 2010           **Mobile Forensics Inc. 202 Workshop**  
*M.F.I. Mobile Forensics Inc.*
- Advanced cell phone seizure and analysis workshop
- 2010           **iPhone Forensics**  
*Jonathan Zdziarski*
- Two day workshop on advanced level IOS forensics
- 2009           **Mobile Forensics Inc. 101 Workshop**  
*M.F.I. Mobile Forensics Inc.*
- Introduction to cell phone seizure and analysis workshop
- 2009           **Certified Forensic Computer Examiner**  
*I.A.C.I.S.*
- Successfully completed the 2009-2012 International Association of Computer Investigative Specialists re-certification process. (Recertification required every 3 years)
- 2008           **Cell Phone Analysis Workshop**  
*Canadian Police College*
- Cell phone seizure and analysis workshop
- 2006           **Certified Forensic Computer Examiner**  
*I.A.C.I.S.*
- Successfully completed the 2006-2009 International Association of Computer Investigative Specialists re-certification process. (Recertification required every 3 years)
- 2006           **Using Linux for Forensics**  
*Thomas Rude Forensics*
- Advanced level course on the use of Linux as a forensic platform
- 2006           **Access Data – Boot Camp**  
*Access Data*
- Introduction certification for the use of the Forensic Tool Kit software
- 2005           **Encase Software - Advanced**  
*Guidance Software*
- Advanced training in the use of the Encase Forensic Suite
- 2005           **Internet Searching for Investigators**  
*Canadian Police College*
- Advanced training for using the Internet as a tool for the investigator

- 2004            **Macintosh Forensics Advanced**  
*Canadian Police College*
- Advanced Macintosh platform forensics and analysis workshop
- 2004            **CCNA (Cisco Certified Network Associate)**  
*TriOS Training*
- Advanced Cisco Certified Network Associate certification course
- 2004            **Certified Apple Service Technician**  
*Apple Computer*
- Certification for Apple desktop systems and software
- 2004            **Certified Apple Service Technician**  
*Apple Computer*
- Certification for Apple portable systems and software
- 2004            **Macintosh ESSC**  
*Canadian Police College*
- Completed electronic search and seizure course dealing with the fundamentals of computer crime investigations and related technical aspects specific to Macintosh based systems
- 2003            **Certified Forensic Computer Examiner**  
*I.A.C.I.S.*
- Successfully completed the 2002-2003 International Association of Computer Investigative Specialists certification process. (Recertification required every 3 years)
- 2002            **Network Intrusion Detection**  
*Canadian Police College*
- Successfully completed the intrusion detection course consisting of both theory and hands on practical sessions
- 2002            **Linux Forensics**  
*Canadian Police College*
- Successfully completed Linux Forensics dealing with the Linux operating system and related investigations
- 2002            **Certified Electronic Evidence Collection Specialist**  
*I.A.C.I.S.*
- Successfully completed the 2002 I.A.C.I.S. evidence collection program

2001            **Internet Searching for Investigators**

*Canadian Police College*

- Successfully completed the intermediate portion of this course focusing on the Internet as a Tool for the Investigator

2001            **A+ Certification Course**

*TriOS Training*

- Successfully completed the A+ certification course

2001            **Forensics Conference**

*H.T.C.I.A.*

- High Technology Crime Investigators Association forensics conference held at George Mason University Pennsylvania

2001            **Cyber Crimes**

*Canadian Police College*

- Successfully completed Cyber Crimes specifically dealing with online and Internet based investigations

2000            **Internet Searching for Investigators**

*Canadian Police College*

- Successfully completed the basic portion of this course focusing on the Internet as a Tool for the Investigator

2000            **Networking Principles**

*Canadian Police College*

- Successfully completed networking principles, dealing with the fundamentals of computer networks and related investigations

2000            **Encase Software - Intermediate**

*Guidance Software*

- Successfully completed intermediate course on the Encase software training

2000            **Electronic Search and Seizure**

*Canadian Police College*

- Successfully completed ESSC dealing with the fundamentals of computer crime investigations and related technical aspect

**Emergency Medical Care Attendant**  
Certified E.M.C.A.

*Ministry of Health*

**Ambulance and Emergency Care Program** *Georgian College*  
 Graduated A.E.C. program with honors

**Police Sciences Program Graduate** *Sheridan College*

- Crime and the Community
- Introduction to Criminology
- Community Relations for Law Enforcement Officers
- Criminalistics
- Psychology
- Antisocial Behavior and the Law

## **Speaking and Lecturing**

With my training and background I have been guest lecturer or instructor at many engagements. This has included instructing on several occasions, below are examples of some of the venues;

*More examples can be provided upon request.*

**Canadian Police College (R.C.M.P)** – Recurring instructor on their digital technologies courses

**Sheridan College** – Guest speaker at Sheridan’s Cyber Security Symposium 3.0

**Sheridan College** – Guest speaker at their police foundations course invited to speak about digital technologies and policing

**Royal Military College (Kingston)** – Guest speaker at their International Symposium on Cyber Crime and Digital Technology Investigations

**Peel Regional Police** – guest lecturer on several occasions for their Cyber Academy

**Peel Regional Police** – recurring lecturer for the General Investigative Techniques course, Search Warrant course and other internal training courses.

**CISO (Criminal Intelligence Service of Ontario)** - Attended on three occasions to the University of Toronto to speak to the Advanced Undercover course hosted by C.I.S.O. speaking about utilizing technology in undercover investigations

**TASK T.O. (Toronto Area Security Klatch)** – Guest lecturer on Cyber Crime, WiFi Security Issues and Digital ATM Fraud (TASK T.O. is a consortium of GTA based private sector I.T. security professionals that meet monthly to discuss current security trends. I



was invited to speak by members of the organization who I have spoken in front of on previous engagements.

**H.T.C.I.A. (High Technology Crime Investigators Association)** – Guest lecturer on several occasions for topics including Internet and Web investigations, redirectors and Web bugs and Mobile Device forensics.

**Rogers TV** – Interviewed for Rogers TV regarding the Roll of the Technological Crimes Unit within the Peel Regional Police.

## **Associations**

### **I.A.C.I.S. (International Association of Computer Investigative Specialists)**

Since 2003, I have been a certified member of I.A.C.I.S. I.A.C.I.S. (International Association of Computer Investigative Specialists) is an internationally recognized and respected organization with members from around the world. In order to become certified by this organization you must attend an intense 2-week training course overseen by many supervising instructors. This course is conducted only once a year in Florida, the home base of this organization. This course covers many topics regarding conducting forensic examinations on electronic devices.

Upon completion of this course attendees are assigned a coach officer. The student then has ten months to complete a series of forensic examinations on devices that are sent to them. There are six required examinations with a seventh final written examination that consisted of 80 questions. The Coach Officer reviews the student's progress and can offer guidance within the strict guidelines and code of conduct laid out by I.A.C.I.S. Upon successful completion of this entire process the student is then certified.

This certification is valid for three years expiring and requiring recertification. This consists of an extensive examination of 50 questions. Twenty five of the questions deal with general knowledge of forensic analysis of electronic devices with the other twenty five directly relating to the analysis of a forensic image that is sent to the student. Recertification also requires that the applicant has been actively conducting forensic examinations in the previous three years AND has participated in at least 60 hours of digital forensic related training also within the previous three years.

### **H.T.C.I.A. (High Technology Crime Investigators Association)**

I have been an active member of the H.T.C.I.A. since 2001. The High Technology Investigators Association is an international association with local chapters all over the world. Local chapters hold monthly local meetings featuring guest speakers on technology

related topics. These meetings are also Web-cast to members that are unable to attend. There is an annual conference that is held at a predetermined location.

I have guest lectured on several occasions for the Ontario chapter on several topics. Also I was on the Ontario chapter elected board of directors as second Vice President for 2005.

I attended a one week H.T.C.I.A. sponsored forensic conference hosted at George Mason University in Pennsylvania in 2002. I also attended the H.T.C.I.A. Annual Conference in Long Beach California in 2001.

### **Recent Court Testimony**

*More examples can be provided upon request.*

R vs Lu  
October 2022  
Judge and Jury  
Official: Mr. Justice Harris  
Mobile Device Evidence  
Charge: Murder

R vs MERRITT, Melissa / FATTORE, Christopher  
October 2017  
Judge and Jury  
Official: Mr. Justice DAWSON  
Expert Witness (Mobile Forensics)  
Charge: Murder

R vs XXXXX (Youth Offender Name withheld)  
February 2019  
Judge and Jury  
Official: Mr. Justice Andre  
Charge: Murder

R vs SALIFU, HASSAN, ABUDULAI  
October 2018  
Judge and Jury  
Official: Mr. Justice Harris  
Charge: Murder

R vs KAWAL, NICHOLSON, ROWE  
June 2018  
Judge and Jury  
Official: Mr. Justice Harris  
Charge: Attempt Murder-Firearm, Robbery, Kidnapping-Cause Confinement, Disguise with Intent, Aggravated Assault, Poss. Firearm (Unauthorized, with Ammunition, while prohibited)

R vs UDE, Nnabuike

Judge and Jury

June 2018

Official: Madam Justice Baltman

Charge: Import/Export Substance, Conspire to Commit Indictable Offence

R vs NEIL, Daniel

Judge Alone

March 2018

Official: Mr. Justice Coroza

Charge: Possession Child Pornography, Distribute Child Pornography

R vs BROWNE, WILLIAMS, GREENSWORD

Judge Alone

February 2017

Official: Mr. Justice Coroza

Charge: Murder

This is Exhibit "B" referred to in the Affidavit of Dave Burton sworn by Dave Burton of the Town of Georgetown, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 22, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

*Commissioner for Taking Affidavits (or as may be)*

**DARREN FRANK**

**(LSO# 81700U)**

**Darren Frank**

---

**From:** Clewley, Laura <Laura.Clewley@epiqglobal.ca>  
**Sent:** August 25, 2022 12:59 PM  
**To:** Brian Greenspan; cmacleod@cambridgellp.com; dave.burton@teeltechcanada.com  
**Cc:** Derek Knoke; Monique Jilesen  
**Subject:** Follow up Call re Xela

Good afternoon everyone,

Appreciate the time for the call this morning, please find below summary of anticipated workflow next week=

Workflow for handling of the drive,

- Brian, Dave, and Laura to join a zoom call for Brian to share the current password(s) of the drive  
Epiq will connect the drive and input the password to unlock the drive, confirming the validity of the password, ending the zoom call
  - Epiq will copy the data off the drive to allow for processing of the data for review in Relativity
  - Once we have confirmed the images validity through processing, we will confirm completion for Dave to come into the office
- Dave will meet Laura at the Epiq office, go into the board room, where Laura will provide the drive for Dave to apply a new password

1. Dave will release the drive back to Laura to put it back in the media secure storage

For the zoom meeting on Tuesday= Brian, and Dave, would 9:15 am work for you both, just so I can ensure the drive is ready for the call please?

Please let me know of any questions.

Thank you,

**Laura Clewley**

Epiq | Project Manager

44 Victoria Street, Suite 900

Toronto, ON, M5C 1Y2

Email: [Laura.Clewley@epiqglobal.ca](mailto:Laura.Clewley@epiqglobal.ca)

**People. Partnership. Performance.**

[www.epiqglobal.com](http://www.epiqglobal.com)

This electronic mail (including any attachments) may contain information that is privileged, confidential, and/or otherwise protected from disclosure to anyone other than its intended recipient(s). If you have received this message in error, please notify the sender immediately by reply email of the inadvertent transmission and then immediately delete the original message (including any attachments) in its entirety.

This is Exhibit "C" referred to in the Affidavit of Dave Burton sworn by Dave Burton of the Town of Georgetown, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 22, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

*Commissioner for Taking Affidavits (or as may be)*

**DARREN FRANK**

**(LSO# 81700U)**

October 5, 2022

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

**VIA EMAIL**

Christopher MacLeod and Joan Kasozi  
Cambridge LLP  
333 Adelaide St. West, Suite 400  
Toronto, ON M5V 1R5

Brian H. Greenspan  
and Michelle M. Biddulph  
Greenspan Humphry Weinstein LLP  
15 Bedford Rd.  
Toronto, ON M5R 2J7

Dear Counsel:

**RE: Xela – Handling of Hard Drive**  
**Our File No.: 52463**  
**Court File No.: CV-11-9062-00CL**

This letter is in response to Mr. MacLeod's September 26, 2022 email, the September 26, 2022 case conference brief, as well as the endorsement of McEwen J. dated September 27, 2022.

Further to allegations and comments set out in the email and case conference brief and further to McEwen J.'s endorsement, I write to address the handling of the password-protected hard drive that contained images of Mr. Gutierrez's iPhone and iPad (the "**Original Hard Drive**").

At all times the treatment of the Original Hard Drive was in accordance with the Orders of the Court, consistent with standard practice, and protective of any privacy or security interests of Mr. Gutierrez.

**No Breach of the October 27, 2020 Order**

It is suggested that by not immediately uploading the data on the Original Hard Drive to Relativity, the Receiver is engaged in a "serious, ongoing breach of the Court's Order dated October 27, 2020".

The October 27, 2020 Order does not require the Receiver to upload the data onto Relativity as soon as Mr. Gutierrez provided the password or at any specific time. The October 27, 2020 Order provides that, once the Receiver's IT consultant has the data, Epiq is authorized to load the data on Relativity, upon the request of the Receiver. It was always contemplated that the data would not be immediately loaded onto the Relativity Platform:

8. THIS COURT ORDERS that, **at the request of the Receiver** [Epiq] will be **authorized** to load the data onto the Relativity document review platform (the “**Platform**”). [Emphasis added.]

Neither the Receiver nor Epiq was mandated by any Order or direction to load the data onto the Relativity document review platform. No undertaking was given at any time that the data would be uploaded to Relativity as soon as it was received. Nor did Epiq give Mr. Gutierrez’s representatives any assurance as to the timing of the upload onto Relativity.

Given that the data has not been uploaded onto Relativity, the period for review has not been triggered. Paragraphs 9 and 10 of the October 27, 2020 Order state:

9. **THIS COURT ORDERS** that **once the data is loaded** onto the Platform, [Epiq] 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** [Epiq] 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**”). [Emphasis added.]

Mr. Gutierrez’s time to review and assert objections only begins after Epiq uploads the data onto Relativity and grants Mr. Gutierrez access. Since the data has not been uploaded to Relativity, the time for advance review has not yet started. As such, Mr. Gutierrez has suffered no prejudice.

### **Hard Drive Data – iPad and iPhone Images**

#### *A. Handling of the Hard Drive*

On August 30, 2022, a Zoom call was held between Mr. Greenspan, Dave Burton, who is Mr. Gutierrez’s IT consultant, and Laura Clewley, an Epiq representative, in order for Mr. Greenspan to relay to Epiq the password required to open the Original Hard Drive.

Once the Original Hard Drive was accessible, it was opened on a computer in Epiq’s forensic lab by Epiq’s forensic examiner. The forensic examiner proceeded to create a working forensic image and a backup forensic image of the Original Hard Drive on two separate hard drives using a program called FTK Imager. It is Epiq’s standard procedure in forensic work to make a back-up copy of a working hard drive because it is possible for working copies to fail or be inadvertently damaged through usage.

The forensic examiner then verified the images to be true and accurate copies of the Original Hard Drive via a process known as MD5 Hash verification. Once the images were validated, the forensic examiner extracted a single copy of one of the Original Hard Drive



images onto the forensic lab's dedicated server. This transfer facilitated the forensic examiner's use of the software needed to extract the iPad and iPhone image from that larger image. The forensic examiner utilized a program called Cellebrite for this purpose and proceeded to parse and validate the individual iPhone and iPad images on the server. This was done to ensure that the individual device images were valid and accessible. The entire process described above occurred between August 30 and the morning of September 1, 2022.

On September 1, 2022, as prearranged between Ms. Clewley and Mr. Burton, Mr. Burton returned to Epiq's offices with an additional IT consultant, Abbas Najarali, to apply a new password to the Original Hard Drive. **At this time, the new password is known only to Mr. Gutierrez's team.** Mr. Burton changed the password and relocked the drive, and the parties completed the appropriate chain of custody forms to ensure tracking of the Original Hard Drive as it changed hands throughout this process.

All the hard drives in question were catalogued through a digital chain of custody process and placed into Epiq's secure evidence locker directly from Epiq's forensic lab on September 6, 2022 (the Tuesday after the September long weekend). They remain there today. This is verified through Epiq's chain of custody tracking documentation. **None of the Receiver, its counsel, or any other party have had access to these hard drives.**

The copy of the iPad and iPhone images remain on Epiq's forensic server for further work, including forensic examination of their content and processing into Relativity. These images, however, have been disconnected from the Cellebrite program entirely and cannot be meaningfully reviewed without connection to such a program.

#### *B. Location, Access to and Security of the Data*

Apart from the changing of the password of the Original Hard Drive, which happened in Epiq's boardroom and at which both Mr. Burton and Mr. Najarali, were present, at all times Epiq stored the data described above in either its forensic lab or secured evidence locker.

Epiq's forensic lab and evidence locker are physically secure. They are always locked and only accessible by key card. There are only four people that have access to either space via key card. These are three individuals on Epiq's operations team and the forensic examiner. Further, the server on which the copy of the iPhone and iPad data is secured is dedicated solely to Epiq's forensic lab. While Epiq limits access to this forensic server to the three operations employees and the forensic examiner, it is used solely by the forensic examiner. Once the password was applied to the Original Hard Drive on August 30, no one except the forensic examiner accessed any of the data in question on the hard drives or forensic server.

Epiq is a leading provider of discovery and forensic services globally. Epiq's clients include government agencies, and many major US and Canadian corporations, financial institutions, and law firms. Epiq employs state of the art security over all its IT systems, including the server in the forensic lab. These systems employ cutting edge intrusion prevention programs and are monitored for external threats. These systems are also

compliant with standards promulgated by third-party agencies such as the International Standards Organization (“ISO 27001”).

At no point has Xela’s or Mr. Gutierrez’s data in Epiq’s possession been at “undue risk” of unauthorized access or duplication, as alleged by Mr. MacLeod.

*C. Processing into Relativity*

At no time during the August 30, 2022 Zoom meeting did Ms. Clewley represent to either Mr. Greenspan or Mr. Burton, as suggested by Mr. MacLeod in his September 26, 2022 email and case conference brief, that she had instructions to immediately begin processing the data from the Original Hard Drive into Relativity, that the processing of the data on the Original Hard Drive into Relativity would in fact begin once it was unlocked, or that this task would take up to 48 hours.

First, this does not accord with Epiq’s standard procedure when dealing with mobile phone or tablet data. Devices like mobile phones and tablets contain a complex and varied ecosystem of data, located in a myriad of possible applications, all with different features including export capabilities and deletion tracking. Epiq’s standard procedure upon obtaining access to mobile phone or tablet data is to ask their clients what specific data, and from what applications, is required to be extracted from the device image for the client’s purposes. At the time of the Zoom meeting, Ms. Clewley had no specific instructions from the Receiver as to the type of data it sought from the devices. Indeed, as is Epiq’s practice, Ms. Clewley only requested specific instructions from the Receiver’s counsel on September 1, 2022, some 48 hours after Mr. MacLeod says she was supposed to have indicated it would take 48 hours to process the data into Relativity.

Further, the suggestion by Mr. MacLeod in his September 26, 2022 email and case conference brief that the device data would be loaded into Relativity within a 48-hour window does not reflect what is often the length of time such a process would take if one were seeking any reasonable volume of data from the devices. Such a process could take a number of days because the data from devices must be parsed, extracted, in some cases enhanced for reviewability, and then processed into Relativity.

Contrary to Mr. MacLeod’s September 26, 2022 case conference brief, Mr. Greenspan was not “misled” by Epiq that the data would be uploaded to Relativity.

As you will recall, at the time that Mr. Gutierrez agreed to deliver the passwords, the Receiver was dealing with a funding issue, and accordingly it did not want to cause costs to be incurred by Epiq or by Mr. Gutierrez reviewing these documents pending the outcome of the funding issue. The Receiver advised Mr. MacLeod and Mr. Greenspan of this by email on September 13, 2022, immediately following the case conference where this issue was discussed.

We trust that this addresses all issues raised in the September 26, 2022 case conference brief and email from Mr. MacLeod. It is the Receiver’s intention that the hard drive remain secure in the evidence locker until the Receiver directs Epiq to upload the data to Relativity.

The Receiver will provide Mr. Gutierrez' counsel with notice once that step occurs. In the meantime, the evidence is secure, and Mr. Gutierrez suffers no prejudice.

Yours truly,

A handwritten signature in black ink, appearing to be 'Monique Jilesen', written in a cursive style.

Monique Jilesen

MJ

- c. Sarah Millar and Derek Knoke, *Lenczner Slaght LLP*  
Laura Clewley, *Epiq Global*

MARGARITA CASTILLO  
Applicant

-and- XELA ENTERPRISES LTD. et al.  
Respondents

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

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

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**AFFIDAVIT OF DAVE BURTON**

---

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

**Christopher MacLeod (LSO# 45723M)**  
cmacleod@cambridgellp.com  
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**N. Joan Kasozi (LSO# 70332Q)**  
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Tel: 416.477.7007  
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Lawyers for the Respondent  
Juan Guillermo Gutierrez

# TAB 5

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

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

and

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

Defendants

**AFFIDAVIT OF GRACE TSAKAS**

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

1. I am a law clerk with the law firm of Lenczner Slaght LLP, lawyers for KSV Restructuring Inc. (“**KSV**”), the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all the property, assets, and undertakings of Xela Enterprises Ltd. (“**Xela**”), and, as such, have knowledge of the matters contained in this Affidavit.
2. On July 25, 2017, Juan Guillermo Gutierrez attended an Examination in Aid of Execution. Attached hereto and marked as **Exhibit “A”** are excerpts from the transcript of the examination.
3. On August 30, 2018, Mr. Gutierrez attended a continued Examination in Aid of Execution Attached hereto and marked as **Exhibit “B”** are excerpts from the transcript of the examination.

4. Various enforcement actions were pursued by Ms. Castillo. However, by 2019, the majority of the Judgment Debt remained outstanding.
5. On January 14, 2019, Ms. Castillo swore an affidavit in support of her application to appoint a receiver and manager over Xela. Attached hereto and marked as **Exhibit “C”** are excerpts of Ms. Castillo’s January 14, 2019 affidavit (exhibits removed).
6. On June 17, 2019, Mr. Gutierrez swore an affidavit in support of his application on behalf of Xela for protection under the *Companies’ Creditors Arrangement Act* (“**CCAA**”). Attached hereto and marked as **Exhibit “D”** are excerpts of Mr. Gutierrez’s June 17, 2019 affidavit.
7. On July 5, 2019, McEwen J. appointed the Receiver.
8. On October 17, 2019, the Receiver delivered its first report. Attached hereto and marked as **Exhibit “E”** is a copy of the Receiver’s first report (all appendices removed except appendix A).
9. On January 18, 2021, the Receiver brought a motion to compel Mr. Gutierrez to provide passwords to certain devices, obtain investigative powers, and other relief (the “**Investigative Powers Motion**”).
10. On February 9, 2021, the Receiver brought a motion to hold Mr. Gutierrez in contempt of Court for swearing a declaration (the “**Declaration**”) in support of a criminal complaint against the Receiver’s representatives in Panama (the “**Contempt Motion**”). The Receiver obtained an urgent case conference for the following day.

11. On February 9, 2021, Mr. Gutierrez delivered a notice of motion seeking to vary the Appointment Order by substituting KSV with a receiver to be determined (the “**February 9<sup>th</sup> Notice of Motion**”). Attached hereto and marked as **Exhibit “F”** is a copy of the February 9<sup>th</sup> Notice of Motion.
12. On February 22, 2021, Mr. Gutierrez swore an affidavit, opposing the Investigative Powers Motion. Attached hereto and marked as **Exhibit “G”** is a copy of Mr. Gutierrez’s February 22, 2021 affidavit (exhibits removed).
13. On March 17, 2021, Mr. Gutierrez filed a factum, opposing the Investigative Powers Motion. Attached hereto and marked as **Exhibit “H”** is a copy of Mr. Gutierrez’s March 17, 2022 factum.
14. On March 25, 2021, the Court made an Order in respect of the Investigative Powers Motion.
15. On March 25, 2022, Mr. Gutierrez sought to schedule a motion for an injunction of the March 25, 2021 Order. Attached hereto and marked as **Exhibit “I”** is a copy of Mr. Gutierrez’s draft notice of motion for an injunction.
16. On March 25, 2022, the Court made an Order that Mr. Gutierrez provide passwords to an image of his devices by March 28, 2022 at 5 pm (the “**March 25, 2022 Order**”).
17. On March 28, 2022, Mr. Gutierrez brought a motion in the Divisional Court to stay the March 25, 2022 Order. Attached hereto and marked as **Exhibit “J”** is a copy of Mr. Gutierrez’s notice of motion.



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

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

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

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

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

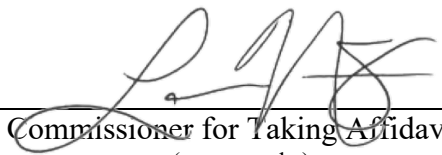
23. On November 15, 2022, I conducted real property searches in all counties in Ontario to see if Mr. Gutierrez owns any real property in Ontario. Attached hereto and marked as **Exhibit “N”** is a report of the searches conducted, confirming no direct hits in any counties in Ontario with the exception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

and Parry Sound properties confirming that Mr. Gutierrez no longer personally owns these Ontario properties.

24. On November 7, 2022, Mr. Gutierrez's counsel delivered a bill of costs in the Receiver's contempt motion. Attached hereto and marked as **Exhibit "P"** is a copy of the bill of costs.

25. Attached hereto and marked as **Exhibit "Q"** is a copy of the Receiver's expected bill of costs in Mr. Gutierrez's Recusal Motion.

**SWORN** by Grace Tsakas of the City of Richmond Hill, in the Regional Municipality of York, before me at the City of Hamilton, in the Province of Ontario, on November 15, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

Commissioner for Taking Affidavits  
(or as may be)

Lauren Nixon  
P14847



---

**GRACE TSAKAS**

This is **Exhibit "A"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

*A Commissioner for taking Affidavits (or as may be)*

Lauren Nixon  
P14847

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 Examination In Aid of Execution of JUAN  
GUILLERMO GUTIERREZ, a Defendant herein, taken at the  
offices of Network Court Reporting, 1 First Canadian  
Place, 100 King St. West, Suite 3600, Toronto, Ontario,  
on July 25, 2017.  
-----

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

Jason W.J. Woycheshyn  
Adam Zur, Summer Student

for the Plaintiff

Martin Mendelzon

for the Defendants,  
Xela Enterprises Ltd.,  
Tropic International  
Limited, Fresh Quest,  
Inc., Juan Guillermo  
Gutierrez and Carmen S.  
Gutierrez

ALSO APPEARING:  
Margarita Castillo

Page 14

1 31. Q. And your fax number?  
 2 A. No fax number.  
 3 32. Q. Your date of birth is March 1st,  
 4 1956?  
 5 A. Yes.  
 6 33. Q. And your Social Insurance Number is  
 7 487 192 445?  
 8 A. I believe so. I don't know it by  
 9 memory but if it's in my tax return, it must be  
 10 it.  
 11 34. Q. Do you know your Driver's Licence  
 12 number?  
 13 A. No, I don't know it but I have it  
 14 with me, so I can give it to you.  
 15 35. Q. If I can get a copy of it, please.  
 16 Mr. Mendelzon, it's fine if we take a copy of  
 17 that?  
 18 MR. MENDELZON: Yes.  
 19 THE DEPONENT: Just don't forget to give  
 20 it to me before we leave because I have to drive  
 21 home.  
 22 BY MR. WOYCHESHYN:  
 23 36. Q. This is an examination in aid of  
 24 execution arising from a judgment of Justice  
 25 Newbould dated October 28, 2015. Do you remember

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1 that?  
 2 A. Yeah, I do remember.  
 3 37. Q. Okay. You recall that that judgment  
 4 jointly required you to pay Margarita \$4.25  
 5 million plus 2 percent interest. Does that sound  
 6 about right?  
 7 A. Probably, yeah.  
 8 MR. MENDELZON: And, counsel, just to be  
 9 clear, it required him to purchase Margarita's  
 10 shares for 4.25 million.  
 11 BY MR. WOYCHESHYN:  
 12 38. Q. Thank you. And jointly with  
 13 yourself, your father and Xela Enterprises,  
 14 right? You understood that?  
 15 A. I understand that for about the same  
 16 price as we offered her in 2010 and she rejected  
 17 then.  
 18 39. Q. And then you recall in about December  
 19 of 2015, Justice Newbould released his cost  
 20 endorsement for around \$890,000?  
 21 A. I remember hearing about that, yeah.  
 22 40. Q. And then there was an appeal to the  
 23 Divisional Court of Ontario and the Divisional  
 24 Court made an additional order of costs of  
 25 \$76,096.47; do you remember that?

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1 A. I don't remember the exact numbers,  
 2 but yes.  
 3 41. Q. Okay. And then in March of this  
 4 year, the Court of Appeal dismissed a motion for  
 5 leave to appeal and awarded Margarita an  
 6 additional cost of \$1,500. Does that sound about  
 7 right?  
 8 A. Probably.  
 9 42. Q. And then most recently, there was a  
 10 motion for a stay of execution in front of  
 11 Justice McEwen and that motion was dismissed and  
 12 Justice McEwen ordered that Margarita receive an  
 13 additional approximately \$15,000; is that -- you  
 14 are aware of that, sir?  
 15 A. I don't remember hearing the number  
 16 but I guess it's right.  
 17 43. Q. You have not appealed the decision of  
 18 Justice McEwen?  
 19 MR. MENDELZON: As of now there's been no  
 20 appeal.  
 21 MR. WOYCHESHYN: Okay. And if that  
 22 changes, you'll let me know?  
 23 U/T MR. MENDELZON: We sure will.  
 24 BY MR. WOYCHESHYN:  
 25 44. Q. So the total court orders, and I

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1 recognize that the orders against you, sir, are  
 2 joint as against you, your father's estate and  
 3 Xela, total about \$5.2 million. We are now at  
 4 the end of July 2017 and am I right that you  
 5 haven't paid Margarita any money towards that  
 6 judgment or those orders?  
 7 A. Can you ask the question again?  
 8 45. Q. Yes. You haven't paid any money --  
 9 A. No, we have not paid anything.  
 10 46. Q. Okay. And what is the reason for  
 11 non-payment?  
 12 A. Well, part is because we don't have  
 13 the funds to do that. As a matter of fact, we  
 14 intend to pay when we can but right now it's  
 15 impossible. It's impossible because of all the  
 16 actions of Margarita has taken in the last eight  
 17 years has made it impossible.  
 18 MR. MENDELZON: And, counsel, Juan, when  
 19 you are saying "we" in your answers --  
 20 THE DEPONENT: When I say "we", I refer  
 21 myself and my father and the company too, the  
 22 three of us, we would like to pay. Now,  
 23 obviously you are going to cross-examine my  
 24 mother as an executor of my dad's estate and  
 25 somebody else for Xela, so they will speak for

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1 the companies, but I tend to say "we" all the  
 2 time as my way of speaking.  
 3 BY MR. WOYCHESHYN:  
 4 47. Q. And I understand it's a family  
 5 company and you, for a long time, have been the  
 6 head of the company so I understand why you would  
 7 use "we", but in terms of your personal finances,  
 8 your evidence is that you personally do not have  
 9 the resources or assets to pay any portion of  
 10 Margarita's judgment or order?  
 11 A. At this particular time, I don't.  
 12 48. Q. Is there something on the horizon  
 13 that you see a time when you will be able to pay  
 14 those amounts?  
 15 A. Yes. We have a major lawsuit against  
 16 several defendants including Margarita for \$400  
 17 million, very well substantiated, has not gone to  
 18 hearings yet. So we expect to get a solution on  
 19 that and when that happens, we are going to have,  
 20 you know, money to pay for this. I say "we"  
 21 again, it's myself or any of the other two  
 22 parties.  
 23 49. Q. And just so I'm clear, that -- the  
 24 action -- the lawsuit that you are just referring  
 25 to is the lawsuit that you and Xela and others

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1 commenced against Margarita, Ricardo, Roberto and  
 2 I'll call them the boys in Guatemala, but that  
 3 action was commenced in 2011 in Ontario; is that  
 4 the action you are referring to?  
 5 A. That is the action and it's been held  
 6 for six years arguing the service of process  
 7 which has been affirmed. So go figure, six years  
 8 to discuss service, that's where we are but when  
 9 that lawsuit is resolved, we'll have more than  
 10 plenty resources to pay for this judgment.  
 11 Before that, I can't.  
 12 50. Q. Okay. So just so I understand,  
 13 that's the only potential source of income that  
 14 you can get that will satisfy the -- that will  
 15 allow you to pay Margarita.  
 16 A. Me personally, yes. That's the only  
 17 -- the only option I have.  
 18 51. Q. And if -- I know you anticipate that  
 19 you will be successful in that action but if that  
 20 action does not result in a payment to you, am I  
 21 right that you will not be able to pay Margarita?  
 22 A. As things are today, I can't.  
 23 52. Q. And other than the outcome of the  
 24 action, you don't have any source of income that  
 25 you see on the horizon that would allow you to

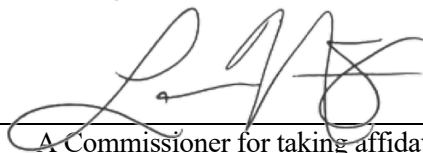
Page 20

1 pay Margarita; am I right?  
 2 A. At this point in the immediate time,  
 3 I can't. I have no source of income coming, and  
 4 I may add, it's a direct consequence of many of  
 5 the actions taken by Margarita and the other  
 6 people that are working with her. So they have  
 7 cornered me. So at this point, I don't have  
 8 anything else. I gave you my financial statement  
 9 there.  
 10 53. Q. Right. So you have nothing right now  
 11 and you have nothing foreseeable other than the  
 12 potential recovery on the action.  
 13 MR. MENDELZON: Counsel, I think you've  
 14 asked him this about --  
 15 BY MR. WOYCHESHYN:  
 16 54. Q. No, but he hasn't --  
 17 A. I answer again, as far as I know, I'm  
 18 not the -- let me put it this way: I don't have  
 19 a crystal ball that tell me what's going to  
 20 happen in the future. At this particular time, I  
 21 don't have any other thing that I can tell you is  
 22 going to barely make me survive at this point. I  
 23 cannot tell you what's going to happen in a year  
 24 or in two years or five years.  
 25 55. Q. Okay. I note you have a lawyer

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1 present with you today.  
 2 A. Yes.  
 3 56. Q. Who is paying for your lawyer?  
 4 A. Well --  
 5 R/F MR. MENDELZON: Don't answer that.  
 6 THE DEPONENT: Okay.  
 7 MR. WOYCHESHYN: On the grounds of?  
 8 MR. MENDELZON: It's privileged.  
 9 MR. WOYCHESHYN: As to who is paying?  
 10 MR. MENDELZON: Correct.  
 11 BY MR. WOYCHESHYN:  
 12 57. Q. Are you paying your lawyer?  
 13 R/F MR. MENDELZON: Don't answer that.  
 14 BY MR. WOYCHESHYN:  
 15 58. Q. I'm going to be examining you in your  
 16 personal capacity and I just -- I'm going to ask  
 17 you some questions about Xela but I'm not  
 18 expecting you to answer questions on behalf of  
 19 Xela; do you understand the difference?  
 20 A. Yes.  
 21 59. Q. You are the president and CEO of  
 22 Xela?  
 23 A. Yes.  
 24 60. Q. And just for clarity of the record,  
 25 when I refer to Xela, I'm referring to Xela

This is **Exhibit "B"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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

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

WILLIAM BORTOLIN

Solicitor for the Plaintiff



JUAN GUILLERMO GUTIERREZ - 129

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

JUAN GUILLERMO GUTIERREZ - 130

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

3                   A. Yes, it is.

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

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

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

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

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

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

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

JUAN GUILLERMO GUTIERREZ - 131

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

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

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

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

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

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

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

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

JUAN GUILLERMO GUTIERREZ - 132

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

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

11 A. That's correct.

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

15 A. That's correct.

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

18 A. I don't know.

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

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

JUAN GUILLERMO GUTIERREZ - 133

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.

JUAN GUILLERMO GUTIERREZ - 134

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?

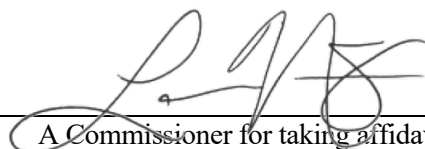
17                   A.    My wife's car.  I don't have a car  
18           because you took my cars away.

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.

This is **Exhibit "C"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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A Commissioner for taking affidavits

Lauren Nixon  
P14847

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

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

B E T W E E N:

**MARGARITA CASTILLO**

Moving Party

- and -

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

Responding Party

**AFFIDAVIT OF MARGARITA CASTILLO**

(Sworn January 14, 2019)

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

**Introduction**

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



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

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

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

### **Most of the Judgment Debt Remains Unpaid**

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

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

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

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


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

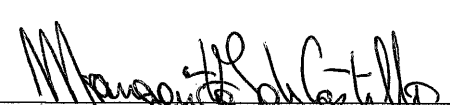
**My Preference Shares of Xela**

62. Xela, besides being a judgment debtor also owes money to me under preference shares, held by me indirectly through a holding company, 696096 Alberta Ltd. The Xela preference shares were the subject of an estate-freeze that prevented them from being redeemed before Arturo’s death. On January 11, 2017 (after Arturo’s death on June 24, 2016), I gave formal notice to redeem the preference shares. Attached as **Exhibit “KK”** is a copy of my redemption notice addressed to Xela.

63. Attached as **Exhibit “LL”** is a copy of the response I received from Xela, dated January 31, 2017. Xela refused to pay me, or any other preferred shareholder, for their preference shares, relying on section 32(2) of the Ontario *Business Corporations Act*. Juan owned an identical amount of preference shares and, I believe, he has similarly has not received payment for them.

**SWORN BEFORE ME** at the City of  
Toronto, Ontario January 14, 201~~8~~<sup>9</sup>

  
\_\_\_\_\_  
Katrina Crocker  
A Commissioner for Taking Affidavits in and  
for the Courts in Ontario

}   
\_\_\_\_\_  
MARGARITA CASTILLO

**Katrina Elizabeth Crocker, a Commissioner, et al.,**  
Province of Ontario, while a Student-at-Law.  
Expires March 22, 2020.

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial List)

Proceeding commenced at Toronto

**AFFIDAVIT OF MARGARITA CASTILLO**  
(Sworn January 14, 2019)

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

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

**Jason Woycheshyn (#53318A)**  
Tel: (416) 777-4662  
Email: woycheshynj@bennettjones.com

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

Lawyers for the applicant, Margarita Castillo

This is **Exhibit "D"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

Court File No.

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

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF XELA ENTERPRISES LTD.**

**AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ  
(Sworn June 17, 2019)**

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

1. I am the president of Xela Enterprises Ltd. ("**Xela**" or the "**Company**"), a role which I have held since August 10, 2000. This role has made me familiar with Xela's business affairs, books and records, relationships with its subsidiaries, ongoing litigation, and its current financial situation. I therefore have personal knowledge of the matters contained in this affidavit, except for those matters about which I have information and belief. In all such cases, I have stated the source of my information and do verily believe it to be true.

**I. Overview**

2. I swear this affidavit in support of Xela's application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), including the granting of a stay of proceedings and approval of debtor-in-possession ("**DIP**") financing by this Court to facilitate the implementation of a plan of compromise or arrangement ("**CCAA Plan**") for the benefit of Xela's stakeholders. Xela also seeks this Court's appointment of RSM Canada Limited ("**RSM**") as Monitor.

3. Xela is indirectly involved in various litigation in Florida (with related proceedings in Panama) and Guatemala. This litigation stems primarily from the maltreatment of Xela's subsidiary, Lisa S.A. ("**Lisa**"), by my cousins ("**The Cousins**"), who are majority shareholders

of a group of vertically-integrated Guatemalan poultry companies in which Lisa holds a 33.33% interest. This group of companies is referred to collectively as “**Avicola**.” Lisa’s interest in Avicola is potentially worth hundreds of millions of dollars.

4. The Cousins have spent years attempting to undermine Lisa’s shareholder rights and exclude Lisa as an Avicola shareholder. Moreover, since 1998, The Cousins have withheld dividends from Lisa, the total value of which I estimate to be in excess of US \$360 million. This has harmed Xela’s indirect investment in Avicola. The ongoing litigation is aimed at restoring Lisa’s shareholder rights and recouping the withheld dividends.

5. Meanwhile, Xela faces a liquidity crisis. It is indebted to numerous creditors and has no ability to generate revenue at this time. Most of its subsidiaries are inactive and its previous access to liquidity in the form of unsecured loans is no longer available. To make matters worse, Xela is facing specific action from a particular creditor: Margarita Castillo, my sister. Xela is a judgment debtor to Ms. Castillo, who is owed approximately \$3.5 million in respect of her judgment. She has taken various steps to enforce this judgment against Xela, including applying for an equitable receiver. Xela is concerned that, through any such receivership, Ms. Castillo will seek to have Xela’s valuable indirect interest in Avicola sold to satisfy her judgment in a fire sale.

6. But, Ms. Castillo is not Xela’s only creditor, and she is not Xela’s most significant creditor. While Ms. Castillo is owed approximately \$3.5 million, Xela owes in excess of \$70 million to other creditors. The Avicola shares and related litigation represent the only potential source of recovery for Xela’s other creditors. The sale of these shares as a result of Ms. Castillo’s receivership would be catastrophic. I believe the shares would be sold at less than their true value, because there are likely to be few buyers for what amounts to a minority stake in a Guatemalan chicken business that has been undermined and embroiled in litigation for years. The only realistic buyers are The Cousins, who are responsible for this dispute. Such a sale would force ongoing litigation to an end, severely limit recoveries for other creditors, and remove all future value from Xela.

7. By contrast, if Xela is able to continue its involvement in pursuing the restoration of Lisa’s shareholder rights and payment of the approximately US \$360 million in dividends that

**(e) The Monitor**

113. RSM has consented to act as the Court-appointed Monitor of Xela, subject to Court approval. RSM is a trustee within the meaning of Section 2 of the *Bankruptcy and Insolvency Act*, as amended, and is not subject to any of the restrictions on who may be appointed as monitor set out in section 11.7(2) of the CCAA.

114. RSM has been working with Xela and its advisors in the lead-up to these proceedings and has familiarity with the Company's business. RSM is experienced with this type of proceeding and is well-suited to the role of Court-appointed Monitor in these proceedings.

115. RSM, as proposed Monitor, has advised me that it is supportive of the relief being sought in favour of Xela, as well as the existence and amounts of the DIP Lender's Charge, the Administration Charge, and the Directors' and Officers' Charge.

**XII. Foreign Representative**

116. Given that Xela has an interest in litigation in the United States, Panama, and Guatemala, the draft Initial Order contemplates that Xela be given authority to apply as a foreign representative for recognition of any orders of this Court, as well as for any ancillary relief flowing out of the recognition of this Court's orders.

SWORN BEFORE ME at the City of  
Toronto, in the Province of Ontario,  
this 17 day of JUNE, 2019.

\_\_\_\_\_  
Commissioner for Taking Affidavits

Stefan M. Case

\_\_\_\_\_  
JUAN GUILLERMO GUTIERREZ



IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF XELA ENTERPRISES LTD.

Court File No.

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial List)

Proceeding commenced at Toronto

**AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ**  
(Sworn June 17, 2019)

**Torys LLP**

79 Wellington Street West  
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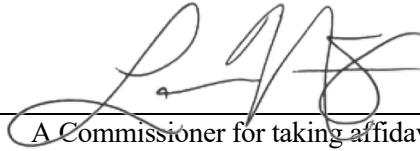
**Stefan Case** LSO#: 75404C

Tel: 416.865.8204

Email: [scase@torys.com](mailto:scase@torys.com)

Lawyers for Xela Enterprises Ltd.

This is **Exhibit "E"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847



**First Report of  
KSV Kofman Inc.  
as Receiver and Manager of Xela Enterprises Ltd.**

**October 17, 2019**

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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**

**AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.  
FIRST REPORT OF KSV KOFMAN INC.**

**OCTOBER 17, 2019**

## **1.0 Introduction**

1. On January 18, 2011, Margarita Castillo (“Margarita”) commenced an application in the Ontario Superior Court of Justice (the “Court”) seeking, among other things, relief against her now-deceased father, Juan Arturo Gutierrez (“Juan Arturo”), and her brother, Juan Guillermo Gutierrez (“Juan Guillermo”), in her capacity as a director of Tropic International Limited (“Tropic”), a wholly-owned subsidiary of Xela Enterprises Ltd. (the “Company”).
2. Pursuant to a judgement issued by the Court on October 28, 2015, the Company, Juan Guillermo and Juan Arturo, became jointly obligated to pay Margarita approximately \$5 million, plus interest and costs (the “Judgment Debt”).
3. Margarita, through an Alberta company, also owns preference shares in the Company with a face amount of approximately \$14 million. The Alberta company continues to own these shares.
4. On January 15, 2019, Margarita made an application to the Court for, among other things, the appointment of KSV Kofman Inc. (“KSV”) as receiver and manager of the Company (the “Receiver”) pursuant to Section 101 of the *Court of Justices Act* (Ontario). The Receiver understands that the present balance owing under the Judgment Debt is approximately \$4.1 million, plus interest and costs which continue to accrue.

5. In response to Margarita's application, the Company filed an application for protection under the *Companies' Creditors Arrangement Act* ("CCAA") on June 17, 2019.
6. On July 5, 2019, the Court dismissed the CCAA application and appointed KSV as Receiver. A copy of the receivership order is attached as Appendix "A" (the "Receivership Order").
7. The Company is the parent company of more than two dozen subsidiaries, located predominantly in Central America, that carry or carried on business in the food and agricultural sectors. Most of these businesses have been discontinued, are no longer operating or, as discussed in this report ("Report"), were conveyed to the ARTCARM Trust (the "Trust"), a Barbados domiciled trust, the beneficiaries of which are Juan Guillermo's children. The Trustee of the Trust is Alexandria Trust Corporation ("ATC").
8. Presently, the Company's most significant asset is its indirect one-third interest in a group of successful family-owned vertically integrated poultry businesses operating in Central America referred to as the "Avicola Group". The Company's interest in the Avicola Group is held as follows:
  - a) 25% through its wholly owned indirect subsidiary, Lisa, S.A. ("Lisa"), a Panamanian holding company; and
  - b) 8.3% through Villamorey S.A. ("Villamorey"), a Panamanian holding company<sup>1</sup>.

Attached as Appendix "B" is the Company's present corporate organizational chart.<sup>2</sup>

9. Dionisio Gutierrez Sr., Isabel Gutierrez de Bosch and their children (collectively, the "Cousins") are believed to own the remaining two-thirds of the Avicola Group through entities they own, including the remaining two-thirds of Villamorey.
10. Margarita, Juan Guillermo and the Cousins have been litigating for decades, primarily related to shareholder disputes involving the Avicola Group (the "Avicola Litigation").
11. As of mid-2018, the Company and Lisa had received approximately \$43 million and US\$57 million, respectively, from BDT, Arven and a subsidiary of Arven, Preparados Alimenticios Internacionales, CA ("PAICA"), to assist them to fund the Avicola Litigation.
12. The Receiver understands that prior to April 2016, Empress Arturo International ("EAI"), a Barbados company and a wholly owned subsidiary of the Company, directly and indirectly owned and operated the "Arturos" restaurant business in Venezuela through BDT and Arven. The Receiver has been advised by Juan Guillermo that the Arturos restaurant chain is still operating and that BDT and Arven are now owned by the Trust.

---

<sup>1</sup> Villamorey owns 25% of the Avicola Group, of which the Company has an indirect one-third ownership interest.

<sup>2</sup> The Company's corporate organizational chart does not show the Villamorey interest in the Avicola Group; however, the Receiver understands based on court pleadings and its conversations with Juan Guillermo that Villamorey owns a 25% interest in the Avicola Group.

13. The effect of the transactions discussed in this Report (the transactions are defined below as the EAI Transaction and the Assignment Transaction) was to transfer from the Company to the Trust all or the majority of the potential value of the Avicola Litigation and the Arturo business (owned by BDT and Arven) to Juan Guillermo's children as beneficiaries of the Trust.

## 1.1 Purposes of this Report

1. The purposes of the Report are to:
  - a) provide background information concerning the Company;
  - b) discuss the Receiver's concerns regarding:
    - i. the sale, conveyance or transfer in early 2016 by EAI of the shares of BDT and Arven to Juan Arturo, and then from Juan Arturo to the Trust (the "EAI Transaction"); and
    - ii. the assignment in January 2018 by Lisa of the proceeds from the Avicola Litigation to BDT (the "Assignment Transaction");
  - c) recommend that the Court issue an order:
    - i. requiring each of BDT, Arven, the Trust and ATC, the directors of EAI and any other person with information concerning the EAI Transaction, to deliver such information to the Receiver, including any and all documentation related to the EAI Transaction;
    - ii. requiring each of Lisa, BDT, the Trust and ATC and any other person with information concerning the Assignment Transaction to deliver such information to the Receiver, including any and all documentation related to the Assignment Transaction;
    - iii. sealing Confidential Appendices "1" and "2" pending the issuance of a further order of the Court unsealing the Confidential Appendices;
    - iv. approving the fees and disbursements of the Receiver and its legal counsel, Aird & Berlis LLP ("A&B"), arising for the periods referenced in the attached fee affidavits; and
    - v. approving this Report and the Receiver's activities, as described herein.

## 1.2 Currency

1. All references to currency in this Report are in Canadian dollars unless otherwise stated.

### 1.3 Restrictions

1. In preparing this Report, the Receiver has relied upon unaudited financial information of the Company, the books and records of the Company, materials filed in the Avicola Litigation, discussions with representatives of the Company and discussions with Margarita. The Receiver has also relied upon answers to questions it submitted to Juan Guillermo and on the information provided by Juan Guillermo during meetings between him and the Receiver and their respective legal counsel.
2. The Receiver has also relied upon the Examination of Juan Guillermo held on June 26, 2019 (the "Examination") and the related Answers to Undertakings, Advisements and Refusals from the Examination (the "Examination Undertakings"). Copies of the Examination and Examination Undertakings are attached hereto as Appendices "C" and "D", respectively.
3. The Receiver has not audited, or otherwise attempted to verify the accuracy or completeness of the financial information relied on to prepare this Report in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the *Chartered Professional Accountants of Canada Handbook* and, accordingly, the Receiver expresses no opinion or other form of assurance contemplated under the CAS in respect of such information.
4. This Report provides an update relating to these receivership proceedings and support for the relief to be sought by the Receiver at its motion returnable October 29, 2019. This Report should not be relied upon for any other purpose. The Receiver expresses no opinion or other form of assurance with respect to the financial and other information presented in this Report or relied upon by the Receiver in preparing this Report. Any party wishing to place reliance on the financial information should perform its own diligence.

### 1.4 Receivership Materials

1. All materials filed in the receivership proceedings are available on the Receiver's website at: <https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd>.

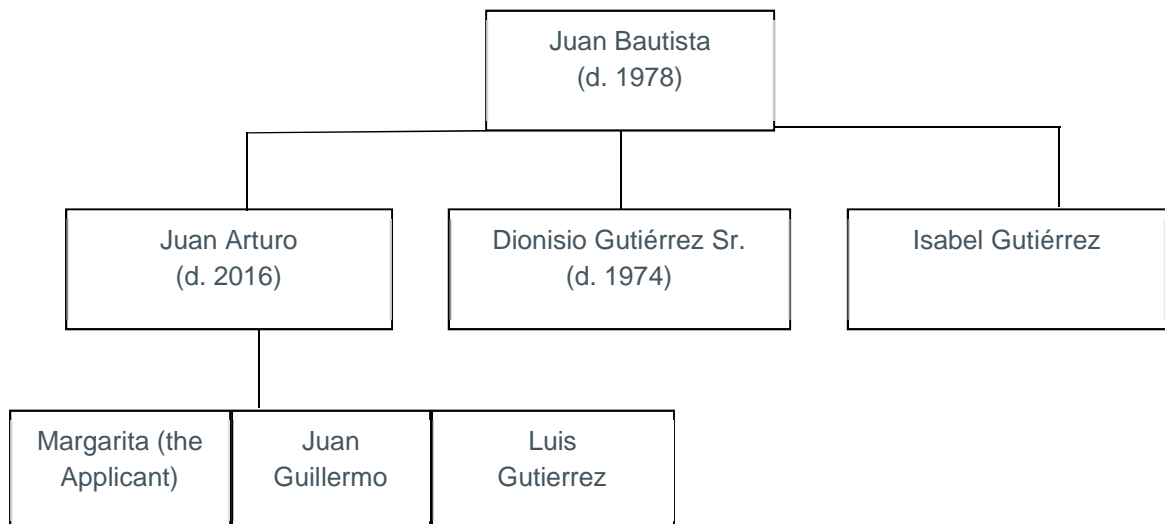


## 2.0 Executive Summary

1. As a result of the EAI Transaction (i.e. the sale, transfer or conveyance of the shares of each of BDT and Arven to the Trust) and the Assignment Transaction, the majority of the economic interest in the Company has been transferred from the Company to the Trust, the beneficiaries of which are Juan Guillermo's children. The EAI Transaction and the Assignment Transaction were completed at a time when Juan Guillermo was litigating with Margarita. While the Receiver has not completed its review of the EAI Transaction and the Assignment Transaction because several information requests made of Juan Guillermo and others remain outstanding, it is apparent that Juan Guillermo had (and has) several conflicts of interest related to these transactions, including that his children will benefit from them if there is a recovery by Lisa on the Avicola Litigation. Juan Guillermo appears to be leading the Avicola Litigation on behalf of Lisa, notwithstanding he is not an officer or director of that company.
2. As the Receiver is continuing to review the EAI Transaction, the Assignment Transaction and other matters related to these proceedings, the Receiver is of the view that any settlement of the Avicola Litigation and/or the sale of the Company's interests in Avicola Group should require consultation with the Receiver and approval of the Court.

## 3.0 Background

1. Juan Bautista Gutierrez ("Juan Bautista") was the patriarch of the Gutierrez family and the founder of the Avicola Group. A condensed family tree is provided below:



2. The Avicola Group is based in Guatemala. The Avicola Group carries on a large and successful poultry business in Central America.
3. The Receiver understands that in 1978, Juan Bautista conveyed his interest in the Avicola Group equally to his three children, Juan Arturo, Dionisio Gutierrez Sr. and Isabel Gutierrez. Juan Arturo's interest in the Avicola Group was indirectly held by the Company through Lisa.
4. A dispute arose in 1998 as to whether the Cousins were concealing the Avicola Group's financial results from Lisa. The Avicola Group has not paid dividends to Lisa since that time. The Receiver understands that Lisa is presently involved in over 100 lawsuits with the Cousins in multiple jurisdictions, including Canada, the State of Florida, Panama and Guatemala with respect to, among other things, dividends totalling approximately US\$360 million<sup>3</sup> owing to Lisa and Villamorey from the Avicola Group.

### 3.1 The Company

1. The Company is a holding company incorporated in Canada. The Company's major shareholders include members of Juan Arturo's family.<sup>4</sup> Juan Guillermo is a director and the President of the Company.
2. The Company has six wholly owned subsidiaries, as detailed below.

Subsidiary	Jurisdiction	Status
Gabinvest, S.A.	Panama	Owns Lisa, which holds the Avicola Group Interest
Xela International Inc.	Canada	Inactive
Tropic International Ltd.	Canada	Inactive
Empress Arturo International	Barbados	See Section 4
Xela Global Resources	Canada	Inactive
Boucheron Universal Corp.	Panama	Inactive

<sup>3</sup> Paragraph 121 of the Examination.

<sup>4</sup> As reflected in the Affidavit of Juan Guillermo sworn June 17, 2019 in support of the CCAA application (the "Guillermo Affidavit").

3. The Company's most recent financial statements were prepared as of May 31, 2018. A summary of the Company's unaudited and unconsolidated<sup>5</sup> balance sheet as of that date is provided below<sup>6</sup>:

(unaudited; \$000s)	
Assets	
Investments	270
Advances to related parties	22,485
Total assets	<u>22,755</u>
Liabilities	
Accounts payable and other current liabilities	9,459
Due to shareholders	671
Due to related parties	72,944
Total liabilities	83,075
Equity	<u>(60,319)</u>
Total liabilities and equity	<u>22,755</u>

4. As reflected above, as at May 31, 2018, the Company had significant liabilities owing to related parties. A summary of these balances as at May 31, 2018 is provided below:

(unaudited; \$000s)	Amount	Status
BDT	24,194	See Section 4 below
Badatop Holdings Inc.	21,884	Inactive
PAICA	11,835	See Section 4 below
Arven	6,508	See Section 4 below
Other	8,523	Inactive
Total due	<u>72,944</u>	

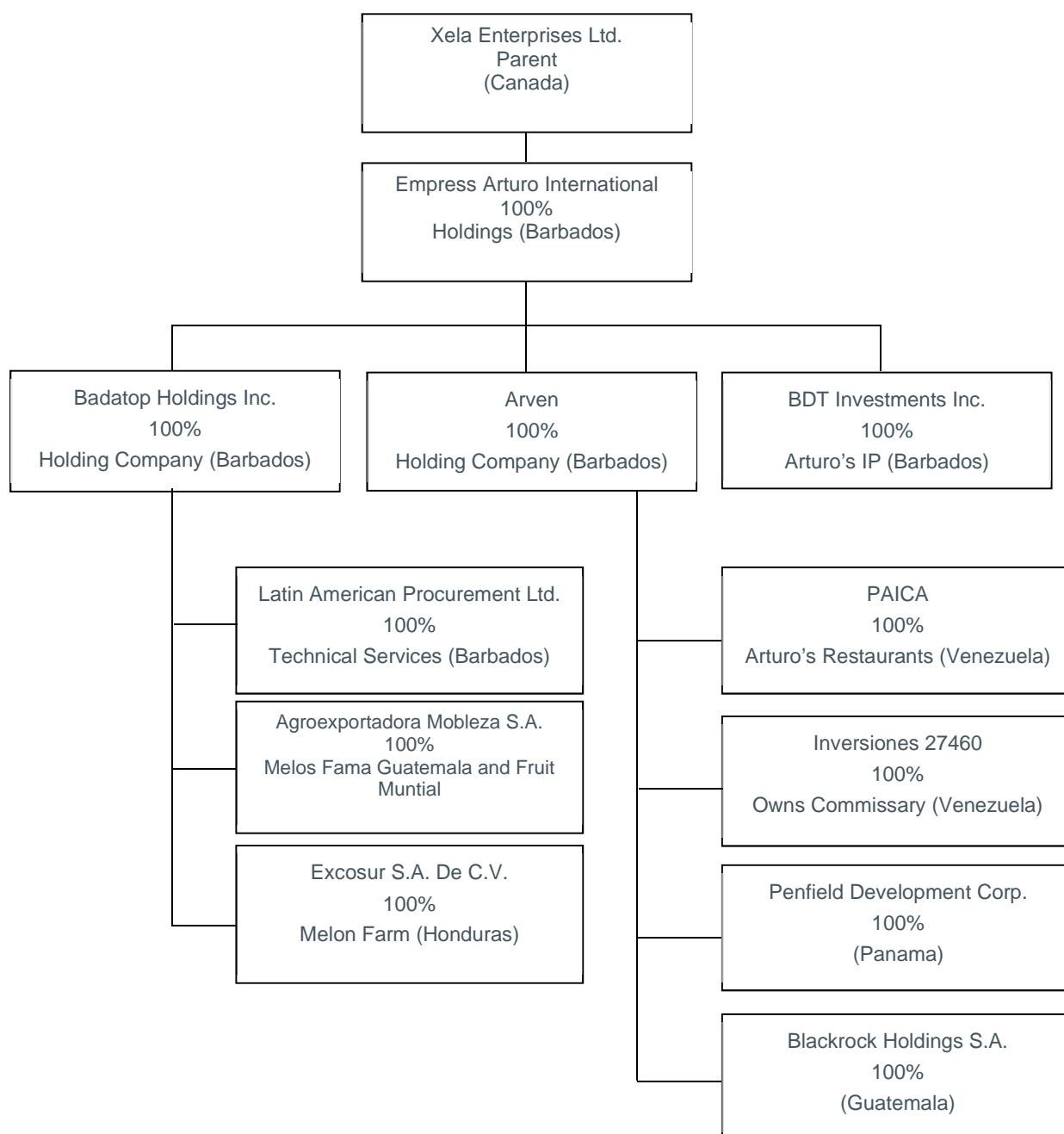
<sup>5</sup> The Company has not provided consolidated financial statements.

<sup>6</sup> The Company's financial statements exclude the debt owing to Margarita.

## 4.0 EAI Transaction and Assignment Transaction

### 4.1 EAI Transaction

1. The Company is the sole shareholder of EAI. At the time of the EAI Transaction, Juan Guillermo was a Director of EAI and its President.
2. BDT and Arven were subsidiaries of EAI prior to April 2016. The corporate chart for EAI prior to the EAI Transaction is reflected below.



3. The Receiver understands that BDT owns the intellectual property used by “Arturos”, a chain of 90 fast food chicken restaurants operating in Venezuela. The Arturos restaurants are owned by PAICA, a Venezuelan entity which is wholly owned by Arven. PAICA pays royalties and service fees to BDT.
4. The Receiver understands that BDT, Arven and PAICA have a history of profitability. Juan Guillermo has advised that the Arturos business has suffered in recent years due to the political and economic situation in Venezuela. The Receiver understands that BDT, Arven and PAICA have collectively advanced a total of approximately USD\$57 million to Lisa and \$43 million to the Company to fund the Avicola Litigation as of the dates reflected in the table below.

(unaudited; \$000s)	Company (CAD) (as at May 31, 2018)	Lisa (USD) (as at June 30, 2018)	Total
BDT	24,194	47,076	71,270
Arven	6,508	12,727	19,235
PAICA	11,835	(2,913)	8,922
	42,537	56,890	99,427

5. According to information provided to the Receiver by Juan Guillermo, at the time of the EAI transaction (around April 2016), EAI owed Juan Arturo approximately US\$9 million on account of loans purportedly advanced by Juan Arturo to EAI. To date, the Receiver has not been provided with any evidence of advances by Juan Arturo to EAI despite the Receiver’s requests for this evidence.
6. The Receiver has been advised by Juan Guillermo that EAI was unable to repay the amounts owing to Juan Arturo and, as a result, EAI conveyed the shares of BDT and Arven to Juan Arturo for US\$6.5 million<sup>7</sup> in partial satisfaction of EAI’s obligation to him. The Receiver understands from Juan Guillermo that the balance of the debt remains outstanding.
7. The Receiver has been further advised by Juan Guillermo that Juan Arturo subsequently transferred the BDT and Arven shares he acquired from EAI to the Trust. The effect of the EAI Transaction was to remove the shares of BDT and Arven from the Company’s organization and to transfer them to the Trust. The Receiver is concerned that the consideration paid by Arturo for the shares of BDT and Arven may not have reflected the value of the Arturos’ business, nor that sufficient value was attributed to the receivables owing by Lisa and the Company to BDT, Arven and PAICA.
8. Juan Arturo died in June 2016. Juan Guillermo advises that: (a) he only learned of the sale, transfer or conveyance of the shares in BDT and Arven to the Trust from his father just prior to father’s death; (b) he has no information concerning the Trust or the details of the EAI Transaction; and (c) he is not presently involved in the business and operations of either of BDT and/or Arven.

<sup>7</sup> Comprised of US\$3.75 million for the shares of BDT and US\$2.75 million for the shares of Arven.

9. Juan Guillermo provided the Receiver with valuations of BDT and PAICA<sup>8</sup> (the “Valuations”) in the context of the EAI Transaction. Copies of the Valuations are attached hereto as Confidential Appendix “1”. The Receiver’s concerns with the Valuations are provided in Confidential Appendix “2”.
10. The Receiver has the following additional concerns with respect to the EAI Transaction:
  - a) BDT, Arven and PAICA have advanced tens of millions of dollars to Lisa to fund its costs (and the Receiver understands that they continue to fund, or are prepared to continue to fund, Lisa’s litigation); however, it is unclear to the Receiver why EAI decided not to use the cash flow generated by these entities to repay the amounts EAI owed to Juan Arturo. This could have been done through payment of a dividend from some or all EAI’s subsidiaries to EAI; and
  - b) it is unclear how the Boards of Directors of each of the Company and EAI satisfied themselves as to the value of BDT and Arven, including the receivables owing from Lisa. It is also unclear whether the Boards of the Company and EAI had separate legal counsel when completing the EAI Transaction, and the extent of Juan Guillermo’s participation in the EAI Transaction.
11. Based on the foregoing, the Receiver requires additional information from each of BDT, Arven, and ATC to further investigate the EAI Transaction<sup>9</sup>. The Receiver recommends that the Court issue an order requiring these and any other party with information concerning the EAI Transaction to provide all such information to the Receiver forthwith, so that the Receiver can complete its review of the transaction.
12. In the interim, as EAI is incorporated in Barbados, the Receiver has engaged local counsel in Barbados.

#### 4.2 Assignment Transaction

1. In January 2018, BDT sought additional consideration from Lisa for amounts advanced, or to be advanced, by BDT to Lisa to fund the Avicola Litigation. Pursuant to the Assignment Agreement, BDT agreed to fund Lisa’s costs in the Avicola Litigation, provided Lisa assign its interest in the Avicola Litigation to BDT. BDT agreed to pay Lisa 30% of the net litigation proceeds, after deducting costs and the repayment by Lisa of any amounts owing to BDT. A copy of the Assignment Agreement is attached as Appendix “E”.

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<sup>8</sup> The BDT valuation was prepared by Deloitte LLP. The PAICA valuation was prepared by Lara Marambio & Asociados, which is a subsidiary of or related to Deloitte LLP.

<sup>9</sup> The Receiver has requested details regarding the Trust, including a copy of the Trust Agreement and the names of the law firms that represent the Trust. Juan Guillermo has advised the Receiver that ATC will not provide any information concerning the Trust.

2. The effect of the Assignment Transaction is to transfer further recoveries from the Avicola Litigation to BDT. At the time of the Assignment Transaction, Lisa owed BDT approximately \$47 million. The Receiver understands that the amounts advanced from BDT to Lisa since the date of the Assignment Agreement are insignificant<sup>10</sup>. Accordingly, it is unclear whether Lisa received any consideration for entering into the Assignment Agreement. If the litigation is settled in the near term, BDT will receive a windfall despite making no material additional advances to Lisa to fund the Avicola Litigation since the date of the Assignment Agreement.
3. The Receiver is concerned, again, that Juan Guillermo is conflicted as President of the Company, a director of the Company and the father of the beneficiaries of the Trust (who stand to benefit from the Assignment Transaction).

#### 4.3 Confidential Appendices

1. Torys LLP (“Torys”), which is acting as counsel to the Company (but not to the Receiver) required that the Receiver sign a Non-Disclosure Agreement in order to be provided with a copy of the Valuations. Accordingly, the Receiver respectfully requests that the Valuations be filed with the Court on a confidential basis and be sealed as the documents contain confidential information and are currently subject to confidentiality restrictions as ordered by the Court under the Receivership Order. In the circumstances, the Receiver is of the view its concerns with the Valuations should also be subject to the confidentiality provisions as they reference the Valuations. The Receiver is not aware of any party that will be prejudiced if the information in the Confidential Appendices is sealed. Accordingly, the Receiver believes the proposed Sealing Order is appropriate in the circumstances.

#### 5.0 Receivership Order – Clarification re Paragraph 4

1. Pursuant to paragraph 4 of the Receivership Order, the Receiver is not permitted to, among other things, take steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between the Company and its subsidiaries and/or affiliates and any third party until December 31, 2019 or such other date as the Court may order.
2. The Avicola Group presently represents substantially all the Company’s value and currently is the only potential source of recoveries for the Company’s stakeholders. In the circumstances, the Receiver is of the view that it should be consulted with respect to any settlement or transaction negotiated by Juan Guillermo, and that any such settlement or transaction must be approved by the Court given Juan Guillermo’s conflicts of interest. The Receiver also believes that Court approval of any settlement or transaction involving the Avicola Group is required until the Receiver can fully investigate the transactions discussed in this Report. The Receiver is of the view that this requirement is not inconsistent with paragraph 4 of the Receivership Order.

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<sup>10</sup> According to answer 15 to the undertakings at the Examination, the debt owing by Lisa to BDT is less than \$50 million. An exact amount was not provided in the answers.

3. The Receiver has been advised by Juan Guillermo that he disagrees with the Receiver's position that Court approval is required of any settlement. Despite efforts to bridge the gap between the parties, and to avoid involving the Court, the parties were required to attend before Justice McEwen to request advice and direction in this regard. The Court requested that the Receiver, Margarita and Juan Guillermo provide written submissions by no later than October 25, 2019 outlining their respective interpretations of paragraph 4 of the Receivership Order. This matter is to be determined by the Court at a case conference on October 29, 2019, following the Receiver's motion.

## 6.0 Professional Fees

1. The fees of the Receiver and A&B are summarized in the table below:

(\$)					
Firm	Period	Fees	Disbursements	Total	Average Hourly Rate
KSV	Jan 7/19 – Aug 31/19	36,763.75	65.92	36,829.67	620.49
A&B	Jan 10/19 – Sept 11/19	42,636.50	852.15	43,488.65	549.44
Total		79,400.25	918.07	80,318.32	

2. Detailed invoices for the Receiver and A&B can be found in the affidavits sworn by their representatives in Appendices "F" and "G", respectively.
3. The Receiver is of the view that the hourly rates charged by A&B are consistent with the rates charged by law firms practicing in the area of insolvency and restructuring in the Toronto market, and that the fees charged are reasonable in the circumstances.
4. Funding for these proceedings has been provided by Margarita pursuant to Receiver Certificates. There is presently no source of liquidity in the Company to fund the costs of these proceedings.

## 7.0 Overview of Receiver's Activities

1. The Receiver's activities in respect of these proceedings include the following:
  - a) familiarizing itself with the status and history of the litigation involving the Company;
  - b) corresponding with A&B concerning all matters in connection with the receivership proceedings;
  - c) preparing the Notice and Statement of the Receiver pursuant to subsections 245(1) and 246(1) of the *Bankruptcy and Insolvency Act*;
  - d) attending two meetings with Margarita and Bennett Jones;
  - e) attending two meetings with Torys and Juan Guillermo;
  - f) preparing questions for Juan Guillermo, reviewing his responses and sending follow-up questions;



- g) reviewing financial information concerning the Company;
- h) reviewing the EAI Transaction and the Assignment Transaction;
- i) dealing with Torys regarding various matters in these proceedings, including several information requests and the dispute as to whether Court approval is required of any settlement of the Avicola Litigation;
- j) engaging with Barbados and Panamanian counsel to assist the Receiver with a review of the subsidiaries, the Avicola Litigation and the EAI Transaction;
- k) reviewing, commenting and executing a confidentiality agreement between the Receiver and Juan Guillermo; and
- l) corresponding with Stikeman Elliot LLP, Canadian counsel to the Cousins.

## 8.0 Conclusion and Recommendation

1. As a result of the transactions discussed in this Report, the Receiver is concerned that EAI may have received inadequate consideration when it sold, conveyed or transferred the shares of BDT and Arven to Juan Arturo. In addition to further investigating the EAI Transaction and the Assignment Transaction, further investigation is required into the Valuations of BDT, Arven and PAICA to assess the reasonableness of the consideration paid by Juan Arturo to EAI for the shares of BDT and Arven.
2. Based on the foregoing, the Receiver respectfully recommends that this Court make an Order granting the relief detailed in Section 1.1(1)(c) of this Report.

\* \* \*

All of which is respectfully submitted,



**KSV KOFMAN INC.,  
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF  
XELA ENTERPRISES LTD. AND  
NOT IN ITS PERSONAL OR CORPORATE CAPACITY**

## Appendix “A”

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

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

THE HONOURABLE )

JUSTICE **MCEWEN** )**FRIDAY**, THE **5<sup>th</sup>**DAY OF **July**, 2019**MARGARITA CASTILLO**

Applicant

- and -

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

Respondents

**ORDER**  
**(appointing Receiver)**

THIS MOTION made by the Applicant for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing KSV Kofman Inc. as receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of Xela Enterprises Ltd. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

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

### **SERVICE**

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

### **APPOINTMENT**

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

### **RECEIVER'S POWERS**

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

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

- 3 -

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

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

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

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

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

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

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

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

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

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

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

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

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



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

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

#### **NO PROCEEDINGS AGAINST THE RECEIVER**

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

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

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

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

#### **NO INTERFERENCE WITH THE RECEIVER**

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

#### **CONTINUATION OF SERVICES**

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

#### **RECEIVER TO HOLD FUNDS**

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

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

#### **EMPLOYEES**

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

#### **PIPEDA**

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

#### **LIMITATION ON ENVIRONMENTAL LIABILITIES**

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

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

#### **LIMITATION ON THE RECEIVER'S LIABILITY**

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

#### **RECEIVER'S ACCOUNTS**

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

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

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

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

#### **FUNDING OF THE RECEIVERSHIP**

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

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

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

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

#### **TERMINATION OF RECEIVERSHIP**

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

#### **SERVICE AND NOTICE**

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

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

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

#### **GENERAL**

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

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

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

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

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

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

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

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

JUL 05 2019

PER / PAR: 



**SCHEDULE "A"**

**RECEIVER CERTIFICATE**

CERTIFICATE NO. \_\_\_\_\_

AMOUNT \$ \_\_\_\_\_

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

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

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

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

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

- 2 -

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

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

DATED the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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

Per: \_\_\_\_\_

Name:

Title:

**MARGARITA CASTILLO**  
Moving Party

-and-

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial List)

Proceeding commenced at Toronto

**ORDER**

**BENNETT JONES LLP**

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

**Jeffrey S. Leon (#18855L)**

Email: leonj@bennettjones.com

**Jason Woycheshyn (#53318A)**

Email: woycheshynj@bennettjones.com

**William A. Bortolin (#65426V)**

Email: bortolinw@bennettjones.com

Telephone: (416) 863-1200

Fax: (416) 863-1716

Lawyers for the moving party, Margarita Castillo

This is **Exhibit "F"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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 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;

-2-

[ 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;

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- 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;

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- 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;



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- 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;

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- 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;

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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

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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;

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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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MARGARITA CASTILLO  
Applicant

-and-

XELA ENTERPRISES LTD. et al.  
Respondents

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

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**PROCEEDING COMMENCED AT  
TORONTO**

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**NOTICE OF CROSS-MOTION**

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Juan Guillermo Gutierrez

This is **Exhibit "G"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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

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

**MARGARITA CASTILLO**

Applicant

-and-

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

Respondents

**AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ**

(Sworn February 22, 2021)

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

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

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

## II. BACKGROUND

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

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

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

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

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

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

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

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

28. Along the way, although the process has been slow and arduous, justice has occasionally emerged. After the Nephews stops disbursing dividends in 1999, LISA sued companies controlled by the Nephews in Bermuda, alleging that they had misappropriated some of LISA's dividends and converted the monies to their own use, laundering illicit cash receipts through the sale of bogus insurance policies at an inflated premium issued by a Bermuda-based reinsurance company that they owned. Judgment was entered in favor of LISA on September 5, 2008 (**the "Leamington Judgment"**), from which the Nephews did not appeal. A true and correct copy of the Leamington Judgment is attached as Exhibit A to my Affidavit sworn on March 22, 2020 (**"my 2020 Affidavit"**). As indicated there, the Leamington Judgment establishes, among other things, the following unrefuted facts:

- a. That LISA was a victim of a conspiracy to defraud by the Nephews;
- b. That the Avicolas used accounting records that recorded only a portion of its true income;
- c. That a substantial portion of the income generated by the Avicolas was kept off the books and used to fund distributions to the Nephews but not to LISA;
- d. That the re-insurance policies at issue were not genuine;
- e. That some of the "black" money was being "whitened" by paying the insurance premiums that were then distributed as purportedly legitimate corporate profits, and

that the Nephews intended to deprive LISA of its rightful share of the profits generated by the Avicolas;

- f. That the Nephews used cash-only operations to conceal the Avicola's true earning from the Guatemalan tax authorities;
- g. That the Nephews intended to injure LISA through a fraudulent conspiracy;
- h. That LISA had been excluded from participating in the distributions made to the Nephews; and
- i. That the members, officers and directors of the various Avicolas companies had "actual knowledge of all of the facts which made the conspiracy unlawful."

29. Justice Kawaley, who presided over the Leamington trial and issued the Leamington Judgment, also made one significant comment concerning the real mastermind behind the fraud, which LISA had formally alleged in its pleadings was Avícola Villalobos S.A. (referred to "AVSA"), the largest of the Avicola companies and the conduit for distribution of the laundered funds. While Justice Kawaley's observation was not a conclusive part of the judgment – which actually found *against* LISA on its allegation of fraud by AVSA – his observation as factfinder in the case are nevertheless interesting:

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

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

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

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

### ***B. The Nephews' Role in the Oppression Action***

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

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

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



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

35. Specifically, as I stated in my 2020 Affidavit, G&T Bank and other records indicate the following:

- a. Villamorey declared in LISA’s favor (but did not pay) dividends of US\$4,166,250 in 2010. A true and correct copy of Villamorey’s audited financial statements for 2009/2010 is attached to my 2020 Affidavit as Exhibit B.
- b. On May 6, 2010, Juan Luis Bosch, one of the Nephews, used those dividends, without LISA’s knowledge or consent, to open an account in Villamorey’s name with G&T Bank. A true and correct copy of the opening statement for G&T Bank account No. 900051264, showing the initial deposit of US\$4,166,250, is attached hereto as Exhibit C to my 2020 Affidavit; and
- c. On May 25, 2010, the initial deposit to Account No. 900051264 (*i.e.*, LISA’s dividends) was used to purchase Certificate of Deposit #010152676 in the amount of US\$4,166,250 (**the “CD”**). A true and correct copy of the CD is attached as Exhibit D to my 2020 Affidavit; see also Exhibit B to my 2020 Affidavit, referencing CD #010152676.

36. Further, during meetings in September 2012 and November 2012, Mr. Jorge Porras – at the time an attorney for one of Xela’s subsidiaries – provided information to Xela, of which he had personal knowledge, regarding an ongoing conspiracy between the Nephews and Margarita to injure Xela. During those meetings, Mr. Porras told Xela, among other things, that:

- a. Roberto Barillas had executed the Castillo Loan documents on Margarita’s behalf, under a power of attorney signed and delivered to Roberto by Margarita in Miami in March 2010;
- b. The Castillo Loan was for a total of US\$4.35 million;
- c. A portion of the Castillo Loan was intended to finance the Oppression Action; and
- d. He (Mr. Porras) had attended meetings in Toronto with Margarita and her lawyers, Jeffery Leon and Jason Woycheshyn (Bennet Jones). Katherine Kay (Stikeman Elliott), who represents the Nephews in various legal matters, was also present during at least one of those meetings. The subject of the meetings was Margarita’s oppression action against Xela, during which Margarita disclosed to her lawyers that the action would be financed through the Nephews.

37. Under cross-examination on April 17, 2012 in Toronto, Margarita admitted receiving the Castillo Loan, and she testified that G&T Bank had given her the loan solely on the basis of her “net worth,” as she had no assets in Guatemala and had not lived there in decades. A copy of an excerpt from Margarita’s cross-examination is attached to my 2020 Affidavit as Exhibit E. However, in an affidavit dated September 9, 2011, Margarita testified that she had been struggling financially, and that she had asked the Nephews for “help” securing the Castillo Loan. A copy of that Affidavit is attached to my 2020 Affidavit as Exhibit F. In any case, Margarita confirmed in cross-examination that she had used at least some of the Castillo Loan proceeds to pursue the Oppression Action against Xela, Arturo and me. (See Exhibit E to my 2020 Affidavit.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

59. As I affirmed in my 2020 Affidavit, I participated in at least four meetings in Guatemala in 2016 with high-level representatives of G&T Bank about the Castillo Loan. Initially, I spoke with Mr. Estuardo Cuestas, a member of the Board of Directors of G&T Bank and a close advisor to the President. I told him that I believed G&T Bank had given a loan to Margarita that was collateralized with LISA's Villamorey 2010 dividends, which she had used to fund litigation

against me in Canada. Mr. Cuestas promised to look into the situation. During our second meeting, Mr. Cuestas confirmed that the Castillo Loan had indeed been collateralized with CD #010152676, and he seemed to recognize the seriousness of the situation. He arranged a meeting for me with Mr. Mario Granai, the President of G&T Bank. I shared my concerns with Mr. Granai, who provided no substantive commitment, although he seemed genuinely concerned about the bank's exposure.

60. Some weeks passed, after which Mr. Cuestas contacted me by telephone and informed me that G&T Bank would not be able to assist me, and that the Castillo Loan was "no longer an issue" for the Bank, as it had been "collapsed." I understood Mr. Cuestas' comments to signify that G&T Bank had satisfied the Castillo Loan by foreclosing the collateral (i.e., using the CD purchased with LISA's 2010 Villamorey dividends), without Margarita being required to repay any part of the Castillo Loan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

\* \* \*

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

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



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

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

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

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

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

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

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

\* \* \*

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

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

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

*Thank you.*

*This information is insufficient.*

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

\* \* \*

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

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

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

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

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

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

*Dear Kyle:*

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

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

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

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

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

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

*As you are aware, we are the lawyers for KSV Kofman Inc. (“KSV”), in its capacity as the court-appointed receiver and manager (in such capacity, the “Receiver”) of Xela, appointed pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the “Court”) issued and entered on July 5, 2019 (the “Appointment Order”).*

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

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

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

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

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

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

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

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

*If Juan Guillermo continues to refuse to comply with the Receiver's information request, the Receiver will take such steps as it deems appropriate to protect the integrity of the Receivership and the interest of all stakeholders of Xela, all of which will be reported to the Court. Such steps may include, without limitation, a motion to hold Mr. Gutierrez in contempt of Court orders, which orders he continues to willfully disregard. [Emphasis mine.]*

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

\* \* \*

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

\* \* \*

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

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

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

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

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

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

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

#### ***G. The Receiver's Pursuit of Discovery in Toronto***

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

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

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

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

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

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

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

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

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

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

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

#### **IV. THE MOTION SHOULD BE DENIED ON ITS MERITS**

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

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



unproductive and a waste of resources, as Mr. Almengor's filings were appropriately reversed by the Panama authorities. Third, the Receiver's activities furthered a pattern that ran contrary to the purpose of the receivership, as detailed above. Fourth, all billing descriptions in the Lenczner Slight invoices are redacted, making it impossible to evaluate those invoices. Fifth, as discussed above, the Receiver interfered with the LISA Loan, the proceeds of which would have fully satisfied the Castillo Judgment and all enforcement costs and other expenses of the receivership in January 2020. For all of those reasons, I believe that the Receiver's request for approval of its fees should be denied.

**SWORN** by Juan Guillermo Gutierrez at the City of Toronto, in the Province of Ontario, before me on February 22, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.




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Commissioner for Taking Affidavits  
(or as may be)

**N. JOAN KASOZI (LSO# 70332Q)**




---

**JUAN GUILLERMO GUTIERREZ**

This is **Exhibit "H"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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

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

Respondents

**FACTUM OF THE RESPONDENT, JUAN GUILLERMO GUTIERREZ**

March 18, 2021

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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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  
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B E T W E E N:

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and

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GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of  
Juan Arturo Gutierrez

Respondents

**FACTUM OF RESPONDENT, JUAN GUILLERMO GUTIERREZ**

**I. OVERVIEW**

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



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3. The Receiver's objection to the LISA Loan was that it did not know "how the economics . . . affect the interests of other stakeholders of Xela or its subsidiaries."<sup>1</sup> The LISA Loan, however, would have satisfied the Castillo Judgment and all receivership expense; those concerns could have been raised in response to a motion for discharge.

4. The Receiver prevented the LISA Loan from funding by publicly exercising Xela's shareholder rights in Panama without any recognition in that country. The Receiver caused shareholder minutes to be filed in Panama's Public Registry to take control of the board of Gabinvest S.A., a Panama company and LISA's sole shareholder ("**Gabinvest**"). The filing claimed that Gabinvest's shareholder (*i.e.*, Xela) was present at the Panama meeting either in person or by proxy, while omitting any reference to: (a) the Receiver; (b) Xela's name; (c) the name of the person authorizing the alleged proxy; (d) the name of the person receiving the alleged proxy; or (e) any power of attorney from the Receiver. The Public Registry rejected the filing, and Gabinvest's board of directors remained unchanged, but the lender withdrew the LISA Loan as a result.

5. The Receiver's investigation of the "Reviewable Transactions" has been inappropriate and costly. The transactions are unrelated to assets in Ontario, and involve only foreign entities. At best, they are contingent unliquidated claims and/or remote/uncertain entitlements, which are not a proper basis for equitable receivership.

6. Further, the Receiver has repeatedly cast Mr. Gutierrez as non-cooperative when he has asserted his rights. The allegations have never been supported by actual evidence, yet they follow a troubling propensity to characterize the facts unfavorably to

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<sup>1</sup> Exhibit 12 to Affidavit of Juan Guillermo Gutierrez dated February 22, 2021; Responding Record dated March 9, 2021 at Tab A page 247 (the "**Gutierrez Affidavit**").

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

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

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

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

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

additional costs. Further, the Court's Order dated July 5, 2019 (**the "Appointment Order"**) already authorizes the Receiver to seek recognition overseas.

11. It is in the interest of Justice that the Receiver's motion is dismissed with costs.

## II. SUMMARY OF FACTS

### A. Background

12. Mr. Gutierrez is the president and owner of 100% of the voting shares of Xela, subject to the limitations imposed by the receivership.<sup>2</sup>

13. Mr. Gutierrez's father was one of the original founders of a 28-company agricultural conglomerate in Guatemala (**collectively the "Avicolas"**). LISA owns a 1/4 stake in each of the individual Avicola companies, along with a 1/3 stake in Villamorey S.A. (**"Villamorey"**), a Panama company that separately holds 25% of the Avicolas shares.<sup>3</sup> Until his passing in 2016, LISA was wholly owned by Mr. Gutierrez's father, Arturo Gutierrez (**"Arturo"**). The other 2/3 stake in the Avicolas and Villamorey are held by the Nephews, members of the two branches of the Gutierrez family that remain in Guatemala.

14. In 1984, Arturo relocated with his family to Toronto, ceding operational control of the Avicolas and Villamorey to the Nephews. Thereafter, the Nephews implemented a tax fraud scheme in Guatemala that understated the actual revenues of the Avicolas (along with the corresponding sum of dividends disbursed to LISA) and concealed the fraud with false accounting records.<sup>4</sup> In 1998, Arturo discovered the discrepancies by accident, and within a year after he confronted the Nephews, they ceased all dividend

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<sup>2</sup>Gutierrez Affidavit at para 1; Responding Record dated March 9, 2021 at Tab A page 1.

<sup>3</sup>Gutierrez Affidavit at para 18; Responding Record dated March 9, 2021 at Tab A page 9

<sup>4</sup>Gutierrez Affidavit at paras 23-26; Responding Record dated March 9, 2021 at Tab A page 12.

payments to LISA and embarked on a crusade to ruin Arturo and his family financially.<sup>5</sup>

### **B. The Leamington Judgment**

15. In or about 1998, LISA sued companies controlled by the Nephews in Bermuda. Judgment was entered for LISA on September 5, 2008 (**the “Leamington Judgment”**), which was not appealed. The Leamington Judgment establishes, among other things, that: (a) Lisa was a victim of a conspiracy to defraud by the Nephews; (b) the Avicolas used false accounting records to conceal income; (c) a substantial portion of the concealed income was used to fund distributions to the Nephews but not to LISA; (d) phony re-insurance contracts were used to launder the funds; (e) the Nephews intended to deprive LISA of its rightful share of the profits; (f) the Nephews used cash-only operations to conceal earnings from the Guatemalan tax authorities; (g) the Nephews intended to injure LISA; (h) LISA was excluded from distributions made to the Nephews; and; (i) the members, officers and directors of the Avicolas had actual knowledge.<sup>6</sup>

### **C. Funding for the Oppression Action**

16. After the Leamington Judgment, the parties entered settlement discussions. It was at this time that Applicant Margarita Castillo (**“Margarita”**) – while a director of Xela – secretly joined forces with the Nephews to plan a counterattack, which led to a breakdown of discussions.<sup>7</sup> The counterattack began with the civil action in Toronto that ultimately led to the Castillo Judgment (**the “Oppression Action”**). The Nephews helped fund the Oppression Action by arranging for a friendly bank in Guatemala, G&T Continental Bank

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<sup>5</sup>Gutierrez Affidavit at para 24; Responding Record dated March 9, 2021 at Tab A pages 12-13.

<sup>6</sup>Gutierrez Affidavit at paras 28-30; Responding Record dated March 9, 2021 at Tab A pages 14-15.

<sup>7</sup>Gutierrez Affidavit at para 31; Responding Record dated March 9, 2021 at Tab A page 16.

(**“G&T Bank”**), to give Margarita a loan of US\$ 4.35 million (**the “Castillo Loan”**). Evidence suggests that the loan was collateralized with a portion of LISA’s dividends, and repaid by foreclosure.<sup>8</sup> If so, the Castillo Judgment as already in effect been paid.

#### **D. Theft and Misuse of Xela’s Computer Records**

17. The Nephews’ counterattack also involved attempts to exclude LISA from the Avicolas using stolen Xela documents made public by Margarita through the Oppression Action. Margarita’s husband Ricardo coerced a former Xela employee to download the entirety of Xela’s computer servers, including privileged and confidential documents. Margarita then attached the documents in bulk as a single exhibit to the complaint in the Oppression Action, although the documents did not relate to the action itself. Once in the public record, the Nephews used the documents in corporate resolutions and in legal proceedings in Guatemala to try to exclude LISA’s interest in the Avicolas. Those proceedings were baseless and ultimately failed, but at significant cost to LISA.<sup>9</sup>

18. Thereafter, Xela filed a complaint for civil conspiracy in the Superior Court in Toronto against Margarita, Ricardo, the Nephews and others (**“the Conspiracy Action”**). The Conspiracy Action, which is still pending, was delayed by procedural arguments and appeals, but the Oppression Action proceeded, yielding the Castillo Judgment.<sup>10</sup>

#### **E. The “Reviewable Transactions”**

19. In 2005, LISA was forced to begin borrowing from BDT Investments Inc. (**“BDT”**), which at the time was a subsidiary of Xela, to cover the cost of pursuing the unpaid

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<sup>8</sup> Affidavit of Juan Guillermo Gutierrez dated March 22, 2020 at paras 31-38, Responding Record dated March 9, 2021 at Tab A page 14.

<sup>9</sup>Gutierrez Affidavit at paras 39-46; Responding Record dated March 9, 2021 at Tab A page 19-21.

<sup>10</sup> Gutierrez Affidavit at para 47 Responding Record dated March 9, 2021 at Tab A pages 21-22.

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dividends. In 2012, BDT secured a judgment in Panama of approximately US\$19 million against LISA, with additional debt accumulating over time to approximately US\$50 million. In 2020, all of LISA's indebtedness to BDT was satisfied in a settlement under which LISA assigned all of its dividend rights to BDT. LISA's borrowing from BDT is the basis for three of the four Reviewable Transactions.<sup>11</sup>

20. The Reviewable Transactions are described in the Receiver's Notice of Motion, in summary as follows: (a) "**EAI Transaction**" – the transfer in early 2016 by EAI of BDT and Arven shares to Arturo, then from Arturo to the ARTCARM Trust (**the "Trust"**); (b) "**Assignment Transaction**" – the assignment in January 2018 by LISA of the majority of proceeds from the Avicola litigation to BDT; (c) "**Lisa Transfer**" – the transfer from LISA in February 2020 to BDT of Lisa's interest in the Avicolas; and (d) "**Litigation Assignment**" – the assignment of the right to control Lisa's litigation against the Avicolas.<sup>12</sup>

21. Based on information reported by the Receiver: (a) EAI is a Barbados corporation; (b) BDT and Arven are Barbados corporations; (c) The Trust is a trust established in Barbados; (d) The Avicola litigation involves litigation between Mr. Gutierrez and the Nephews that has lasted decades, relating primarily to the Avicolas, which operates a number of businesses in Central America; (e) Lisa is a Panamanian corporation; (f) Gabinvest is a Panamanian corporation; and (g) Villamorey is a Panamanian corporation.<sup>13</sup> Thus, the Reviewable Transactions all relate exclusively to entities, assets and transactions that are outside of Ontario, and specifically in Barbados, Panama and

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<sup>11</sup> Gutierrez Affidavit at para 27; Responding Record dated March 9, 2021 at Tab A pages 13-14.

<sup>12</sup> Motion Record of the Receiver dated January 18, 2021 at Tab 1, Page 2

<sup>13</sup> Motion Record of the Receiver dated January 18, 2021 at Tab 2

Guatemala.

22. While the Receiver has indicated that it has not uncovered any commercially reasonable basis for the Reviewable Transactions<sup>14</sup>, that conclusion ignores the several explanations provided to the Receiver regarding the Reviewable Transactions, including the shareholder loans payable by EAI to Arturo, the valuation received at the time of the EAI Transaction of the shares, the inability of Lisa to continue to fund its participation in the Avicola Litigation and BDT's loans to Lisa in respect of this litigation, BDT's ability to recover amounts owing to it by Xela and Lisa being connected to the Avicola Litigation, and more. Although the Receiver may not accept these reasons, it is not accurate to say that it has not uncovered any commercially reasonable basis.<sup>15</sup>

#### **F. Receiver's Conduct of the Receivership**

23. The Receiver has exhibited a pattern of conduct throughout the course of these proceedings that has frustrated the primary purpose of the receivership, such that it has become difficult or impossible for this receiver to achieve satisfaction of the Castillo Judgment. The details are set out in the Gutierrez Affidavit, while the highlights are summarized here.<sup>16</sup>

24. **LISA's Dividends** – The Receiver has not prioritized LISA's dividends.<sup>17</sup>

25. **Communication with the Nephews** – The Receiver has not explained its ongoing, undisclosed communications over at least 13 months with the Nephews, despite

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<sup>14</sup>Motion Record of the Receiver dated January 18, 2021 at Tab 2, Page 31, Para 2.4(1)

<sup>15</sup> Gutierrez Affidavit at paras 55-57, 69; Responding Record dated March 9, 2021 at Tab A pages 25-26, 30-31.

<sup>16</sup>Gutierrez Affidavit at para 48-108; Responding Record dated March 9, 2021 at Tab A page 22-48

<sup>17</sup> Gutierrez Affidavit at para 48; Responding Record dated March 9, 2021 at Tab A page 22.

acknowledging that LISA's dividends are the only realistic source of funds.<sup>18</sup>

26. **The LISA Loan** – Had the Receiver not taken unrecognized action in Panama, the Castillo Judgment and receivership expenses could have been paid in their entirety.<sup>19</sup>

27. **Conduct in Panama** – The Receiver tried to replace the Gabinvest and LISA boards without any notice to those entities, Mr. Gutierrez, or any of their counsel. The document it filed in the Panama Public Registry was false or at least misleading, and was rejected as a result, leaving the boards unchanged.<sup>20</sup> The Receiver has never sought recognition in Panama, although Paragraph 31 of the Appointment Order expressly authorizes it.<sup>21</sup>

28. **Contempt Motions** – The Receiver has twice sought to incarcerate Mr. Gutierrez. First the Receiver moved for contempt when LISA and Gabinvest declined voluntarily to adopt the Receiver's directors, even though Mr. Gutierrez has no authority over Xela's foreign subsidiaries<sup>22</sup> Now the Receiver seeks contempt because of the sworn statement submitted by Mr. Gutierrez in the criminal proceedings in Panama against the Receiver's agent, even though Mr. Gutierrez was merely confirming that he was not the anonymous person who purported to give Xela's proxy at the Gabinvest shareholder meeting, and despite his compliance with the Court's Order dated February 10, 2021.<sup>23</sup> When LISA's

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<sup>18</sup> Gutierrez Affidavit at paras 49-53; Responding Record dated March 9, 2021 at Tab A pages 22-24.

<sup>19</sup> Gutierrez Affidavit at paras 70-86; Responding Record dated March 9, 2021 at Tab A pages 31-39.

<sup>20</sup> Gutierrez Affidavit at paras 87-99; A copy of the Gabinvest Minutes, with a certified English translation, is attached as Exhibit 1 to the Supplemental Affidavit of Juan Guillermo Gutierrez dated March 5, 2021, in response to the Receiver's Motion for Investigative Authority & Recognition (returnable March 22, 2021).

<sup>21</sup> Gutierrez Affidavit at paras 109; Responding Record dated March 9, 2021 at Tab A pages 48-49.

<sup>22</sup> Gutierrez Affidavit at para 97-100; Responding Record dated March 9, 2021 at Tab A page 43-44.

<sup>23</sup> Gutierrez Affidavit at paras 12, 93-94, 100; Responding Record dated March 9, 2021 at Tab A pages 6-7, 42 and 44-45.



president refused to withdraw the complaint, the Receiver sought contempt.<sup>24</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to take this step for more than 20 months created serious problems in Panama.<sup>33</sup>

35. **Inaccuracies and Misstatements in the Receiver's Reports** – The Receiver's fourth report is troubling in its inaccuracy. Virtually every statement approaches the facts from a contentious perspective, making conclusory statements without appropriate knowledge or evidence, all of which cut against Mr. Gutierrez and his family. Many of the misstatements are corrected throughout the Gutierrez Affidavit.<sup>34</sup> A table listing some of the inaccuracies is submitted as Annex A.

### III. STATEMENT OF ISSUES, LAW & AUTHORITIES

#### **A. Whether the Consent Order Allows Mr. Gutierrez to Review the Data on His Personal Devices Before They Are Uploaded to a Relativity Database Maintained by the Receiver's Agent**

36. The Receiver contends that Mr. Gutierrez has violated the Court's October 27, 2020 Order by refusing to permit the Receiver to upload the contents of his personal devices to a Relativity database maintained by the Receiver's agent, without having the opportunity to review the data first and object to its discoverability. That contention is misguided.

37. The Receiver's request to examine Mr. Gutierrez's personal devices is based on the belief that they may contain documents produced in the course of Xela's business operations. As a preliminary matter, the receivership relates to Xela property, not Mr. Gutierrez's personal property. As a consequence, any data on his personal devices that was not generated in the course of Xela's business operations is not discoverable by

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<sup>33</sup>Gutierrez Affidavit at paras 1, 22 and 129; Responding Record dated March 9, 2021 at Tab A pages 1, 11-12 and 55-56.

<sup>34</sup> Gutierrez Affidavit at para 127-128; Responding Record dated March 9, 2021 at Tab A page 55.

the Receiver. As Mr. Gutierrez has averred, there is good reason to be concerned about the Receiver's access to his personal devices, as they contain few if any documents belonging to Xela, but do contain personal documents and information that, while perfectly proper and above-board, might – as before – be used by creative lawyers in Panama and/or Guatemala to interfere with BDT's ability to collect LISA's dividends.<sup>35</sup>

38. In the spirit of cooperation, however, Mr. Gutierrez consented to an Order (**the "Consent Order"**) that sets out the procedure for review of his personal devices and production of Xela documents, if any, to the Receiver. Among other things, the Consent Order required Mr. Gutierrez to produce his personal devices to the Receiver's IT consultant for forensic imaging within seven business days of the Consent Order.<sup>36</sup>

39. On October 25, 2020, before the Consent Order was issued, Mr. Gutierrez's wife received word that her mother, who was 97 years old at the time and residing in Guatemala City, had been diagnosed with colon cancer, and that the decision had been made to perform emergency surgery to remove a tumor. Given the circumstances, Mr. Gutierrez and his wife left for Guatemala City on October 26. Prior to leaving, and before the Consent Order was signed, Mr. Gutierrez informed the Receiver and promised to keep the Receiver updated about the circumstances, which was done several times.<sup>37</sup>

40. Unfortunately, Mr. Gutierrez's mother-in-law experienced complications and eventually passed away. Mr. Gutierrez remained to settle some personal and financial affairs, and he arrived back in Toronto late on December 17, 2020.<sup>38</sup> Mr. Gutierrez then

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<sup>35</sup> Gutierrez Affidavit at paras 44-46 and 110; Responding Record dated March 9, 2021 at Tab A pages 20-21 and 49.

<sup>36</sup> Gutierrez Affidavit at para 110-111; Responding Record dated March 9, 2021 at Tab A page 49-50.

<sup>37</sup> Gutierrez Affidavit at para 112; Responding Record dated March 9, 2021 at Tab A pages 50.

<sup>38</sup> Gutierrez Affidavit at para 113; Responding Record dated March 9, 2021 at Tab A page 50.

engaged a computer expert who coordinated with the Receiver's expert to meet on January 5, 2021. During that process, Mr. Gutierrez noticed that the Receiver's IT consultants were using an @kroll.com domain, which caused grave concern because Kroll had surveilled Mr. Gutierrez's family for the Nephews. Mr. Gutierrez also recalled the previous theft of Xela's computer records and their improper use by the Nephews. The pattern of conduct exhibited by the Receiver amplified his concern.<sup>39</sup>

41. Noting that Paragraph 6 of the Consent Order bars the Receiver's agent from making any additional copies of the imaged personal devices or from accessing the data until after Mr. Gutierrez has had an opportunity to review and object to production, he concluded that using a lockable hard drive during the imaging was the only viable way to deliver his personal devices to the Receiver's agent in accordance with the Consent Order (even though Kroll was not the entity authorized by the Consent Order to perform the imaging), while continuing to protect the safety of the data until the Court could evaluate the circumstances. Mr. Gutierrez's counsel informed the Receiver's counsel of the decision, and on January 5, 2021, Mr. Gutierrez presented himself with his consultant at the offices of Duff & Phelps, where a different Kroll employee, Johan Dorado, performed the imaging onto a locked hard drive (over the objection of the Receiver's counsel). Mr. Gutierrez left the locked hard drive in Kroll's possession. Shortly thereafter, he signed the affidavit required by Paragraph 2 of the Consent Order.

42. Paragraph 8 of the Consent Order requires that Mr. Gutierrez permit all of the data to be uploaded to the Relativity document review platform; however, Paragraph 8 also contemplates such action only "at the request of the Receiver." Under the circumstances,

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<sup>39</sup> Gutierrez Affidavit at paras 113-115; Responding Record dated March 9, 2021 at Tab A pages 50-51.

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the Receiver has not articulated a valid basis for its request that Mr. Gutierrez be required to upload the data to a Relativity platform maintained by Kroll (or the Receiver's substitute consultant) at this stage.

43. First, there is no reason to grant potential access to anybody until Mr. Gutierrez and/or his counsel have had opportunity to review and object to production, as contemplated by Paragraph 10 of the Consent Order. The only limitation on Mr. Gutierrez's ability to conduct review at this stage is that he does not have a duplicate of the locked hard drive, which is required for him to identify documents by reference to the indexing on the hard drive in the possession of the Receiver's agent. Mr. Gutierrez has requested a duplicate, but the Receiver has refused, citing Paragraph 3 of the Consent Order giving the Receiver's agent the right to make "a single forensic image of each of the Devices." However, Paragraph 6 of the Consent Order prohibits the Receiver's agent from making additional copies or images of the devices or any of the data "except as necessary to comply with this Order." It does not bar Mr. Gutierrez from copying the image of his own devices. Mr. Gutierrez could already have begun his review of the data, but for the Receiver's refusal to provide a copy of the imaged drive.

44. Second, most if not all of the data on Mr. Gutierrez's personal devices is his own; it does not belong to Xela. Such data is not covered by the receivership, and some consideration should be given to Mr. Gutierrez's personal privacy.

45. Third, the data on Mr. Gutierrez's personal devices is confidential and sensitive, and might be subject to manipulation by creative lawyers in Panama and/or Guatemala. The Receiver's pattern of conduct suggests coordination with the Nephews, and the Receiver's billing records are replete with communications between the Receiver's

counsel and lawyers for both the Nephews and Margarita. Margarita has already shown that she cannot be trusted with documents that might potentially be used against LISA's interest in the dividends. Thus, there is some risk, minimal or not, that Mr. Gutierrez's personal data could find its way into the hands of the Nephews, even if the Consent Order expressly prohibits the Receiver's use of the data for any purpose other than the receivership.

46. Finally, the Receiver is not prejudiced by proceeding with the review of Mr. Gutierrez's personal electronic devices in the manner he is suggesting. Kroll has already performed forensic analysis of the devices sufficient to demonstrate that no irregular file deletion has occurred, and there is no exigency because the devices have been imaged and are currently in possession of the Receiver's agent. Thus, even if the Consent Order could be interpreted to call for the remedy demanded by the Receiver, there is ample reason under the circumstances to proceed with caution.

47. For these reasons, the Receiver's request for an Order compelling Mr. Gutierrez to unlock the imaged drive at this juncture and upload it to a Relativity platform managed by the Receiver's agent should be denied. Mr. Gutierrez and/or his lawyers should be permitted to conduct a review using a duplicate of the locked hard drive and to communicate objections to the Receiver based on the matching indexing of those two hard drives, and thereafter to perform the remaining requirements of the Consent Order.

**B. Whether the Receiver's Agent Should Be Permitted to Conduct Additional Forensic Analysis of Mr. Gutierrez's Personal Devices At This Stage to Evaluate Possible Deletion of Documents**

48. The Receiver contends that Mr. Gutierrez has violated the Consent Order by refusing to permit the Receiver to conduct further forensic analysis of Mr. Gutierrez's

personal devices. There is no valid basis for that claim, and the Receiver's request should be denied.

49. Before leaving the Duff & Phelps offices on January 5, 2021, Mr. Gutierrez permitted Kroll to conduct limited forensic analysis of the imaged drive, the results of which produced a list of all files that had been deleted from his personal devices. That report revealed that the deletion record was consistent with ordinary use of similar electronic devices, and that no suspicious activity was evident to suggest that Mr. Gutierrez had taken action to delete data in order to conceal information from the Receiver.<sup>40</sup>

50. Although the Receiver wishes to conduct more in-depth forensic analysis of Mr. Gutierrez's Personal Devices, Paragraph 7 of the Consent Order only contemplates such action "at the request of the Receiver." The Receiver, however, has not articulated any reasonable basis for such a request. There is no indication from the forensics already conducted by Kroll to suggest any suspicious activity or other reason to perform further analysis at this stage. There is, therefore, no basis for the Receiver's request to conduct further forensics into possible deletion of documents.

### **C. Whether ATS Should Be Required to Produce Mr. Gutierrez's Emails**

51. The Receiver has demanded all of Mr. Gutierrez' emails from ATS, whether or not they involve an @xela.com domain, and whether or not they exist on active ATS servers or inactive ones. The Receiver's motion should be denied.

52. The receivership applies only to the property of Xela, "acquired for, or used in

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<sup>40</sup> Gutierrez Affidavit at para 117-118; Responding Record dated March 9, 2021 at Tab A page 52.



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relation to a business carried on” by Xela. The Receiver is not appointed over Mr. Gutierrez. Here, Mr. Gutierrez’s emails are hosted on ATS servers. Therefore, *prima facie*, the emails do not constitute property of Xela. Further, as the emails are directed to Mr. Gutierrez, they are not Records within the meaning of Paragraph 5 of the Appointment Order unless they are related to the business affairs of Xela. Additionally, the fact that some emails may be addressed to Mr. Gutierrez using an @xela.com domain does not in itself alter the character of the data. No assumptions can be made about the nature and/or content of the communications without evaluating each communication individually to determine whether it constitutes Property or Records of Xela within the meaning of the Appointment Order.

53. Because the Receiver’s request demands all of Mr. Gutierrez’s emails, regardless of their domain name and/or whether they exist on active or inactive ATS servers, the demand necessarily includes communications unrelated to the conduct of Xela’s business, and is therefore overbroad. Accordingly, the request should be denied.

54. Even if the request were not overbroad (which it is), a record-by-record review of the data is required before it could be produced to the Receiver. That process would be burdensome and oppressive, and would involve extraordinary cost and expense, including translations from Spanish to English. Further, there is no rational relationship between the requested information and advancing the purpose of the Receivership. For all of these reasons, the Receiver’s request should be denied.

#### **D. Whether the Receiver's Powers Should Be Expanded**

- i. The requested expansion of powers is overbroad, not tailored, and would not benefit the receivership*

55. In *Weig v. Weig*, Justice Brown summarized principles concerning equitable receiverships, quoting liberally from the text Bennett on Receiverships.<sup>41</sup> The following remarks are directly applicable to the Receiver's request for expanded powers:

*Last, it is generally incumbent upon a creditor to show that some benefit will be gained by the appointment and that that benefit is sufficient to justify the making of an order. As a practical matter, the court reviews the amount of the debt owed to the creditor, the amount or amounts likely to be collected if a receiver were appointed, the type of asset that cannot be seized through legal execution, the nature of the debtor's interest, and the probable cost that will be incurred in the appointment of a receiver.*<sup>42</sup>

56. The Receiver has not met this burden. The outstanding portion of the Castillo Judgment approximates \$3.5 million, yet the Receiver has already incurred more than a million dollars in expenses without collecting any funds. Neither does the Receiver articulate how the requested expansion of powers would enhance the prospect of collecting LISA's dividends in the future.

57. The costs likely to be incurred by the Receiver if its powers are expanded could approach the amount remaining to satisfy the Castillo Judgment itself, especially if the requested discovery is granted and massive amounts of data must be reviewed and argued, including translations.

58. In *Akagi v Synergy Group (2000) Inc.*, Blair J. states that "in all cases, the

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<sup>41</sup>[\*Weig v Weig\*, 2012 ONSC 7262 at 19.](#)

<sup>42</sup>[\*Weig v Weig\*, 2012 ONSC 7262 at para 19](#)

investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends."<sup>43</sup>

59. Here, however, the requested expansion of powers is not limited or tailored. The Receiver does not articulate how they will assist in the satisfaction of the Castillo Judgment, nor are any restrictions contemplated that would protect Xela's interests. Rather, the requested expansion of powers seems directed at further investigation into the Reviewable Transactions, which are at best contingent and uncertain.

60. Even if the expanded powers requested by the Receiver could help establish some legal basis to set aside the Reviewable Transactions, such a result would not lead to the recovery of monies but would, at best, provide a viable cause of action which Margarita then might elect to pursue. In any event, legal action would be required in Barbados and/or Panama, yet the Receiver has not articulated a plan in that regard, nor has it submitted a legal opinion from counsel in either of those jurisdictions concerning the viability of the claims.

61. In Panama, the Reviewable Transactions relating to LISA's transfer of rights to the dividends to BDT is supported by consideration in the range of US\$50 million (in the form of extinguishing of the debt incurred by LISA to BDT to pursue its dividends). In Barbados, the Receiver has not explained how transfers to the ArtCarm Trust in 2016 could be actionable in light of the applicable statute of limitations. Other hurdles undoubtedly exist, and none have been addressed by the Receiver. For all these reasons, the requested

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<sup>43</sup> [\*Akagi v Synergy Group \(2000\) Inc.\*, 2015 ONCA 368 at 90 \("Akagi"\)](#).

expansion of powers should be rejected.

*ii. The requested expansion of powers is inappropriate in light of the Receiver's apparent bias and/or conflict of interest*

62. In *Loblaws Brands*, it was stated that in most cases the investigative receiver does not control the debtor's assets or operate its business as it is the Receiver's role to conduct an investigation, and allow the debtor to carry on business.<sup>44</sup> The entire purpose of receivership is to make it easier for a creditor to recover the funds owed to them, and it is not the receiver's role to significantly interfere with the debtor's interests.

63. In *Federal Trust Co. v Frisina*, Galligan J. provided that a Court appointed receiver-manager must be reasonably competent to perform the duties of a receiver, and they must be disinterested and impartial so as to be able to deal with the rights of all persons with an interest, in a fair and even-handed manner.<sup>45</sup> The Court refused to appoint the recommended receiver-manager because of the "...necessity of avoiding a real and reasonable apprehension that the receiver-manager might lack impartiality and disinterestedness..."<sup>46</sup>

64. In *Illidge (Trustee of) v St. James Securities Inc.*, Armstrong J. and the Ontario Court of Appeal considered *Federal Trust CO. v Frisina*, holding that the receiver's appointment by the applications judge should be set aside, as the receiver was in a conflict of interest, and the conflict was too pervasive for the receiver to take a limited role and avoid the conflict.<sup>47</sup>

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<sup>44</sup> *Loblaws Brands Limited v Thornton*, [2009] OJ No 1228 (ON SC) at 17.

<sup>45</sup> *Federal Trust Co. v Frisina*, [1976] 86 DLR (3d) 591 at 593 ("*Frisina*").

<sup>46</sup> *Frisina*, at 595.

<sup>47</sup> *Illidge (Trustee of) v St. James Securities Inc.*, [2002] OJ No 2174 at para 11.

65. In *Akagi*, it was stated that while there are positive features of investigative receivers, the receiver “took a useful concept and ran too far with it.”<sup>48</sup> The same could be said of the Receiver’s conduct in this case. The Receiver has demonstrated a pattern of behavior suggesting it is not sufficiently impartial to continue in its current role, much less to be granted more expansive powers. That pattern of conduct includes, without limitation, the Receiver’s: (a) lack of interest in the dividends; (b) ongoing communications with the Nephews; (c) objection to the LISA Loan; (d) conduct in Panama; (e) multiple contempt motions against Mr. Gutierrez; (f) focus on Reviewable Transactions that promise little if any actual monies; (g) inaccurate/incomplete reporting; (h) lack of interest in the Castillo Loan; (i) lack of interest in the Gadais Limited promissory note; (j) inordinate interest in personal data and emails of Mr. Gutierrez; (k) rejection of the BDT offer.

66. In light of the foregoing, any expansion of the Receiver’s investigative powers is not warranted and would only hinder the discharge of the debtor in this receivership. The Receiver’s conduct seems aligned with the interests of the Nephews, without any reasonable progress toward advancing the purpose of the receivership. Indeed, given the Receiver’s opposition to the LISA Loan, the Receiver’s conduct seems to favor preservation of the receivership rather than satisfaction of the Castillo Judgment. After the LISA Loan was withdrawn, the receivership costs and expenses skyrocketed, as the Receiver launched a raft of expensive and onerous discovery directed at Mr. Gutierrez and his family. For all of these reasons, the Receiver’s request for additional powers should be denied.

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<sup>48</sup> [\*Akagi\*, at 93.](#)

### **E. Whether the Receiver's Fees Should be Approved**

67. In assessing the reasonableness of the Receiver's fees, Courts will consider time spent, however, the value provided should be the predominant factor. The focus of the reasonableness assessment should look to what the Receiver and their counsel accomplished, not how long it took them.<sup>49</sup>

68. Receivers are intended to take a neutral position as an officer of the court and are to maintain that neutral position. They are to avoid becoming a litigant for the cause. If a Receiver has become a litigant, it is subject to the "loser pays" costs regime that applies in Ontario.<sup>50</sup> In *Akagi*, the Receiver was held personally liable for costs based on their misconception of the role of a Receiver and the actions they took as a litigator.

69. The general rule is that a receiver litigates at their own peril, and there is no source of indemnity available to them. It would be unfair to deny a successful defendant the fruits of their labour just because the Receiver pursued litigation without assuming any liability.<sup>51</sup>

70. In July 2019 when the Appointment Order was issued, the judgement debt approximated \$3.5 million, and the Receiver has already incurred more than \$1 million in fees and expenses without making any significant progress toward collecting monies to satisfy the Castillo Judgment. The Receiver cannot blame Mr. Gutierrez or any other person for that shortcoming; more than 20 months into the receivership, the Receiver has taken no steps to be recognized in any foreign jurisdiction, despite express authorization

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<sup>49</sup> *Bank of Nova Scotia v Diemer*, 2014 ONCA 851, at 45.

<sup>50</sup> *Akagi v Synergy Group (2000) Inc.*, 2015 ONCA 771, at 19.

<sup>51</sup> *Hunert-Faga v Faga*, 2013 ONSC 1581 at 12-16.

to do so, in Paragraph 31 of the Appointment Order.

71. Further, the bulk of the subject fees were incurred after the Receiver's actions in Panama caused the lender to withdraw the LISA Loan. It is likely, therefore, that most of the fees could have been avoided.

72. While the Receiver states that it has encountered numerous complications that it claims are a result of a lack of assistance from Mr. Gutierrez, his sons, ATS or any of Xela's subsidiaries, the Receiver has taken numerous unnecessary and costly steps that are beyond the scope of this receivership that have dramatically increased the costs of the receivership.

73. Among other things, the Receiver brought two contempt motions against Mr. Gutierrez. The first was adjourned *sine die*. The second was based on, at worst, an inadvertent violation of the Appointment Order. Mr. Gutierrez complied with the Court's subsequent instructions to withdraw his sworn statement in Panama. It was only when LISA's president refused to withdraw the criminal complaint that the Receiver brought the second contempt motion. Mr. Gutierrez, however, is not responsible for the conduct of persons or entities over which he has no control.

74. Further, both contempt motions were based on conduct of third parties stemming from the Receiver's own decision to take action in Panama without first seeking recognition in that country.

75. Moreover, it is questionable whether the Receiver's decision to try to replace the Gabinvest board is an appropriate exercise of the Receiver's powers. Issues also arise concerning whether the new directors designated by the Receiver could or should follow

the instruction of the Receiver, who has no jurisdiction in Panama, or whether their duties as directors would require them to protect the interests of the foreign subsidiaries. A director owes a duty to the corporation it represents, not to the shareholder(s) of that corporation; the shareholder may be entitled to financial statements and to appoint directors, but it cannot control the company's operations.

76. Additionally, the Receiver appears to be coordinating with the Nephews. The interest of the Nephews is to force Mr. Gutierrez and his family to exhaust financial resources that might be used to pursue recovery of LISA's dividends. This is precisely what the receivership has accomplished, without any progress toward recovering actual monies to satisfy the Castillo Judgment.

77. In light of the foregoing, serious questions arise concerning the reasonableness of the fees incurred by the Receiver. Accordingly, the Receiver's request for approval of its fees should be denied. In the alternative, the assessment of fees should be directed to a reference.

#### **IV. ORDER REQUESTED**

78. The Receiver's motion should be denied in its entirety.

79. In the alternative, the assessment of fees should be directed to a reference.

80. An Order should issue for costs payable by the Receiver to Mr. Gutierrez.

81. Such further and other relief as this Honourable Court may permit.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of March, 2021.



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March 18, 2021

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

1. *Weig v Weig*, 2012 ONSC 7262
2. *Akagi v Synergy Group (2000) Inc.*, 2015 ONCA 368.
3. *Loblaws Brands Limited v Thornton*, [2009] OJ No 1228 (ON SC).
4. *Federal Trust Co. v Frisina*, [1976] 86 DLR (3d) 591.
5. *Illidge (Trustee of) v St. James Securities Inc.*, [2002] OJ No 2174.
6. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851.
7. *Akagi v Synergy Group (2000) Inc.*, 2015 ONCA 771.
8. *Hunert-Faga v Faga*, 2013 ONSC 1581.

**SCHEDULE "B"**

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

## ANNEX “A”

## INACCURACIES IN THE RECEIVER’S REPORTS

Source of Inaccurate statement	Inaccurate Statement	Clarification
<b>Fourth Report of the Receiver dated January 18, 2021 (“Fourth Report”)<sup>52</sup>– Page 26, 1.3 (Overview) Paragraph 1</b>	The Receivership has been frustrated by Juan Guillermo	<p>Juan has complied with each and every request of the receiver. Juan has provided all physical files and answered all questions the Receiver has asked. Juan asked the Receiver what information the Receiver wanted. The Receiver said everything and Juan gave him everything.<sup>53</sup></p> <p>Juan requested, on several occasions, to meet with the receiver, however, the receiver refused to meet.<sup>54</sup></p> <p>Receiver’s primary focus has been on investigating Juan, personally.</p>
<b>Fourth Report – Page 26, 1.3 (Overview) para 3</b>	The Receiver identified two Reviewable Transactions (as defined below) and a third transaction, the Lisa Transfer (also defined below). Each transaction was prejudicial to the Company and serves no business purpose other than to benefit entities formerly owned by the Company.	<p>Juan had no role with respect to these transactions. Juan has responded and delivered to the Receiver what he has in his possession.</p> <p>The Lisa Transfer was made in satisfaction of debt to BDT in the total amount of approximately US\$50 million, more than US\$19 million of which had been reduced to judgment in Panama.<sup>55</sup></p>
<b>Fourth Report – page 26, 1.3 para 4(a)(i)(iv)</b>	Juan Guillermo has delayed the delivery of images of his electronic device notwithstanding the October 27, 2020 Order.	Around the time of the October 27, 2020 Order, Juan learned that his mother-in-law’s health condition was deteriorating. Juan flew to Guatemala because of his mother-in-law’s condition. Juan’s lawyers kept the Receiver informed and/or updated. Upon his return, Juan was subjected to 14 day Quarantine. However,

<sup>52</sup>Motion Record of the Receiver (Investigative Powers & Recognition Order) Tab 2

<sup>53</sup>Cross-examination of Juan Guillermo Gutierrez at pg. 67 qq 167

<sup>54</sup>Cross-examination of Juan Guillermo Gutierrez at pg. 146-147 qq. 400

<sup>55</sup>The Leamington Judgment, Affidavit of Juan Guillermo Gutierrez dated March 22, 2020 at Exhibit “A”

		after his quarantine, Juan made the devices available to the parties as soon as the IT experts were available. <sup>56</sup>
<b>Fourth Report – page 26-27, 1.3 para 4(a)(i)(iv)(v)</b>	Juan Guillermo has refused to permit the Receiver's agent to image his devices in accordance with the October 27, 2020 Order, which he ultimately provided to the Receiver on January 5, 2021 for that purpose.	<p>Imaging was conducted in accordance with protocols as Juan understood them. The Receiver failed and/or refused to disclose to the court and the parties that Kroll was a subsidiary of D&amp;P and that imaging would be subcontracted and conducted to Kroll. Kroll has previously followed Juan's family (including Juan's minor children who were photographed) and surveilled his home.<sup>57</sup> Juan did not know about Kroll's involvement until the appointment was made with the experts and he realized that the experts emails were kroll.com.<sup>58</sup> Kroll's prior involvement in the history of these proceedings, demonstrates a clear conflict of interest</p> <p>Juan has complied with Court Orders to the best of his abilities. As evidenced by the Receiver's motion to replace D&amp;P<sup>59</sup> there is a live issue with respect to conflict of interest and therefore, disclosure of imaging in the face of a conflict would be impractical and potentially detrimental to Juan. Kroll has previously Surveilled Juan's family and property.<sup>60</sup> Juan served a notice of motion to vary the October 27, 2020 motion to address these issues. That motion has not yet been scheduled.</p>
<b>Fourth Report, page 31, 2.4 (The Investigation of the Reviewable Transaction) para 10</b>		The Reviewable Transaction was not completed by Juan. This transaction was enacted by Juan's father without any input from Juan. Juan did not benefit from this transaction.
<b>Fourth Report, page 44, 4.2 (Juan Guillermo's Relationship with ATS and the Company subsidiaries and Former</b>	Mr. Korol's Answers, given under oath, about Juan Guillermo's knowledge and access to information, demonstrate to the Receiver that Juan Guillermo is withholding information from the Receiver, that he is	<p>Mr. Korol confirmed that Juan does not have a role in ATS. In addition, Mr. Korol confirmed that Juan did not have a role in PAICA, BDT, Inversiones and Arven.<sup>61</sup></p> <p>Mr. Korol was asked by the receiver to speculate regarding how LISA would act (even though he is not an officer or director of LISA:</p>

<sup>56</sup>Gutierrez Affidavit at paras 112-117, Responding Record at pgs 50-52

<sup>57</sup>Gutierrez Affidavit at para 19, Responding Record at pgs 9-10

<sup>58</sup>Cross-examination of Juan Guillermo Gutierrez at pg. 36 qq 90

<sup>59</sup>Supplementary Motion Record of the Receiver (Substitution of Forensic Expert) dated February 1, 2021

<sup>60</sup>Gutierrez Affidavit at para 19, Responding Record dated March 9, 2021 at pgs 9-10

<sup>61</sup>Fourth Report, page 43 at para 6, Motion Record of the Receiver Tab 2

<b>Subsidiaries) para 10</b>	involved with ATS, that he has knowledge of BDT, Arven and PAICA, and that he is extensively involved in the Avicola Litigation.	“Q. But wouldn’t you expect that if Juan Guillermo had any question about the activities of Lisa as a shareholder of Xela that he would be provided those answers by Members of the Board or Management of Lisa? a.. “Yes, I – I would – I would expect that.” <sup>62</sup>
<b>Fourth Report – Conduct of Juan Guillermo, page 48, 6.0 (Conduct of Juan Guillermo)</b>	The October 27, 2020 Order sets out a specific protocol for imaging and review of the devices. Contrary to the terms of the Order, Cambridge insisted that the resulting image be locked with a password retained by Juan Guillermo. Cambridge LLP does not agree that data can be uploaded to the relativity platform or that a deletion analysis can be undertaken in the manner set out in the October 27, 2020 Order.	Juan’s mother-in-law was critically ill. Juan flew to Guatemala after his mother-in-law became critically ill. Juan’s lawyers kept the Receiver updated with respect to Juan’s circumstances. Juan’s mother-in-law ultimately passed away. <sup>63</sup>  As indicated above, Juan’s motion to vary the order has not been scheduled. The motion requests an order varying the order dated October 27, 2020, due to the subsequent discovery that Kroll would be involved in the imaging process and extensive communication between Receiver and the Cousins who are an adverse party.
<b>Fourth Report, page 54, 9.0 (Recognition Order)</b>	As a result of the lack of assistance from the non-Hatstone board members of Gabinvest and Lisa, and the inability to obtain information from the former resident agent, ARFA, together with continued interference and threats from various parties, the Receiver, as Court-appointed representative of the company, has not been able to exercise its authority as shareholder (or ultimate shareholder in the case of Lisa) of	Despite the Appointment Order of July 2019 that gave the Receiver the power to seek recognition of the Appointment Order, the Receiver has not taken any steps, until now, to seek recognition of the Appointment Order. <sup>64</sup>  An order for recognition should have been sought from the outset. At the very least, the order should have been sought before the Receiver attempted to take significant steps like changing the composition of the Board of a foreign entity.

<sup>62</sup>Fourth Report, page 43-44 at para 7

<sup>63</sup>Gutierrez Affidavit at paras 113-117; Responding Record dated March 9, 2021 at pgs 50-52

<sup>64</sup>Gutierrez Affidavit at para 1; Responding Record dated March 9, 2021 at pg 1

	each company and obtain the information it requires.	
<b>Fourth Report, page 55, 10.0 Lisa's Dividends, para 3</b>	"After approximately 22 years of litigation, the Receiver understands that Juan Guillermo, Hals and those directing Lisa have never been successful in obtaining any of the dividends payable to LISA arising from tis Avicola Interest or the Avicola Litigation	Contrary to the Receiver's statement, LISA secured the Leamington Judgment in Bermuda in 2008, pursuant to which the Avicola Group paid approximately US\$1.94 million plus pre and post-judgment interest. <sup>65</sup> Thereafter, the cousins sought to negotiate in order to resolve the issues. These negotiations were derailed by Margarita, who began to work with the cousins and ultimately sued Xela and the family. <sup>66</sup>
<b>Fourth Report, page 56, 12.0 (Conclusions and Recommendations)</b>	<p>Through the Reviewable Transactions and the Lisa Transfer, Juan Guillermo has caused the company to be stripped of essentially all of its business, assets and cash flow to the detriment of the Company's creditors</p> <p>The Reviewable Transactions and the Lisa Transfer have no purpose other than to defeat the company's creditors for the benefit of Juan Guillermo and the beneficiaries of the Trust, his children.</p> <p>Juan Guillermo, Thomas and Andres have caused the Trust, BDT and Arven to fail to respond to the Receiver's questions by</p>	<p>Juan has not stripped the company of essentially all of its business, assets and cash flow to the detriment of the Company's creditors.</p> <p>The Lisa Transfer did not benefit Juan and/or his family. The Transfer was made in satisfaction of debt to BDT in the total amount of approximately US\$50 million, more than US\$19 million of which had been reduced to judgment in Panama.<sup>67</sup></p> <p>Juan has been cooperative with the Receiver and has offered to have meetings with the Receiver. Juan cannot provide information that he does not have. The Receiver highlights family relations to support his position that Juan has influence over his brother in law (Hals) and other family members, however, omits the fact that the Judgment Debt arises out of litigation between Juan and his sister.<sup>68</sup> In addition, the receiver fails to acknowledge the adversarial role of the cousins (also family members).</p> <p>Juan has not intimidated and/or threatened the Receiver's counsel. The Receiver's counsel has not been intimidated.</p>

<sup>65</sup>The Leamington Judgment, Affidavit of Juan Guillermo Gutierrez dated March 22, 2020 at Exhibit "A"

<sup>66</sup>Gutierrez Affidavit at paras 31 and 33, Responding Record dated March 9, 2021 at pg 16

<sup>67</sup>Gutierrez Affidavit at para 27, Responding Record dated March 9, 2021 at pg 13-14; Affidavit of Andres Gutierrez dated February 22, 2021

<sup>68</sup>Gutierrez affidavit at para 11; Responding Record dated March 9, 2020 at pg 6

	hiding behind the foreign jurisdiction of these entities.	The Receiver's conclusions are not accurate and are not supported by evidence.
<b>Third Supplement to the Fourth Report of the Receiver dated March 1, 2021 ("Third Supplement to the Fourth Report") at page 4, 2.0 (Response to the Juan Guillermo Affidavit) para 1</b>	At paragraph 19 of the Juan Guillermo Affidavit, Juan Guillermo implies that the Receiver may be surveilling him and his personal residence. The receiver confirms that it is neither surveilling Juan Guillermo nor his house	Juan's Affidavit does not imply that the Receiver is surveilling Juan's home. The Affidavit states clearly that Kroll surveilled Juan's home and his family in the past. <sup>69</sup>
<b>Third Supplement to the Fourth Report at pg 4, 2.0 (Response to the Juan Guillermo Affidavit) para 2</b>	Receiver has had 'infrequent' discussions with Stikeman Elliott LLP, counsel to the Cousins, concerning these proceedings.	<p>There are a number of references to conference calls and/or correspondence (regarding status updates and requests for information) with the lawyers of Stikeman Elliott. The calls are more than incidental.<sup>70</sup> It is impossible to determine the extent of interaction between Lenczner Slaght Royce Smith Griffin LLP since all of their dockets are redacted.</p> <p>The Avicola group owes millions of dollars in dividends to a subsidiary of Xela. Judgments have been obtained against the Avicola Group.<sup>71</sup></p> <p>None of the four Receiver's reports contain information regarding correspondence with the cousins (Nephews) and any steps taken to collect dividends from the Avicola Group. The Avicola Group owes LISA roughly \$400 million in unpaid dividends.<sup>72</sup></p> <p>A Judgment was obtained against the cousins ("Leamington Judgment") finding that they participated in, <i>inter alia</i>, money laundering, defrauding tax authorities.<sup>73</sup></p>

<sup>69</sup>Affidavit of Juan Guillermo Gutierrez at para 19

<sup>70</sup>Gutierrez Affidavit at Exhibit 1, Responding Record dated March 9, 2021 at pgs, 61, 66, 67, 71, 72, 80, 108, 110, 113, 119, 121, 122

<sup>71</sup>Gutierrez Affidavit at paras 23-28 and 35, Responding Record dated March 9, 2021 at pgs 12-15 and 17

<sup>72</sup>Gutierrez Affidavit at para 23, Responding Record dated March 9, 2021 at pgs 12

<sup>73</sup>Gutierrez Affidavit at para 28, Responding Record dated March 9, 2021 at pgs 14 and 15



		The receiver has not made any comments in any of its reports about these judgments and any efforts to collect from the Avicola Group/Cousins. The Receiver should be transparent with respect to his communications with Stikeman Elliott. There should be no reason to hide any information from the court and the parties to this proceed, especially in light of the fact that the cousins are adverse parties.
<b>Third Supplement to the Fourth Report at pg 4, 2.0 (Response to the Juan Guillermo Affidavit) para 3.</b>	At paragraph 117 of the Juan Guillermo Affidavit, Juan Guillermo says that the Receiver's agent, Duff & Phelps ("D&P"), performed a deletion analysis and that there was "no suspicious activity". This is not true.	In cross-examinations, Juan Guillermo stated as follows:  <i>"The two experts, the Kroll expert, Mr. Johan – I forget his last name, sorry – and my expert, both of them, after the images were completed and before the drive was encrypted, they conducted, I don't know, I'm not an expert so I can't tell you exactly what its called. But they conducted forensic work to determine if there were any substantial or out of normal deletions on the files. They spend a long time doing so. And they finished, both of them took photographs of the --- or screen shots of the computer that was used for the imaging. And when both of them were satisfied and they both agreed there was no substantial – nothing was deleted that was not out of the ordinary or anything out of the ordinary was done to the devices."</i> <sup>74</sup>  Juan's statement was correct.
<b>Third Supplement to the Fourth Report at pg 5, 4.0 (Update on Panama Criminal Proceeding, para 4</b>	Juan Guillermo's letter addressed to the prosecutor's office in Panama did not ask the Prosecutor's Office to withdraw the Criminal Complaint.	The Order of Justice McEwen did not require Juan to request the prosecutor to withdraw the complaint. <sup>75</sup> Juan does not have authority to request the withdraw of the criminal complaint as Juan did not initiate the criminal complaint/proceeding.  The Order of Justice McEwen states at paragraph 6 that "Juan Guillermo Gutierrez, shall, by 5 p.m. on Thursday, February 11, 2021: (b) provide the public prosecutor's office in Panama with the Withdrawal Affirmation; (b) provide a copy of this Order to the public prosecutor's office in Panama." <sup>76</sup>  Juan complied with the Order of Justice McEwen. Among other things, Juan sent a letter to the Prosecutor asking the prosecutor to withdraw his Affidavit and included a copy of the Order of Justice McEwen dated February 10, 2021 in that correspondence. <sup>77</sup>

<sup>74</sup>Transcript of the Cross-examination of Juan Guillermo Gutierrez at pg. 47-48, qq. 117

<sup>75</sup>Order of Justice McEwen dated February 10, 2021; Second Supplementary Motion Record of the Receiver at pages 12-16

<sup>76</sup> Order of Justice McEwen dated February 10, 2021; Second Supplemental Motion Record of the Receiver at pages 12-16

<sup>77</sup>Affidavit of Juan Guillermo Gutierrez dated February 12, 2021; Second Supplementary Motion Record of the Receiver at page 9 and 10

MARGARITA CASTILLO  
Applicant

-and-

XELA ENTERPRISES LTD. et al.  
Respondents

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

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF THE RESPONDENT, JUAN GUILLERMO  
GUTIERREZ**

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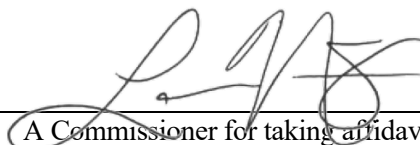
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Juan Guillermo Gutierrez

This is **Exhibit "I"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line. The signature is stylized and cursive.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

p)

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

**NOTICE OF MOTION  
[Injunctive Relief]**

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

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

By video conference.

at the following location

**THE MOTION IS FOR**

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

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

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

**THE GROUNDS FOR THE MOTION ARE:**

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

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

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- 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
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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**”);
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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
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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.
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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

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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

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MARGARITA CASTILLO  
Applicant

-and- XELA ENTERPRISES LTD. et al.  
Respondents

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**NOTICE OF MOTION**

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Lawyers for the Respondent  
Juan Guillermo Gutierrez

a)

This is **Exhibit "J"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

**NOTICE OF MOTION**

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

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

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

**THE MOTION IS FOR**

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

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

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

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

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

### ***The Production Orders***

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

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

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

***Events Giving Rise to Heightened Concerns***

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

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

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



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

***March 25, 2022 Case Conference***

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

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

***Leave to Appeal***

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

***Need for a Stay***

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

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

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

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

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the

Motion:

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

**March 28, 2022**

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Moyorga



**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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TORONTO**

**NOTICE OF MOTION**

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**Lawyers for the Respondent**

This is **Exhibit "K"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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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MARGARITA CASTILLO  
Applicant

-and- XELA ENTERPRISES LTD. et al.  
Respondents

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

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

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**NOTICE OF MOTION FOR LEAVE TO APPEAL**

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Lawyers for the Respondent  
Juan Guillermo Gutierrez

This is **Exhibit "L"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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**From:** Chris Macleod <cmacleod@cambridgellp.com>  
**Sent:** April 13, 2022 5:43 PM  
**To:** Monique Jilesen; Derek Knoke  
**Cc:** Joan Kasozi; Brian Greenspan  
**Subject:** Xela Exchange Server

**EXTERNAL MESSAGE**

Monique:

We understand from counsel for ATS that the Receiver and/or its agent(s) intend to access data on the Xela Exchange Server, to which we object in the strongest possible terms. The Xela Exchange Server will contain Mr. Gutierrez's emails that are personal, privileged or otherwise not properly discoverable by the Receiver, and that are at least in part duplicative of data on the Personal Devices and the ATS Server Emails, and for which privilege has not been waived and to which the Objections Protocol should apply. The data on the Xela Exchange Server must be given the same level of safety consideration applicable to the Personal Devices and the ATS Server Emails. Moreover, as you know, the issue of access to the Personal Devices and the ATS Server Emails is presently under review, further to our Motion for Leave to Appeal. There is nothing to suggest that the Receiver would take appropriate steps to preserve Mr. Gutierrez's privacy and confidentiality, and the Receiver must not have unfettered access to the Xela Exchange Server while these issues are unresolved. Any decision to access the data under these circumstances would, in our view, suggest intentional misconduct.

Regards,

**Chris Macleod**

Partner, Cross-Border Litigation & Business Litigation Groups

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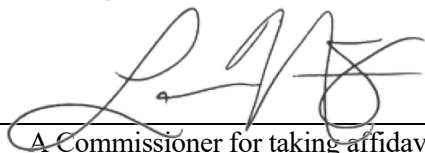
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This is **Exhibit "M"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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**

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;

-2-

[ X ] By video conference.

at the following location:330 University Avenue, Toronto, Ontario

**THE MOTION IS FOR:**

- a) An Order varying the appointment Order dated July 5, 2019 (the “**Appointment Order**”) to substitute Albert Gelman Inc. in place of KSV Restructuring Inc. (“**KSV**”) as receiver;
- b) An Order for costs in favor of Mr. Gutierrez, payable on a priority basis over the Applicant from funds collected by the receivership; and
- c) such further and other relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

- d) Pursuant to the Appointment Order, KSV was appointed receiver and manager over Xela Enterprises Ltd. (“**Xela**”) pursuant to the *Courts of Justice Act* to enforce a judgment dated October 28, 2015 (the “**Castillo Judgment**”), and a series of outstanding costs orders, in favour of the Applicant, Margarita Castillo (“**Ms. Castillo**”);
- e) Mr. Gutierrez is also a judgment debtor pursuant to the Castillo Judgment and the sole shareholder of Xela;
- f) At the time of the Appointment Order, approximately \$1.568 million had been paid against the Castillo Judgment – all from the liquidation of Mr. Gutierrez’s personal assets – and approximately \$4 million remained outstanding in respect of the Castillo Judgment;
- g) In its First Report to the Court dated October 17, 2019, KSV reported that Xela’s most

-3-

significant asset was its indirect one-third interest in certain businesses in Central America, referred to as the “Avicola Group,” and which was the subject of multi-year, multi-jurisdictional litigation relating to shareholder disputes (the “**Avicola Litigation**”);

h) KSV further reported that it was investigating certain transactions that it alleged had the effect of transferring the potential value of the Avicola Litigation to third parties (referred to as the “**EAI Transaction**” and the “**Assignment Transaction**”);

i) The EAI Transaction occurred in April 2016 and relates to the transfer by a Barbados corporation (EAI) of shares in two other Barbados corporations – BDT Investments Inc. (“**BDT**”) and Corporacion ARVEN Limited – to Mr. Gutierrez’ father, Juan Arturo Gutierrez (now deceased) (“**Arturo**”), and then subsequently to a Barbados trust, the ARTCARM Trust, as part of Arturo’s estate planning.

j) The Assignment Transaction occurred in January 2018 and describes a transaction between a Panamanian corporation, LISA S.A. (“**LISA**”), assigning its interest in the Avicola Litigation to BDT in consideration for BDT’s past and continued funding of the Avicola Litigation;

k) Xela was not a party to the EAI Transaction nor the Assignment Transaction, both of which involved foreign corporations;

l) A mutual lack of trust has developed between Mr. Gutierrez and KSV that has infected the proceedings. As a practical matter, it has become impossible under KSV’s authority to achieve the objective of the receivership, which is to satisfy the Castillo Judgment.

m) Mr. Gutierrez asserts that KSV has failed to act objectively and in good faith to seek satisfaction of the Castillo Judgment but has engaged in a fishing expedition in coordination

-4-

with Mr. Gutierrez's cousins (the "**Cousins**") – with whom Mr. Gutierrez and his family have been embroiled in highly contentious multi-jurisdictional Avicola Litigation for more than twenty years – that has no nexus to the potential receipt of funds and instead appears designed solely to inflict financial injury on Mr. Gutierrez.

n) During meetings with Mr. Gutierrez in the early days of the receivership, KSV's Bobby Kofman explicitly refused to discuss the only monies realistically available to satisfy the Castillo Judgment, which are the claims for an estimated US\$400 million in dividends improperly withheld by the Cousins from LISA, an indirect Panamanian subsidiary of Xela. After more than three years as receiver, KSV has yet to articulate a plan to address collection of the unpaid dividends but has rejected multiple requests by Mr. Gutierrez to discuss a coordinated, cooperative approach.

o) KSV has engaged in numerous regular discussions with the Cousins throughout the course of the receivership without disclosing the nature of those communications. Mr. Gutierrez became aware of the coordination between KSV's lawyers and the Cousins' lawyers solely as a result of billing records submitted by KSV to this Court for approval. Despite inquiries from Mr. Gutierrez, KSV refuses to disclose the content of or reasoning behind those discussions.

p) Rather than pursue the dividends withheld by the Cousins from LISA, KSV has focused exclusively on certain "reviewable transactions" that, even if reversed, would have no bearing on the potential collection of funds. Although KSV has already incurred more than a million dollars in professional fees investigating those transactions, it has not collected a single dollar in the receivership.

q) Conversely, KSV has taken no steps to collect an unpaid \$400,000 promissory note in favor



of Xela from a company owned by Ms. Castillo's husband. Neither has KSV investigated the evidence supplied by Mr. Gutierrez suggesting that Ms. Castillo received the full benefit of a US\$4.35 million loan in 2010 that was repaid with LISA dividends wrongfully pledged as collateral by the Cousins, effectively satisfying the Castillo Judgment.

r) KSV's official reports are riddled with inaccurate and/or incomplete statements and omissions, unfairly casting Mr. Gutierrez as uncooperative and giving little if any consideration to Mr. Gutierrez's legal rights. Although Mr. Gutierrez has corrected the record repeatedly with both sworn testimony and documentary evidence, KSV has not amended its reports accordingly. Further, KSV has made of practice of making sensitive documents public, seemingly without reason. For example, KSV recently posted on its website a copy of a SWIFT electronic funds transfer confirmation that contained personal information belonging to a Russian third-party lender who was transferring funds to Mr. Gutierrez's counsel to satisfy the Castillo Judgment. Those funds were subsequently held up by the U.S.-based intermediary bank identified in the SWIFT, further preventing satisfaction of the Castillo Judgment.

s) KSV has abused its broad discovery powers in search of documents potentially useful to the Cousins. Most notably, under the premise that it required additional information to review the transactions, KSV continued to insist on access to all of Mr. Gutierrez's emails and his personal electronic devices in a manner not available to ordinary civil litigants. Yet without advising the Court or the stakeholders, KSV had already commenced a civil claim in Ontario against Mr. Gutierrez and his family relating to the same "reviewable transactions" under investigation by KSV in the receivership. Consequently, KSV has now exposed highly confidential and personal information belonging to Mr. Gutierrez – not to Xela – to the risk of security breach, knowing that Xela's entire electronic database had been stolen and delivered

-6-

to the Cousins at least once before.

t) KSV has articulated no potential nexus between information in Mr. Gutierrez's emails/personal devices and the collection of funds. KSV's efforts to obtain the information over the last three years has been grossly disproportionate to any potential relevance of the evidence expected to be contained therein. The data uploaded to an electronic database maintained by KSV's agent constitute more than 60 gigabytes and hundreds of thousands of separate emails spanning more than 20 years. Proper review calls for a massive outlay of time and resources in the days ahead – all of which will undoubtedly be charged to Mr. Gutierrez, who has already lost all his personal assets to Ms. Castillo, including his family home and his ability to support his aging mother in Toronto, who receives no financial assistance from her daughter Ms. Castillo.

u) KSV took possession of all of Xela's physical documents without cataloguing them, creating unnecessary chain-of-custody concerns. KSV subsequently refused to address tax issues of certain Xela subsidiaries whose documents were seized by KSV.

v) In 2019, LISA secured a third-party loan commitment that would have satisfied the Castillo Judgement and all receivership expenses (the "**LISA Loan**"). KSV objected to the Lisa Loan on the ground that it could not evaluate the impact of the loan on the remaining Xela creditors (*i.e.*, other than Ms. Castillo). KSV has never explained the logic of that reasoning considering Paragraph 25 of the Appointment Order, which places the onus on Ms. Castillo to argue that the Receiver should not be discharged even if the Castillo Judgment were satisfied.

w) More importantly, in response to LISA's disclosure of the LISA Loan and its request for a payoff amount, the Receiver intentionally interfered with the loan and prevented its funding.

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Even while KSV's lawyers were in discussions with LISA's lawyers concerning the LISA Loan, KSV quietly hired the Hatstone law firm in Panama ("**Hatstone**") and instructed it to take over LISA without first going through the process of seeking recognition in Panama consistent with Paragraph 30 of the Appointment Order. In order to achieve that objective, Hatstone filed an official public writing with the Panamanian corporate registry falsely representing that Gabinvest, S.A. ("**Gabinvest**"), LISA's parent company, had properly notified and conducted a shareholder meeting in Panama during which the Gabinvest board of directors was ostensibly reconstituted to give Hatstone representatives control. The public writing filed by Hatstone made no reference: (1) to Xela; (2) to KSV; (3) to the fact that – at least in Ontario, Canada – KSV had replaced Mr. Gutierrez as the acting shareholder of Xela; or (4) to the fact that the Appointment Order had not been recognized in Panama, and that KSV's authority to act as Xela's sole shareholder therefore did not extend to Panama.

x) Thereafter, Hatstone sought to cause Gabinvest to reconstitute the LISA board of directors to give Hatstone control of LISA. The scheme was uncovered by LISA's and Gabinvest's Panamanian lawyers before the changes could take effect. Still, the public controversy over LISA's board caused the third-party funder to withdraw its loan commitment. Consequently, Mr. Gutierrez was prevented from satisfying the Castillo Judgment and bringing a motion to discharge the receivership, and KSV's onerous investigation into the "reviewable transactions" took on new life and continues to the present.

y) As the Court knows, Hatstone is now facing criminal charges in Panama stemming from the misconduct. In the process, Mr. Gutierrez – still the only Xela shareholder recognized in Panama – truthfully affirmed that he had not participated in the Gabinvest shareholder meeting alleged by Hatstone. In response, this Court ordered Mr. Gutierrez to withdraw his affirmation

and to direct LISA to withdraw the criminal complaint in Panama, which he did. However, LISA declined on the ground that it was under a legal obligation in Panama to report criminal activity, and the prosecution against Hatstone continues.

z) KSV has never acknowledged its own misconduct in Panama. Instead, in apparent retaliation for the outcome in that country, KSV sought a finding of criminal contempt and incarceration against Mr. Gutierrez, which was heard before Justice Conway on May 30/31 and June 2, 2022. Although Justice Conway (erroneously) concluded that Mr. Gutierrez was liable in civil contempt, she found that he had not engaged in criminal conduct. However, sentencing is pending, and the potential injury to Mr. Gutierrez is still unknown.

aa) Although KSV failed to give Hatstone a power of attorney as required under Panama law, creating the appearance that Hatstone was acting alone, Mr. Kofman has admitted under oath that KSV instructed Hatstone. Consequently, KSV and/or Mr. Kofman may themselves be exposed to potential criminal prosecution in Panama, exacerbating the conflict between KSV and Mr. Gutierrez. KSV should not continue to act as an Officer of the Court in a receivership where KSV and/or its principal may be charged criminally in connection with the conduct of the same receivership.

bb) The foregoing developments have created serious tensions and a mutual lack of trust between KSV and Mr. Gutierrez. There is a conflict of interest – or, at the very least, an appearance of conflict – with respect to KSV’s mandate as receiver given the undisclosed relationship with the Cousins, the potential for criminal sanctions in Panama, and the singular focus on Mr. Gutierrez’s personal emails and data. Under these circumstances, Mr. Gutierrez has found it challenging to fulfill his responsibilities under the Appointment Order while

safeguarding his own legal rights. All parties would seemingly benefit from a new receiver.

cc) Albert Gelman Inc. is a licensed insolvency trustee with extensive experience under similar mandates and has agreed to act, subject to satisfactory payment terms.

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

dd) Affidavit of Juan Guillermo Gutierrez to be sworn; and

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

September 12, 2022

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-10-

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MARGARITA CASTILLO  
Applicant

-and-

XELA ENTERPRISES LTD. et al.  
Respondents

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**NOTICE OF MOTION**

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Lawyers for the Respondent  
Juan Guillermo Gutierrez



This is **Exhibit "N"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

## PRELIMINARY SEARCH RESULTS ACROSS ALL COUNTIES IN ONTARIO FOR ANY PROPERTY OWNED BY JUAN GUILLERMO GUTIERREZ

**NO HITS IN:** ALGOMA, BRANT, BRUCE, COCHRANE, DUFFERIN, DUNDAS, DURHAM, ELGIN, ESSEX, FRONTENAC, GLENGARRY, GRENVILLE, GREY, HALDIMAND, HALIBURTON, HALTON COUNTY, HASTINGS, HURON, KENORA, KENT COUNTY, LAMBTON, LANARK, LEEDS, LENNOX, MANITOULIN, MIDDLESEX COUNTY, MUSKOKA, NIAGARA NORTH/NIAGARA, NIAGARA SOUTH/NIAGARA 30, NIPISSING, NORFOLK, NORTHUMBERLAND, OTTAWA-CARLTON, OXFORD COUNTY, PEEL, PERTH, PETERBOROUGH, PRESCOTT, PRINCE EDWARD, RAINY RIVER, RENFREW, RUSSELL, SIMCOE, STORMONT, SUDBURY, TIMISKAMING, THUNDER BAY, VICTORIA, WATERLOO, WELLINGTON, HAMILTON WENTWORTH, YORK REGION

### HITS IN TORONTO - 2 EXACT HITS NO LONGER ACTIVE:

Name: GUTIERREZ, JUAN GUILLERMO

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 1

PIN	STATUS	ADDRESS	DESCRIPTION		
10102-0345 (R)	INACTIVE	2 GORDON ROAD, NORTH YORK	LOT 187, PLAN 3517 TWP OF YORK/NORTH YORK , CITY OF TORONTO	Parcel Register	Map

Address: 2 GORDON ROAD

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 2

PIN	STATUS	ADDRESS	DESCRIPTION		
10102-0345 (R)	INACTIVE	2 GORDON ROAD, NORTH YORK	LOT 187, PLAN 3517 TWP OF YORK/NORTH YORK , CITY OF TORONTO		
10102-0198 (LT)	ACTIVE	2 GORDON ROAD, TORONTO	LT 187 PL 3517 NORTH YORK; TORONTO (N YORK) , CITY OF TORONTO	Parcel Register	Map

Name: GUTIERREZ, JUAN GUILLIERMO

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 1

PIN	STATUS	ADDRESS	DESCRIPTION		
10100-0203 (R)	INACTIVE	109 GORDON ROAD, NORTH YORK	LOT 51, PLAN 3517 TWP OF YORK/NORTH YORK , CITY OF TORONTO	Parcel Register	Map

Address: 109 GORDON ROAD

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 2

PIN	STATUS	ADDRESS	DESCRIPTION		
10100-0203 (R)	INACTIVE	109 GORDON ROAD, WILLOWDALE	LOT 51, PLAN 3517 TWP OF YORK/NORTH YORK , CITY OF TORONTO		
10100-0119 (LT)	ACTIVE	109 GORDON ROAD, TORONTO	LT 51 PL 3517 NORTH YORK; TORONTO (N YORK) , CITY OF TORONTO	Parcel Register	Map

**HITS IN PARRY SOUND - 2 EXACT HITS NO LONGER ACTIVE - CONSOLIDATED INTO PIN 52193-0908**

Name: GUTIERREZ, JUAN GUILLERMO

Parcel Types: (LT) Land Titles - (R) Registry - (RD) Parcelized Day Forward Registry

Number of Properties Found: 2

PIN	STATUS	ADDRESS	DESCRIPTION
52193-0895 (LT)	INACTIVE	, SEGUIN	PT SHORE RDAL IN FRONT LT 29 CON 6 HUMPHREY PTS 1 & 2 42R19805 (CLOSED BY BY-LAW 2014-012 AS IN GB71242); TOWNSHIP OF SEGUIN
52193-0194 (LT)	INACTIVE	174 HAMER BAY RD, SEGUIN	PCL 25187 SEC SS; PT LT 29 CON 6 HUMPHREY PT 2 42R5848; SEGUIN

52193-0908 ✓ ▾ Parcel Register: 52193-0908 (LT) PDF ▾

Adjacents

Custom

52193-0194 ▶

52193-0845 ▶

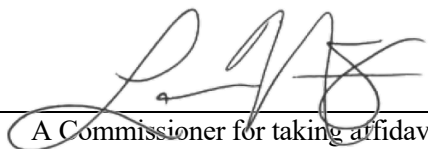
**DESCRIPTION**

PT LT 29 CON 6 HUMPHREY PT 2 42R5848; PT SHORE RDAL IN FRONT LT 29 CON 6 HUMPHREY PTS 1 & 2 42R19805 (CLOSED BY BY-LAW 2014-012 AS IN GB71242); TOWNSHIP OF SEGUIN

---

<b>Estate:</b>	FEE SIMPLE	<b>PIN Creation:</b>	2014/07/07
<b>Qualifier:</b>	ABSOLUTE	<b>Recently:</b>	CONSOLIDATION

This is **Exhibit "O"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

A Commissioner for taking affidavits

Lauren Nixon  
P14847



10102-0198 (LT)

\* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

PROPERTY DESCRIPTION: LT 187 PL 3517 NORTH YORK; TORONTO (N YORK) , CITY OF TORONTO

PROPERTY REMARKS:

ESTATE/QUALIFIER:  
FEE SIMPLE  
LT CONVERSION QUALIFIED

OWNERS' NAMES  
MULLINS, LARRY

PIN CREATION DATE:  
2002/04/29

RECENTLY:  
RE-ENTRY FROM 10102-0345  
CAPACITY SHARE  
ROWN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
** PRINTOUT		INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2002/04/26 **				
**SUBJECT,		ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:				
**		SUBSECTION 44 (1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES *				
**		AND ESCHEATS OR FORFEITURE TO THE CROWN.				
**		THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF				
**		IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY				
**		CONVENTION.				
**		ANY LEASE TO WHICH THE SUBSECTION 70(2) OF THE REGISTRY ACT APPLIES.				
**DATE OF CONVERSION TO LAND TITLES: 2002/04/29 **						
64BA1677	1980/04/28	PLAN BOUNDRIES ACT				C
		REMARKS: RE: NY778220, FL11216				
64BA2487	1990/10/15	PLAN BOUNDRIES ACT				C
		REMARKS: RE: TH719171/PLAN 12027				
TR7793	1997/07/15	TRANSFER		*** DELETED AGAINST THIS PROPERTY *** MULLER, STACEY LYNN MULLER, KIRK CHRISTOPHER	GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	
TR9847	1997/08/18	CHARGE		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE TORONTO-DOMINION BANK	
					NUTLEY.	
TR66199	2000/09/08	CHARGE		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE TORONTO-DOMINION BANK	

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.  
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.



10102-0198 (LT)

\* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
TR85837	2001/11/13	CHARGE		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE TORONTO-DOMINION BANK	
E549412	2002/06/10	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE TORONTO-DOMINION BANK	
E602780	2002/09/19	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
				REMARKS: RE: TR085837		
E602787	2002/09/19	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
				REMARKS: RE: TR066199		
AT1727091	2008/03/05	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE BANK OF NOVA SCOTIA	
AT1738970	2008/03/26	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
				REMARKS: RE: E549412		
AT3289565	2013/05/01	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE BANK OF NOVA SCOTIA		
				REMARKS: AT1727091.		
AT3302149	2013/05/16	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
				REMARKS: TR9847.		
AT3302825	2013/05/17	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	THE BANK OF NOVA SCOTIA	
AT4413110	2016/11/25	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	2348793 ONTARIO LTD.	
AT4939270	2018/08/20	DISCH OF CHARGE		*** COMPLETELY DELETED *** 2348793 ONTARIO LTD.		
				REMARKS: AT4413110.		

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10102-0198 (LT)

\* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
AT4939381	2018/08/20	TRANSFER	\$3,174,596	GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	MULLINS, LARRY	C
AT4939382	2018/08/20	CHARGE	\$1,200,000	MULLINS, LARRY	THE TORONTO-DOMINION BANK	C
AT4946745	2018/08/30	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE BANK OF NOVA SCOTIA		
REMARKS: AT3302825.						



Ontario ServiceOntario

PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

PAGE 1 OF 3  
PREPARED FOR GraceT01  
ON 2022/11/15 AT 10:50:24

LAND  
REGISTRY  
OFFICE #66

10100-0119 (LT)

\* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

PROPERTY DESCRIPTION: LT 51 PL 3517 NORTH YORK; TORONTO (N YORK) , CITY OF TORONTO

PROPERTY REMARKS:

RECENTLY:  
RE-ENTRY FROM 10100-0203

PIN CREATION DATE:  
2002/04/29

FEE SIMPLE  
LT CONVERSION QUALIFIED

OWNERS' NAMES  
JIWA, SALZAH  
CAPACITY SHARE  
ROWN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
** PRINTOUT		INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2002/04/26 **				
**SUBJECT,		ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:				
**		SUBSECTION 44 (1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES *				
**		AND ESCHEATS OR FORFEITURE TO THE CROWN.				
**		THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF				
**		IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY				
**		CONVENTION.				
**		ANY LEASE TO WHICH THE SUBSECTION 70 (2) OF THE REGISTRY ACT APPLIES.				
**DATE OF CONVERSION TO LAND TITLES: 2002/04/29 **						
64BA1677	1980/04/28	PLAN BOUNDRIES ACT				
		REMARKS: RE: NY778220, FL11216				
TR9902	1997/08/18	TRANSFER		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	KALLMEYER, JEFFREY LYNTON KALLMEYER, DORYN	C
TR9903	1997/08/18	CHARGE		*** DELETED AGAINST THIS PROPERTY *** KALLMEYER, JEFFREY LYNTON KALLMEYER, DORYN	BANK OF MONTREAL	
TR9904	1997/08/18	CHARGE		*** DELETED AGAINST THIS PROPERTY *** KALLMEYER, JEFFREY LYNTON KALLMEYER, DORYN	BANK OF MONTREAL	
TR21462	1998/03/31	TRANSFER OF CHARGE		*** DELETED AGAINST THIS PROPERTY *** BANK OF MONTREAL	ROYAL BANK OF CANADA	
		REMARKS: RE TR9903				

1112

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.  
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10100-0119 (LT)

\* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
TR76257	2001/05/11	CHARGE		*** DELETED AGAINST THIS PROPERTY *** KALLMEYER, JEFFREY LYNTON KALLMEYER, DORYN	CANADIAN IMPERIAL BANK OF COMMERCE	
TR78357	2001/06/27	TRANSFER OF CHARGE		*** DELETED AGAINST THIS PROPERTY *** ROYAL BANK OF CANADA	CIBC MORTGAGES INC.	
AT1365731	2007/01/30	TRANSFER		*** COMPLETELY DELETED *** KALLMEYER, DORYN KALLMEYER, JEFFREY LYNTON	KALLMEYER, JEFFREY LYNTON	
AT1379938	2007/02/16	CHARGE		*** COMPLETELY DELETED *** KALLMEYER, JEFFREY LYNTON	CIBC MORTGAGES INC.	
AT1390842	2007/03/05	DISCH OF CHARGE		*** COMPLETELY DELETED *** CIBC MORTGAGES INC.		
AT1401637	2007/03/20	CHARGE		*** COMPLETELY DELETED *** KALLMEYER, JEFFREY LYNTON	CANADIAN IMPERIAL BANK OF COMMERCE	
AT1465511	2007/06/05	DISCH OF CHARGE		*** COMPLETELY DELETED *** CANADIAN IMPERIAL BANK OF COMMERCE		
AT1733839	2008/03/17	DISCH OF CHARGE		*** COMPLETELY DELETED *** BANK OF MONTREAL		
AT1738818	2008/03/25	TRANSFER		*** COMPLETELY DELETED *** KALLMEYER, JEFFREY LYNTON	COX, FIRIND	
AT1738819	2008/03/25	CHARGE	\$800,000	COX, FIRIND	BANK OF MONTREAL	C
AT1751563	2008/04/09	DISCH OF CHARGE		*** COMPLETELY DELETED *** CIBC MORTGAGES INC.		
AT1794012	2008/05/30	DISCH OF CHARGE		*** COMPLETELY DELETED *** CANADIAN IMPERIAL BANK OF COMMERCE		

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.  
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.



10100-0119 (LT)

\* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
AT2995559	2012/04/20	TRANSFER		COX, FIRIND	JIWA, SALZAH	C
AT3230956	2013/02/04	CHARGE	\$500,000	JIWA, SALZAH	BANK OF MONTREAL	C

REMARKS: RE: AT1401637



Ontario ServiceOntario

PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

LAND  
REGISTRY  
OFFICE #42

PAGE 1 OF 2  
PREPARED FOR GraceT01  
ON 2022/11/15 AT 11:18:46

52193-0908 (LT)

\* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

PROPERTY DESCRIPTION: PT LT 29 CON 6 HUMPHREY PT 2 42R5848; PT SHORE RDAL IN FRONT LT 29 CON 6 HUMPHREY PTS 1 & 2 42R19805 (CLOSED BY BY-LAW 2014-012 AS IN GB71242); TOWNSHIP OF SEGUIN

PROPERTY REMARKS: CROWN GRANT SEE LP1258.

ESTATE/QUALIFIER: RECENTLY:  
FEE SIMPLE CONSOLIDATION FROM 52193-0194, 52193-0895  
ABSOLUTE

OWNERS' NAMES  
WEVER, ELISA MARIA  
CAPACITY SHARE  
ROWN

PIN CREATION DATE:  
2014/07/07

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
** PRINTOUT			INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2014/07/07 **			
42R5848	1978/11/14	PLAN REFERENCE				C
LT194742	1992/09/30	TRANSFER		*** DELETED AGAINST THIS PROPERTY ***	GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	
LT263182	2004/11/15	CHARGE		*** DELETED AGAINST THIS PROPERTY ***	THE BANK OF NOVA SCOTIA	
42R19805	2012/12/11	PLAN-REFERENCE				C
GB69256	2013/11/27	APL (GENERAL)		THE CORPORATION OF THE TOWNSHIP OF SEGUIN	THE CORPORATION OF THE TOWNSHIP OF SEGUIN	C
REMARKS:			APPLICATION TO BE ENTERED AS OWNER			
GB71242	2014/03/06	BYLAW		THE CORPORATION OF THE TOWNSHIP OF SEGUIN		C
REMARKS:			BEING A BY-LAW TO STOP UP CLOSE AND SELL PTS 1 & 2 42R19805.			
GB72199	2014/04/23	TRANSFER		*** DELETED AGAINST THIS PROPERTY *** THE CORPORATION OF THE TOWNSHIP OF SEGUIN	GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE	
GB72200	2014/04/23	APL ANNEX REST COV		GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE		C
GB74096	2014/07/04	APL CH NAME OWNER		*** DELETED AGAINST THIS PROPERTY *** GUTIERREZ, JUAN GUILLERMO	GUTIERREZ, JUAN GUILLERMO	
GB74097	2014/07/04	APL CONSOLIDATE		GUTIERREZ, JUAN GUILLERMO GUTIERREZ, WENCKE		C
GB114228	2018/08/14	APL (GENERAL)		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	GUTIERREZ, WENCKE	

1115

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.  
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.



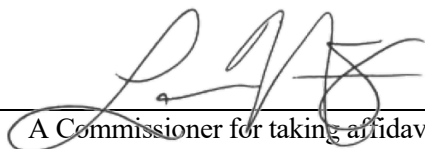
52193-0908 (LT)

\* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
		REMARKS: DEED POOL				
GB114229	2018/08/14	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	NORTHERN FUNDING GROUP INC.	
GB114230	2018/08/14	NO ASSGN RENT GEN		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	NORTHERN FUNDING GROUP INC.	
		REMARKS: GB114229 - RENTS				
GB137705	2020/12/24	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	SACKS, ANNETTE 2632344 ONTARIO INC.	
GB141544	2021/05/10	CHARGE		*** COMPLETELY DELETED *** GUTIERREZ, WENCKE	LETHRIDGE, FREDERICK EDWARD REYNOLDS, ROBERT GEORGE MAXELL ETHERINGTON, JAMES DAVID HANS	
GB145827	2021/09/01	DISCH OF CHARGE		*** COMPLETELY DELETED *** LETHRIDGE, FREDERICK EDWARD REYNOLDS, ROBERT GEORGE MAXELL ETHERINGTON, JAMES DAVID HANS		
		REMARKS: GB141544.				
GB145842	2021/09/01	DISCH OF CHARGE		*** COMPLETELY DELETED *** SACKS, ANNETTE 2632344 ONTARIO INC.		
		REMARKS: GB137705.				
GB145845	2021/09/01	DISCH OF CHARGE		*** COMPLETELY DELETED *** NORTHERN FUNDING GROUP INC.		
		REMARKS: GB114229.				
GB145853	2021/09/01	TRANSFER	\$4,000,000	GUTIERREZ, WENCKE	WEVER, ELISA MARIA	C
		REMARKS: PLANNING ACT STATEMENTS.				
GB145854	2021/09/01	CHARGE	\$2,400,000	WEVER, ELISA MARIA	BANK OF MONTREAL	C
GB148548	2021/11/18	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE BANK OF NOVA SCOTIA		
		REMARKS: LT263182.				
						1116

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.  
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.

This is **Exhibit "P"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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, Executor of the Estate of Juan Arturo Gutierrez

Respondents

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

**BILL OF COSTS OF JUAN GUILLERMO GUTIERREZ**

<b>STATEMENT OF EXPERIENCE</b>				
A claim for fees is being made with respect to the following lawyers, law clerks and law students:				
<b>Name of Lawyer</b>	<b>Years of Experience (Year of Call)</b>	<b>Partial Indemnity Rate<sup>1</sup></b>	<b>Substantial Indemnity Rate<sup>2</sup></b>	<b>Actual Billable Hourly Rate</b>
Brian H. Greenspan	48 years (1974)	\$600	\$900	\$1,000
Michelle M. Biddulph	7 years (2015)	\$180	\$270	\$300


<sup>1</sup> The Respondent agrees with the Receiver that the partial indemnity rate is 60% of actual fees.

<sup>2</sup> The Respondent agrees with the Receiver that the substantial indemnity rate is 1.5x the partial indemnity rate.

<b>01 - Tasks Related to Contempt Motion Prep and Hearing (April – June, 2022)</b>							
	Hours	Partial Indemnity		Substantial Indemnity		Actual Billable Rate	
<b>Brian H. Greenspan</b>	68.9	\$600	\$41,340	\$900	\$62,010	\$1,000	\$68,900
<b>Michelle M. Biddulph</b>	87.1	\$180	\$15,678	\$270	\$23,517	\$300	\$26,130
	156	<b>Total: \$57,018</b>		<b>Total: \$85,527</b>		<b>Total: \$95,030</b>	

<b>02 – Tasks Related to Contempt Sentencing Hearing (July – September, 2022)</b>							
	Hours	Partial Indemnity		Substantial Indemnity		Actual Billable Rate	
<b>Brian H. Greenspan</b>	32.1	\$600	\$19,260	\$900	\$28,890	\$1,000	\$32,100
<b>Michelle M. Biddulph</b>	35.9	\$180	\$6,462	\$270	\$9,693	\$300	\$10,770
	68	<b>Total: \$25,722</b>		<b>Total: \$38,583</b>		<b>Total: \$42,870</b>	

This is **Exhibit "Q"** to the Affidavit of **Grace Tsakas** sworn remotely on November 15, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

8Lauren Nixon  
P14847



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, Executor of the Estate of Juan Arturo Gutierrez

Respondents

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

**BILL OF COSTS OF THE RECEIVER**  
**(Motion for Security for Costs, returnable November 24, 2022)**

<b>STATEMENT OF EXPERIENCE</b>				
A claim for fees is being made with respect to the following lawyers, law clerks and law students:				
<b>Name of lawyer</b>	<b>Years of experience (Year of Call)</b>	<b>Partial Indemnity Rate<sup>1</sup></b>	<b>Substantial Indemnity Rate<sup>2</sup></b>	<b>Actual Billable Hourly Rate</b>
Monique J. Jilesen	22 years (2000)	\$591	\$887	\$985
Derek N. Knoke	4 years (2018)	\$312	\$468	\$520
Grace Tsakas, Law Clerk		\$210	\$315	\$350
Adam Davis, Law Student		\$174	\$261	\$290

---

<sup>1</sup> The partial indemnity rate has been set at 60% of actual fees. Per the Court of Appeal in *Inter-Leasing, Inc. v. Ontario (Revenue)*, 2014 ONCA 683, “the cost rates set out in the Information for the Profession set out in the preamble to [Rule 57](#) of the [Rules of Civil Procedure](#) are now out of date, and that amounts calculated at 55%-60% of a reasonable actual rate might more appropriately reflect partial indemnity, particularly in the context of two sophisticated litigants well aware of the stakes”

<sup>2</sup> The substantial indemnity rate is 1.5 times the partial indemnity rate, per Rule 1.03.

<b>01 - Tasks related to preparing Responding Record</b>							
	Hours	Partial Indemnity		Substantial Indemnity		Actual Billable Rate	
Monique J. Jilesen	18.0	\$591	10,638.00	\$887	15,957.00	\$985	17,730.00
Derek N. Knoke	35.0	\$312	10,920.00	\$468	16,380.00	\$520	18,200.00
Grace Tsakas, Law Clerk	7.0	\$210	1,470.00	\$315	2,205.00	\$350	2,450.00
Adam Davis, Law Student	30.0	\$174	5,040.00	\$261	7,560.00	\$290	8,400.00
Subtotal			<b>\$28,068.00</b>		<b>\$42,102.00</b>		<b>\$46,780.00</b>

<b>02 - Tasks related to preparing for Cross-Examination</b>							
	Hours	Partial Indemnity		Substantial Indemnity		Actual Billable Rate	
Monique J. Jilesen	17.0	\$591	10,047.00	\$887	15,070.50	\$985	16,745.00
Derek N. Knoke	17.0	\$312	5,304.00	\$468	7,956.00	\$520	8,840.00
Grace Tsakas, Law Clerk	3.0	\$210	630.00	\$315	945.00	\$350	1,050.00
Adam Davis, Law Student	12.0	\$174	2,016.00	\$261	3,024.00	\$290	3,360.00
Subtotal			<b>\$17,997.00</b>		<b>\$26,995.50</b>		<b>\$29,995.00</b>

<b>03 - Tasks related to attending Cross-Examination</b>							
	Hours	Partial Indemnity		Substantial Indemnity		Actual Billable Rate	
Monique J. Jilesen	8.0	\$591	4,728.00	\$887	7,092.00	\$985	7,880.00
Derek N. Knoke	8.0	\$312	2,496.00	\$468	3,744.00	\$520	4,160.00
Adam Davis, Law Student	8.0	\$174	1,344.00	\$261	2,016.00	\$290	2,240.00
Subtotal			<b>\$8,568.00</b>		<b>\$12,852.00</b>		<b>\$14,280.00</b>

<b>04 - Tasks related to preparing for Case-Conference</b>							
	Hours	Partial Indemnity		Substantial Indemnity		Actual Billable Rate	
Monique J. Jilesen	3.0	\$591	1,773.00	\$887	2,659.50	\$985	2,955.00
Derek N. Knoke	5.0	\$312	1,560.00	\$468	2,340.00	\$520	2,600.00
Grace Tsakas, Law Clerk	1.0	\$210	210.00	\$315	315.00	\$350	350.00
Adam Davis, Law Student	5.0	\$174	840.00	\$261	1,260.00	\$290	1,400.00
Subtotal			<b>\$4,383.00</b>		<b>\$6,574.50</b>		<b>\$7,305.00</b>

<b>05 - Tasks related to preparing the Factum</b>							
	Hours	Partial Indemnity		Substantial Indemnity		Actual Billable Rate	
Monique J. Jilesen	15.0	\$591	8,865.00	\$887	13,297.50	\$985	14,775.00
Derek N. Knoke	30.0	\$312	9,360.00	\$468	14,040.00	\$520	15,600.00
Grace Tsakas, Law Clerk	7.0	\$210	1,470.00	\$315	2,205.00	\$350	2,450.00
Adam Davis, Law Student	30.0	\$174	5,040.00	\$261	7,560.00	\$290	8,400.00
Subtotal			<b>\$24,735.00</b>		<b>\$37,102.50</b>		<b>\$41,225.00</b>

<b>06 - Tasks related to preparing for and attending Hearing</b>							
	Hours	Partial Indemnity		Substantial Indemnity		Actual Billable Rate	

Monique J. Jilesen	10.0	\$591	5,910.00	\$887	8,865.00	\$985	9,850.00
Derek N. Knoke	15.0	\$312	4,680.00	\$468	7,020.00	\$520	7,800.00
Adam Davis, Law Student	15.0	\$174	2,520.00	\$261	3,780.00	\$290	4,200.00
Subtotal			<b>\$13,110.00</b>		<b>\$19,665.00</b>		<b>\$21,850.00</b>

<b>07 - Tasks related to all sections noted above completed by the Receiver</b>							
	Hours	Partial Indemnity	Substantial Indemnity	Actual Billable Rate			
Robert Kofman	40.0	\$459	18,360.00	\$689	27,560.00	\$775	31,000.00
Noah Goldstein	30.0	\$397	11,910.00	\$595	17,850.00	\$675	20,250.00
Other	4.0	\$240	1,848.00	\$360	1,440.00	\$160	640.00
Subtotal			<b>\$32,118.00</b>		<b>\$46,850.00</b>		<b>\$51,890.00</b>

<b>SUMMARY OF FEES</b>				
		Partial Indemnity Rate	Substantial Indemnity Rate	Actual Billable Rate
1	Work on Responding Record	\$28,068.00	\$42,102.00	\$46,780.00
2	Preparing for Cross-Examination	\$17,997.00	\$26,995.50	\$29,995.00
3	Attending Cross-Examination	\$8,568.00	\$12,852.00	\$14,280.00
4	Preparing for Case Conference	\$4,383.00	\$6,574.50	\$7,305.00
5	Working on Factum	\$24,735.00	\$37,102.50	\$41,225.00
6	Preparing for and attending Hearing	\$13,110.00	\$19,665.00	\$21,850.00
7	Receiver's Fees	\$32,118.00	\$46,850.00	\$51,890.00
	<b>TOTAL FEES</b>	<b>\$128,979.00</b>	<b>\$192,141.50</b>	<b>\$213,325.00</b>

<b>SUMMARY OF DISBURSEMENTS</b>		
Courier Charges		
Online Searches Fees		
Court Filing Fees (Non-Taxable)		
Transcript Fees		
eDiscovery Expenses		
<b>Total ESTIMATED Disbursements</b>		<b>5,000.00</b>
*HST Except	HST at 13%	650.00
<b>Total Disbursements and HST</b>		<b>5,650.00</b>

<b>TOTAL FEES AND DISBURSEMENTS CLAIMED</b>			
	Partial Indemnity Rate	Substantial Indemnity Rate	Actual Rate
Fees	\$128,979.00	\$192,141.50	\$213,325.00
HST on Fees at 13%	\$16,767.27	\$24,978.40	\$27,732.25
Disbursements	5,000.00	5,000.00	5,000.00
HST on Disbursements at 13%	650.00	650.00	650.00
<b>TOTAL</b>	<b>\$151,396.27</b>	<b>\$222,769.90</b>	<b>\$246,707.25</b>

November 15, 2022

**LENCZNER SLAGHT LLP**  
Barristers Suite 2600  
130 Adelaide Street West Toronto ON  
M5H 3P5

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Fax: (416) 865-2851

Email: [mjilesen@litigate.com](mailto:mjilesen@litigate.com)

Derek Knoke (75555E)

Tel: (416) 865-3018

Fax: (416) 865-2876

Email: [dknoke@litigate.com](mailto:dknoke@litigate.com)

**AIRD & BERLIS LLP**

Brookfield Place

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

Kyle Plunkett

Email: [kplunkett@airdberlis.com](mailto:kplunkett@airdberlis.com)

Sam Babe

Email: [sbabe@airdberlis.com](mailto:sbabe@airdberlis.com)

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Moving Party, the Receiver

TO: **THE SERVICE LIST**

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

**BILL OF COSTS OF THE RECEIVER**

**LENCZNER SLAGHT LLP**

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

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

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Sam Babe

Email: [sbabe@airdberlis.com](mailto:sbabe@airdberlis.com)

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Moving Party, the Receiver

# TAB 6

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

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

and

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

Defendants

**AFFIDAVIT OF GRACE TSAKAS**  
**(sworn November 23, 2022)**

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

1. I am a law clerk with the law firm of Lenczner Slaght LLP, lawyers for KSV Restructuring Inc. (“KSV”), the Court-appointed receiver and manager (in such capacity, the “Receiver”), without security, of all the property, assets, and undertakings of Xela Enterprises Ltd. (“Xela”), and, as such, have knowledge of the matters contained in this Affidavit.
2. Attached hereto and marked as **Exhibit “A”** is an official translation of a decision of the Panamanian Public Prosecutor.
3. I am advised that a request was made for a judge to review the Prosecutor’s decision and that a judge did review the decision.

4. Attached hereto and marked as **Exhibit “B”** is a screenshot (received on November 18, 2022) of a summary of the judge’s decision. I am advised that the top left corner says: “Remark: It is instructed to maintain the case closed as has been decreed by the Public Ministry, since the facts complained are not considered the crime of falsehood accused.”

5. On November 22, 2022, at 3:29 pm, Mr. Gutierrez served his Responding Motion Record and Factum.

6. I am advised by Ms. Jilesen that, given the timing of the delivery of the responding material, the Receiver has insufficient time to respond to the affidavit of Mr. Burton, other than to identify that this issue had previously been raised at a case conference on September 26, 2022. The Case Conference Memorandum of Mr. Gutierrez is attached hereto and marked as **Exhibit “C”**, and the Receiver’s Case Conference Memorandum is attached hereto and marked as **Exhibit “D”**.

7. Paragraph 25 of Mr. Gutierrez’s Factum says:

KSV did not alert the Court on a case conference that took place on September 13, 2022 that, as a consequence of KSV’s instructions to Epiq, no progress whatsoever would be made towards compliance with the document review process.

8. I attach hereto as **Exhibit “E”** an email exchange between Mr. MacLeod and Ms. Jilesen from September 13, 2022. Mr. MacLeod asked Ms. Jilesen with whom at Epiq he should coordinate to review the uploaded documents on Relativity. Ms. Jilesen responded as follows at

10:08 am:

Chris,

Until this morning, we had not yet heard that all of the ATS data has yet been uploaded. We need to confirm that information with Epiq.



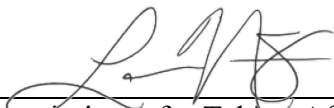
In any event, paragraph 8 of the October 27, 2020 Order provides that “at the request of the Receiver, [Epiq] will be authorized to load the data onto the Relativity document review platform.

In light of the funding issue, the Receiver has not requested that Epiq load the data onto Relativity. As a result, the timetable starting in paragraph 10 of the October 27, 2020 Order has not yet begun to run. We will provide with notice if and when the data is loaded onto relativity in accordance with the Order.

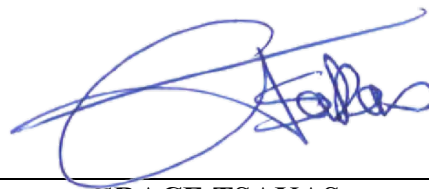
Thanks

Monique

**SWORN** by Grace Tsakas of the City of Richmond Hill, in the Regional Municipality of York, before me at the City of Hamilton, in the Province of Ontario, on November 23, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as may be)



\_\_\_\_\_  
**GRACE TSAKAS**

Lauren Nixon  
P14847

This is **Exhibit "A"** to the Affidavit of **Grace Tsakas** sworn remotely on November 23, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

*A Commissioner for taking Affidavits (or as may be)*

Lauren Nixon  
P14847



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**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.

- **PROVISIONAL FILE No. 496 of the Metropolitan Prosecutor's Office of the Office of the Attorney General of the Republic of Panama, dated August 22, 2022**

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.

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**Jonathan Whiteside, Translator**  
1377 Weston Rd.,  
Toronto, ON. M6M 4S1  
416-244-4831

**SWORN** in the  
City of Toronto  
in the Province of Ontario  
this November 21<sup>st</sup>, 2022.



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**HEATHER MICHELLE SANCHEZ, NOTARY**  
Notary Public for the Province of Ontario  
1377 Weston Rd., unit 1A, Toronto, ON, M6M 4S1

[Seal: Republic of  
Panama  
Attorney General's  
Office  
Metropolitan  
Prosecutor's Office  
Crimes Against Public  
Trust Department]

ATTORNEY GENERAL'S OFFICE  
CRIMES AGAINST THE PUBLIC TRUST OF THE METROPOLITAN PROSECUTOR'S OFFICE

[Logo: National Attorney  
General's Office]

PROVISIONAL FILE No. 496  
Panama. August 22, 2022

FILE  
No. 2021000036.



This agency of the Attorney General's Office is in charge of the criminal investigation identified under number No. **202100003611** for the alleged commission of the crime **AGAINST THE PUBLIC TRUST** in the form of forgery of documents in general.

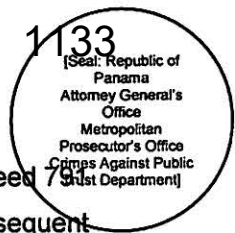
It is the responsibility of the Attorney General's Office to prosecute crimes, directing the investigation, practicing or ordering the execution of the necessary procedures to determine the existence of the crime and those liable pursuant to the Criminal Procedure Code, and thus exercise the corresponding actions at the courts and tribunals where we act.

**I. BACKGROUND.**

Javier Alcides de Leon Almengor, authorized attorney of Harald Johannessen Hals in his capacity as treasurer of GABINVEST S.A., filed a complaint for the commission of the crime outlined in Article 366 of the Code of Criminal Procedure.

Attorney De Leon states that on September 10, 2013, a Shareholders' Meeting of the Company GABINVEST S.A. was held. The agenda of the meeting included the appointment of the Board of Directors of GABINVEST S.A. Mr. EDUARDO SAN JUAN was appointed President and Legal Representative of the aforementioned corporation; DAVID HARRY as Secretary and HARALD JOHANNESSEN as Treasurer. This decision was registered under Public Deed 16715, dated September 10, 2013, issued by the First Notary Office of the Circuit of Panama, and duly recorded in the Public Registry of Panama.

On January 16, 2020, ALVARO ALMENGOR, on behalf of the Law Firm HATSTONE ASOCIADOS, subscribed a Shareholders' Meeting Minutes, whereby the appointments of the acknowledged Board of Directors of the aforementioned company, GABINVEST S.A., were annulled and a new Board of Directors was appointed. A new Board of Directors was appointed, consisting of ALVARO ALMENGOR as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. They did not



have the endorsement to carry out said meeting. This decision was registered under Public Deed 791 of January 16, 2020, issued by the Eighth Notary Office of the Circuit of Panama and its subsequent registration in the Public Registry of Panama.

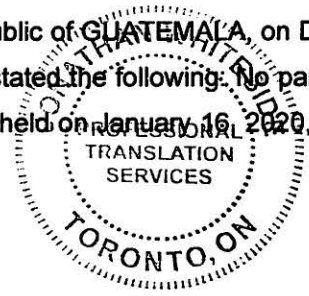
In this line of argument, on April 29, 2020, ALVARO ALMENGOR and MANUEL CARRASQUILLA, acting as President and Secretary respectively (illegally) of the company GABINVEST S. A., signed a Minutes of the Shareholders' Meeting of the aforementioned company, wherein they indicated "that due to the exceptional circumstances derived from Covid19, it is extremely difficult to hold physical meetings. Therefore, this meeting will have to be held by telephone".

Likewise, they inserted a clause in said Minutes amending the Articles of Incorporation stating "Shareholders' Meetings may be held by telephone and other electronic means of communication and shall be considered meetings where 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 meetings where directors were physically present".

Additionally, in the aforementioned meeting, they appointed a Board of Directors executed through Public Deed 791 of January 16, 2020, wherein they appointed ALVARO ALMENGOR as President, MANUEL CARRASQUILLA as Secretary, LIDIA RAMOS as Treasurer. Said Minutes was notarized under Public Deed 4957 of April 29, 2020, issued by the Eighth Notary Office of the Circuit of Panama, and subsequently registered in the Public Registry of Panama.

The actions carried out by the defendants violated the bylaws of the Articles of Incorporation of GABINVEST S A., because the shareholder of the aforementioned company never participated in the Shareholders' Meeting to remove the Board of Directors presided by its attorney, JOSE EDUARDO SAN JUAN. This is because the meeting was not requested, as it was falsely stated in Deed 791 of January 16, 2020, issued by the Eighth Notary Office of the Circuit of Panama. Likewise, false information was inserted through Deed 4957 of April 29, 2020, issued by the Eighth Notary Office of the Circuit of Panama, since the Articles of Incorporation of the affected company did not establish in any of its clauses the holding of meetings by telephone or any other electronic means, as it is intended to be amended in the same Public Deed in its twelfth clause. This situation is contradicted by the holding of that same meeting. Therefore, the crime is totally configured.

Mr. JUAN GUILLERMO GUTIERREZ STRAUSS, in his capacity as PRESIDENT of the company XELA ENTERPRISES, sole shareholder of the company GABINVEST S.A., executed a notarial affidavit before a Notary Public in the City of GUATEMALA, Republic of GUATEMALA, on December 3, 2020, wherein, regarding the facts that concern us today, he stated the following: No participation in the Shareholders' Meeting of the company GABINVEST S.A., held on January 16, 2020, whereby



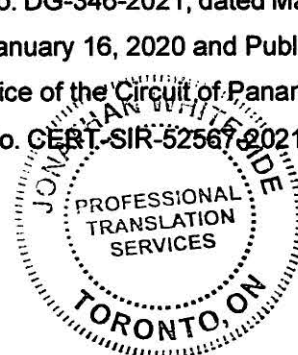
the appointments of the acknowledged Board of Directors of the company GABINVEST S.A. made, was valid. In this sense, a new Board of Directors was appointed, presided by Mr. ALVARO ALMENGOR as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. My client does not know these persons and they do not have the endorsement, authorization or mandate to represent the company GABINVEST S.A. because they are not members of the Board of Directors proposed and elected by the Shareholders of the aforementioned company.

Attorney Javier de Leon, in his complaint, submitted the following evidence:

- Electronic copy from the Public Registry of Public Deed 791 of January 16, 2020, issued by the Eighth Notary Office of the Circuit of the Province of Panama.
- Electronic copy of Public Deed 4957 of April 29, 2020, issued by the Eighth Notary Office of the Circuit of the Province of Panama.
- Certificate of incorporation of the company GABINVEST S.A.
- Certificate of incorporation of the corporation LISA.
- Notarized statement of the shareholder of GABINVEST S.A., wherein the shareholder makes clear that it did not participate in the aforementioned meetings.

## **II. ACTIONS IMPLEMENTED.**

- The Judicial Investigation Directorate forwarded a field investigation form, dated February 25, 2021.
- The Judicial Investigation Directorate forwarded information from the database of the Electoral Tribunal and the Authority of Transit and Land Transportation regarding Mr. Alvaro Almengor with identity card No. 8-751-1550.
- On January 26, 2021, by Resolution No. 147, the complaint filed by Mr. Javier de Leon was admitted.
- The Superior Prosecutor's Office for International Affairs, by means of Official Notice FSAI-1917-2021, forwarded 23 pages translated from English to Spanish of the documentation received through Official Letter No. 1723 dated May 20, 2021.
- The Public Registry of Panama, through Official Notice No. CERT-SIR-84968-2021, forwarded authenticated copies of Public Deed 4957 dated April 29, 2020, issued by the Eighth Notary Office of the Circuit of Panama.
- The Public Registry of Panama, through Official Notice No. DG-346-2021, dated May 12, 2021, forwarded information of entries of Public Deed 791 of January 16, 2020 and Public Deed No. 4957 of April 29, 2020, issued by the Eighth Notary Office of the Circuit of Panama.
- The Public Registry of Panama, through Official Notice No. CERT-SIR-52567-2021, forwarded the certificate of the law firm Hastone Asociados.



- The National Directorate of Financial Benefits, Individual Accounts Department, declares that, after verifying in its systematic records as of January 2021, Mrs. Alvaro Almengor, with ID No. 8-751-1550, appears registered by his employer at the Ministry of Labour and Labour Development, on December 2020.
- The Ministry of Commerce and Industry, General Directorate of Domestic Commerce, through Official Notice DGCI-DG-No. 095-21, informed us that after reviewing their files, they indicate that the commercial name HASTONE ASOCIADOS is **NOT** registered in their system [www.panamaemprende.gob.pa](http://www.panamaemprende.gob.pa). They do not have business registration, business license, or notice of operations.
- The Instituto de Acueductos y Alcantarillados Nacionales [National Aqueduct and Sewer Institute], through Official Notice No. 356-AL, informed us that Alvaro Almengor, with identity card No. 8-751-1550, does not have a water supply contract.
- On December 14, Mr. Juan Miguel Gutierrez gave an interview to state the following: **I am the beneficiary and shareholder of a Canadian company, XELA ENTRERPRISES LTD, which in turn is the shareholder of GAVISMENTS. S.A. As a shareholder, he is affected by the events that occurred. For a case involving the company he manages in Canada, a commercial judge of the province of Ontario issued an order limiting him from participating or advancing this case. This situation makes him feel as if he is a judicial hostage because, despite being a victim and plaintiff, this order prohibits him from participating or advancing in this case. In the changes made to GAVISVENT, his name is directly mentioned as a participant. 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 the shareholders. In this case, he was not summoned nor invited to the meeting. I state for the record that I personally did not participate in that meeting. 100% of GAVISMENTS shares belong to XELA INTERPRISES, the company he represents. The share certificates are under the administration of GAVISMENT S.A. and XELA INTERPRISES. The books of shares are carried by the administration of GAVISVEMTS S.A. This office proceeded to ask the interviewee the type of proceeding for which the company XELA INTERPRISES is under judicial administration. The interviewee answered: This is a court order for payment to a woman who is his sister. The proceeding is ongoing in a Commercial Court of the Province of Ontario, seeking payment arrangements. This proceeding is not related to GAVISMENT. The interviewee should state what damage he has suffered as a representative and shareholder of GAVISMENT as a result of the shareholder's meeting to which he was not summoned: The interviewee answered the question. He is currently under a court order from the authorities in Canada and is therefore not authorized to respond. The interviewee reiterates what was stated at the beginning of the interview, regarding the fact that he was not summoned to participate in the Shareholders Meeting.**
- On December 1, 2021, the law firm Tejada Abogados provided evidence such as the legal

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opinion issued by DLA (Canada) LLP, dated October 18, 2021, duly legalized and apostilled and its translation into Spanish, which clearly states the meaning and scope of the Order issued by the Ontario Court on July 5, 2019. A letter of undertaking executed between Hatstone Abogados and KSV Kofman Inc. (now KSV Restructuring Inc.) (the "Receiver") dated January 15, 2020, and its corresponding translation into Spanish.

- The National Judicial Investigation Directorate informed us that Mr. Alvaro Almengor, with identity card No. 8-751-1550, does not have a detention or arrest warrant. The company EDEMET S.A. (NATURGY) informed us that Alvaro Almengor, with personal identity card No. 8-751-1550, does not have a contract for the supply of electricity.
- The Public Registry of Panama, through Official Notice No. CERT-SIR-177187-2022, forwarded us a certificate and Public Deed 16725 of September 10, 2013, issued by the First Notary Office of the Circuit of Panama.

### III. CONSIDERATIONS OF THE INVESTIGATING OFFICE.

Under the provisions of the Constitution of the Republic of Panama, the Public Prosecutor's Office is responsible for prosecuting crimes, exercising the actions derived from them before the criminal judges and courts, carrying out the investigation of the crimes, executing or ordering the execution of useful procedures to determine the existence or not of the crime and those liable for it, pursuant to the Criminal Law and the Criminal Procedure on the matter.

This provision requires this investigating office to examine the concurrence or not of the elements that constitute the criminal offences complained of with the criminal action outlined in the Criminal Code.

In this regard, the plaintiff refers to the occurrence of several crimes. Therefore, we will begin with the analysis of the facts complained about regarding the alleged commission of the crime against public trust based on the alleged forgery at a shareholders meeting of the company GAVISMENT S.A., where Mr. De Leon states that the only shareholder of GAVISMENT S.A. is the company XELA ENTERPRISES LTD. However, on January 16, 2020, Alvaro Almengor, on behalf of the Law Firm Hatstone Asociados, subscribed a Shareholders' Meeting Minutes whereby he annulled the appointments of the acknowledged Board of Directors of the corporation GABINVEST S.A. A new Board of Directors was appointed, constituted by Alvaro Almengor as President, Manuel Carrasquilla as Secretary and Lidia Ramos as Treasurer, without them having the endorsement to hold such meeting. This was registered under Public Deed 791 of January 16, 2020, issued by the Eighth Notary Office of the Circuit of Panama and its subsequent registration in the Public Registry of Panama. In said Public Deed they indicated **"that due to the exceptional circumstances derived from Covid19, it is extremely difficult to hold physical meetings. Therefore, this meeting will have to be held by telephone"**. Likewise, they have one of the clauses of the Articles of Incorporation amended

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**in said Deed stating, "Shareholders' meetings may be held by telephone and other electronic means of communication and shall be considered 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 meetings at which directors were physically present."**

Now, considering the alleged commission of a crime of forgery of documents in general, it is important to point out that the existence of the company GABINVEST S.A. has been confirmed in the preliminary investigation, according to the information received by the Public Registry of Panama. The Public Registry of Panama certifies that it is a corporation registered in the Commerce Department under folio No. 117511 since September 23, 1983. Its registration is still in force.

Therefore, this investigative agency considers that, up to this stage of the preliminary investigation, Mr. Harald Johannessen Hals, in his capacity as treasurer of the company GABINVEST S.A., has not accredited his capacity as shareholder or heir of GABINVEST S.A. shares.

The lack of legitimacy of Mr. Harald Johannessen Hals is evident, according to the legal provisions, to be considered a victim in this case, despite the fact that at the beginning of the investigation, Mr. Harald Johannessen Hals was admitted to be a victim. During the progress of the investigation, it has not been possible to confirm his rights.

This is based on the provisions of Article 112 of the Code of Criminal Procedure which establishes that: Article 112. Public action dependent on private instance. Crimes of public action dependent on private instance require the complaint of the offended party.

The following are crimes of public action dependent on private instance:

- 1.
- 2.
- 3.
- 4.
- 5.
6. **Forgery of documents to the detriment of individuals.**
- 7.



Article 113. Legitimacy of the Complainant. In the cases provided for in the preceding article, when the law requires a complaint from the offended party to initiate the investigation, it shall be sufficient for the victim to file a request to the Prosecutor to investigate the crime.

This request may be made verbally or in writing, but the interested party must prove his or her status

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as a victim ...

In this regard, Article 3 of the Code of Criminal Procedure establishes that criminal legislation should only intervene when it is impossible to use other social control mechanisms.

Above all, we consider it appropriate to point out that, in order to consider that a given conduct is within the scope of criminal law, the facts must fully comply with the elements that make up the criminal offence. At the same time, an analogy cannot be applied between the fact and what is stipulated in the rule, without it having to be entirely described by the criminal offence, and committed by the person who may be held liable.

In other words, if all the elements of the criminal offence invoked are not confirmed, the possibility of attributing the commission of a crime to any person is immediately ruled out, without prejudice that the same situation could be examined in a jurisdiction other than the criminal jurisdiction, pursuant to the principle of the minimum application of the criminal law, outlined in Article 3 of the Code of Criminal Procedure, which states the following:

“Article 3. Criminal law should only be applied when it is not possible to use other mechanisms of social control. The principle of its minimum application is provided for.”



The principle of minimum intervention in criminal law, also known as the “ultima ratio principle”, has a double meaning: first of all, it implies that criminal sanctions should be limited to the essential circle, to the benefit of other sanctions or even tolerance of lesser offences, i.e., the right to punishment. It does not have to punish all conduct harmful to the legal rights previously considered worthy of protection, but only the most dangerous modalities of attack to them. Secondly, minimum intervention in criminal law responds to the legislator’s conviction that punishment is an irreversible evil and an imperfect solution that should be used only when there is no other remedy, i.e., after the failure of any other means of protection. Therefore, criminal law must be the “last resort” or, in other words, the last resort to be used in the absence of other punitive means. The legislator considers that when criminal law intervenes it must be for the protection of those “majority interests necessary for the functioning of the rule of law”.

Consequently, this jurisdiction must be resorted to when the other mechanisms of social control and peaceful conflict resolution are ineffective, that is, we must only use the criminal jurisdiction when it is not possible to resolve the conflict in any other way or when the other mechanisms are inadequate.

Based on the foregoing, it is appropriate to rule pursuant to the provisions of Article 275 of the Code of Criminal Procedure, which states the following:

**Article 275: Provisional Filing.** The Prosecutor may order the case to be closed, stating the reasons if he has not been able to identify the perpetrator or participant or if it is manifestly impossible to gather convincing evidence. In this case, the investigation may be reopened if elements subsequently emerge that allow the identification of the perpetrators or participants.

Likewise, it will order the file if it considers that the fact does not constitute a crime, dismissing the complaint or the proceedings. Its decision will be reviewed by the judge responsible for procedural safeguards if the victim so requests".



The correct application of the aforementioned regulations leads us to dismiss the complaint because no crime has been committed, and the claims presented by the plaintiff do not correspond to the criminal offences alleged to have been committed.

Considering the facts presented and the aforementioned legal regulations, the Deputy Prosecutor of the Crimes Against the Public Trust Department DECIDES:

**FIRST:** To order the provisional filing of file No. **202100003611** for an alleged **CRIME AGAINST THE PUBLIC TRUST** in the modality of forgery of documents in general and other alleged crimes complained about by Mr. Javier de Almengor, attorney of Harald Johannessen Hals in his capacity as treasurer of GABINVEST S. A.

**SECOND:** To communicate this resolution to **Mr. Harald Johannessen Hals**, informing him of the provisions of the last paragraph of the aforementioned Article 275 of the Code of Criminal Procedure, which indicates that, if the victim disagrees with this decision, he may request the judge responsible for procedural safeguards to review it.

**THIRD:** To communicate this resolution to the defendants **Alvaro Almengor, Lidia Ramos and Manuel Carrasquilla**, informing them of the provisions of the last paragraph of Article 275 of the Code of Criminal Procedure.

**FOURTH:** After communicating with the victim, if he disagrees with the decision taken, inform him that it may be reviewed by the judge responsible for procedural safeguards if he so requests.

**FIFTH:** To release it on the Technological Platform of the Accusatory Criminal System Website.

**LEGAL GROUNDS:** Articles 22, 68, 110, 275 of the Code of Criminal Procedure and Articles 2 and 3 of the Criminal Code of the Republic of Panama.

**SERVE, COMMUNICATE AND EXECUTE.**

[Signature]

**ATTY. ELBA MARLENE AROSEMENA**

Deputy Prosecutor of the Crimes Against Public Trust Department  
Metropolitan Prosecutor's Office

ATTORNEY GENERAL'S OFFICE  
METROPOLITAN PROSECUTOR'S OFFICE  
CRIMES AGAINST THE PUBLIC TRUST  
DEPARTMENT

In Panama, at 3:41 in the afternoon, on the 23<sup>rd</sup> day of August 2022, I notified [Illegible Signature] for the record.

\_\_\_\_\_  
[Signature]  
Signature

ATTORNEY GENERAL'S OFFICE  
METROPOLITAN PROSECUTOR'S OFFICE  
CRIMES AGAINST THE PUBLIC TRUST  
DEPARTMENT

I CERTIFY THE FOREGOING IS A TRUE COPY OF ITS ORIGINAL.

In Panama on the 23<sup>rd</sup> day of August 2022.

\_\_\_\_\_  
[Signature]  
Signature



MINISTERIO PÚBLICO SECCIÓN DE DELITOS CONTRA LA FE PÚBLICA FISCALÍA METROPOLITANA	
	
ARCHIVO PROVISIONAL No. 496 Panamá, 22 de agosto de 2022	CARPETILLA N° 202100003611

Esta agencia del Ministerio Público tiene a su cargo, la investigación penal identificada con el número N° 202100003611, por la presunta comisión del delito **CONTRA LA FE PÚBLICA**, en la modalidad de Falsificación de Documento en General.

Corresponde al Ministerio Público perseguir los delitos, dirigiendo la investigación, practicando u ordenando la ejecución de las diligencias útiles, para determinar la existencia del ilícito y los responsables de conformidad con las disposiciones del Código Procesal Penal y así ejercer las acciones ante los Juzgados y Tribunales en que actuamos.

#### I. ANTECEDENTES.

Mediante querrela suscrita por el licenciado Javier Alcides De León Almengor apoderado principal de Harald Johannessen Hals en calidad de tesorero de GABINVEST, S.A. se adecua a la acción por comisión del tipo descrito en el artículo 366 del Código Penal.

Manifiesta el licenciado De León que 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 su 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.

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.



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"

Adicionalmente en esa supuesta reunión conformaron el nombramiento de Junta Directiva impuesta mediante Escritura 791 de 16 de enero de 2020, en la 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.

Que las acciones desplegadas por los querellados violentaron los estatutos del Pacto Social de la Sociedad GABINVEST S.A., toda vez que el accionista de la referida Sociedad jamás participó en reunión de Junta de Accionistas para remover la Junta Directiva Presidida por su 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.

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, se realizó lo siguiente: 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.

El licenciado Javier De León en su escrito de querrela presenta las pruebas que se detallan a continuación:

- 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 LISA
- Declaración Notarial del Accionista de la Sociedad Anónima GABINVEST S.A. en la cual deja claro su no participación en las reuniones aludidas.

## II. ACTIVIDADES REALIZADAS.

- La Dirección de Investigación Judicial remite formulario de investigación de campo, fechado 25 de febrero de 2021.
- La Dirección de Investigación Judicial remite información de la base de datos del Tribunal Electoral y la Autoridad de Tránsito y Transporte Terrestre, del señor Alvaro Almengor con cédula No. 8-751-1550.
- El 26 de enero de 2021 mediante resolución No. 147 se admite la querrela presentada por el licenciado Javier De León.
- La Fiscalía Superior de Asuntos Internacionales, mediante nota FSAI-1917-2021, remite 23 fojas traducidas del idioma inglés al idioma español de la documentación recibida mediante oficio No. 1723 con fecha de 20 de mayo de 2021.
- El Registro Público de Panamá, mediante Nota No. CERT-SIR-84968-2021, remite copias autenticadas de Escritura Pública 4957 del 29 de abril de 2020 de la Notaría Octava del Circuito de Panamá.



- El Registro Público de Panamá, mediante Nota No. DG-346-2021, fechada 12 de mayo de 2021, remite información de entradas de las Escrituras Públicas 791 de 16 de enero de 2020 y Escritura Pública No. 4957 de 290 de abril de 2020 ambos de la Notaria Octava del Circuito de Panamá.
- El Registro Público de Panamá, mediante Nota No. CERT-SIR-52567-2021, remite certificación de la Sociedad Hastone Asociados.
- La Dirección Nacional de Prestaciones Económicas departamento de Cuentas Individuales, manifiesta que al verificar en sus registros sistemáticos al mes de enero de 2021, el señora Alvaro Almengor con No. de cédula 8-751-1550 figura con el patrono Ministerio De Trabajo Y Desarrollo Laboral, para el mes de diciembre de 2020.
- El Ministerio de Comercio e Industria Dirección General de Comercio Interior, mediante nota DGCI-DG-No. 095-21, nos informa que al revisar sus archivos indica que bajo el nombre comercial HASTONE ASOCIADOS NO aparece registrado en su sistema [www.panamaemprende.gob.pa](http://www.panamaemprende.gob.pa), no poseen Registro Comercial, licencia Comercial, ni de Aviso de Operaciones.
- El Instituto de Acueductos y Alcantarillados Nacionales, mediante Nota No. 356-AL, nos informa que Alvaro Almengor con cédula de identidad personal No. 8-751-1550 no mantiene contrato de suministro de agua.
- El día 14 de diciembre rinde entrevista el señor Juan Miguel Gutiérrez a fin de manifestar 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 se ve afectado de los hechos que se dieron. Por un caso que involucra a la empresa que el dirige en Canadá, una Juez Mercantil de la provincia de Ontario emitió una orden limitándolo a participar o avanzar este caso, cosa que le hace sentir como secuestrado judicialmente, ya que a pesar de ser víctima y querellante dicha orden le prohíbe participar o avanzar en este caso. Ya que en los cambios que efectuaron en la sociedad GAVISVENT, directamente se menciona su 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. Indica que el 100% de las acciones GAVISMENTS le pertenece a XELA INTERPRISES, empresa a la cual el representa. 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 su 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 guarda relación 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 mantiene una orden Judicial por parte de las autoridades en Canadá por lo que no está 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

- El día 1 de diciembre de 2021, la firma Tejada Abogados aporta elementos de convicción como la opinión legal emitida por DLA (Canadá) LLP, de la fecha 18 de octubre de 2021, debidamente legalizado y apostillado y su traducción al idioma español, en la cual se establece claramente el sentido y alcance de la Orden dictada por el Tribunal de Ontario de 5 de julio de 2019. Carta de compromiso suscrita entre Hatstone Abogados y a KSV Kofman Inc. (ahora KSV Restructuring Inc) (el "Administrador Judicial") de fecha 15 de enero de 2020 y sus correspondiente traducción al español.
- La Dirección Nacional de Investigación Judicial nos informa que el señor Alvaro Almengor con cédula de identidad No. 8-751-1550 o mantiene orden de conducción o de aprehensión.
- La Empresa EDEMET, S.A. (NATURGY), nos informa que Alvaro Almengor con cédula de identidad personal No. 8-751-1550 no mantiene contrato de suministro de energía eléctrica.
- El Registro Público de Panamá mediante Nota No. CERT-SIR-177187-2022, nos remite certificación y Escritura Pública 16725 de 10 de septiembre de 2013 de la Notaria Primera del Circuito de Panamá.


### III. CONSIDERACIONES DEL DESPACHO INVESTIGADOR.

Corresponde al Ministerio Público por disposición de la Constitución Política de la República de Panamá, perseguir los delitos ejerciendo las acciones derivadas de ellos ante los jueces y tribunales penales dirigiendo la investigación de los delitos, practicando u ordenando la ejecución de las diligencias útiles para determinar la existencia o no del delito y sus responsables de conformidad con lo que dispone la Ley Penal y el Procedimiento Penal en la materia.

Este mandado supone que este despacho de investigación examine la concurrencia o no de los elementos que constituyen los tipos penales querellados con la acción dolosa regulada en el Código Penal.

En ese orden la parte querellante refiere la ocurrencia de varios delitos, por lo que iniciaremos con el análisis de los hechos querellados respecto a la posible comisión del delito Contra la Fe Pública, en virtud de la supuesta falsedad ante la celebración de una reunión de junta de accionistas de la





sociedad GAVISMENT, S.A., donde el licenciado De León manifiesta que el único accionista de GAVISMENT, S.A. es la sociedad XELA ENTERPRISES LTD, sin embargo el día 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 Sociedad Anónima GABINVEST S.A. y disponen el nombramiento de una nueva Junta Directiva siendo los mismo, Alvaro Almengor como presidente, Manuel Carrasquilla como secretario y Lidia Ramos como tesorera sin que los mismos tuvieran el aval para realizar dicha convocatoria y la misma quedo consignada a través de la Escritura Pública 791 de 16 de enero de 2020 de la Notaria Octava de Circuito de Panamá y sus posterior inscripción en el Registro Público de Panamá; y 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 modifican una de las cláusulas del 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 presente."

Ahora bien, ante la posible comisión de un delito de Falsedad de Documentos en General, es importante puntualizar que se ha corroborado dentro de la investigación preliminar la existencia de la sociedad GABINVEST, S.A., de acuerdo a la información recibida por el Registro Público de Panamá, el cual certifica que es una sociedad anónima, que se encuentra registrada en la sección mercantil, con folio No.117511 desde el 23 de septiembre de 1983, que la misma se encuentra vigente.

Siendo así, esta agencia de investigación es del criterio que, hasta esta fase de investigación preliminar, el señor Harald Johannessen Hals, en su calidad de tesorero de la empresa GABINVEST, S.A no ha acreditado su calidad de socio o heredero de las acciones de la sociedad GABINVEST, S.A.

Siendo, evidente la falta de legitimidad del señor Harald Johannessen Hals a la luz de lo que presupuestos de ley, para que sea considerado víctima dentro de la presente causa, pese a que al inicio de la investigación se admitió la calidad de víctima del señor Harald Johannessen Hals, durante el desarrollo de la investigación no se ha podido obtener acciones que acrediten sus derechos.

Esto es en base a lo establecido en el artículo 112 del Código Procesal Penal que establece que:





Artículo 112. Acción pública dependiente de instancia privada. Los delitos de acción pública dependiente de instancia privada requieren de la denuncia de la parte ofendida.  
Son delitos de acción pública dependiente de instancia privada los siguientes:

- 1.
- 2.
- 3.
- 4.
- 5.
6. Falsificación de documentos en perjuicio de particulares.
- 7.

Artículo 113. Legitimidad del Denunciante. En los casos previstos en el artículo anterior, cuando la ley exija denuncia del ofendido para iniciar la investigación bastará que la víctima presente ante el Fiscal la solicitud de que se investigue el delito.

Esta solicitud puede hacerse verbalmente o por escrito pero el interesado deberá acreditar su condición de víctima.....

Al respecto el artículo 3 del Código Penal establece que legislación penal solo debe intervenir cuando no es posible utilizar otros mecanismos de control social.

Sobre todo, lo expuesto en líneas anteriores, consideramos oportuno advertir, que para estimar que una conducta se encuadra con una norma penal, los hechos deben ajustarse en su totalidad a los elementos que componen el tipo penal, a la vez que no puede aplicarse analogía entre el hecho, y lo que estipula en la norma, sin, que debe ser enteramente descrito por el tipo penal, y cometido por quien pudiera resultar responsable.

Es decir que, de no concurrir todos los elementos del tipo penal invocado, inmediatamente queda descartada la posibilidad de atribuir la comisión de un delito a alguna persona, sin perjuicio que la misma situación, pudiera ser examinada en una jurisdicción distinta a la penal, de conformidad con el principio de la mínima aplicación de la ley penal, consagrada en el artículo 3 del Código Penal que señala lo siguiente:

"Artículo 3. La legislación penal solo debe intervenir cuando no es posible utilizar otros mecanismos de control social. Se instituye el principio de su mínima aplicación."





El principio de intervención mínima en el derecho penal, denominado también "principio de ultima ratio", tiene un doble significado: en primer lugar implica, que las sanciones penales se han de limitar al círculo de lo indispensable, en beneficio de otras sanciones o incluso de la tolerancia de los ilícitos más leves, es decir, el derecho penal, no ha de sancionar todas las conductas lesivas a los bienes jurídicos que previamente se ha considerado dignos de protección, sino únicamente las modalidades de ataque más peligrosas para ellos. En segundo lugar, la intervención mínima en el derecho penal responde al convencimiento del legislador de que la pena es un mal irreversible y una solución imperfecta que debe utilizarse solamente cuando no haya más remedio, es decir, tras el fracaso de cualquier otro modo de protección. Por tanto, el recurso al derecho penal ha de ser la "última ratio" o lo que es lo mismo el último recurso a utilizar a falta de otros medios lesivos. Considera el legislador que cuando el derecho penal intervenga ha de ser para la protección de aquellos "intereses mayoritarios y necesarios para el funcionamiento del Estado de derecho".

En consecuencia, debe recurrirse a esta jurisdicción cuando los otros mecanismos de control social y de solución pacífica de conflictos resulten ineficaces; es decir, que solo debemos utilizar la jurisdicción penal, cuando no sea posible resolver el conflicto de otra manera o cuando los otros mecanismos resulten inadecuados, de allí que ante esta extrema necesidad la vía sea, activar el sistema jurisdiccional.

Conforme queda expuesto procede resolver según lo establecido en el artículo 275 del Código Procesal Penal, el cual dispone lo siguiente:

Artículo 275: Archivo Provisional. El Fiscal puede disponer el archivo del caso, motivando las razones, si no ha podido individualizar al autor o partícipe o es manifiesta la imposibilidad de reunir elementos de convicción. En este caso, se podrá reabrir la investigación si con posterioridad surgen elementos que permitan identificar a los autores o partícipes.

Así mismo, dispondrá el archivo, si estima que el hecho no constituye delito, desestimando la denuncia o las actuaciones. Su decisión será revisada por el Juez de Garantías si la víctima lo solicita".

La correcta aplicación de la normativa citada nos lleva a desestimar la querrela, ya que no se configura ningún delito y las acciones de reclamo, presentadas por el querellante no encuentran adecuación típica en los tipos penales que se señalan infringidos.

En atención a los hechos planteados y a la normativa legal citada, la Fiscal Adjunta, de la Sección de Delitos Contra La Fe Pública, DISPONE:



**PRIMERO:** Ordenar el Archivo Provisional de la carpeta N°202100003611, por un presunto **DELITO CONTRA LA FE PÚBLICA**, en la modalidad de Falsificación de Documentos en General y otros, hechos querellados por el Licenciado Javier De Almengor apoderado principal de Harald Johannessen Hals en calidad de tesorero de GABINVEST, S.A

**SEGUNDO:** Comunicar al señor Harald Johannessen Hals, la presente resolución, dándole a conocer lo establecido en el último párrafo del referido artículo 275 del Código Procesal Penal, que en lo medular indica, que, si la víctima se encuentra en desacuerdo con esta decisión, podrá solicitar al Juez de Garantías, la revisión de la misma.

**TERCERO:** Comunicar a los querellados Alvaro Almengor, Lidia Ramos y Manuel Carrasquilla la presente resolución, dándole a conocer lo establecido en el último párrafo del referido artículo 275 del Código Procesal Penal.

**CUARTO:** Luego de la comunicación a la víctima, en caso de manifestar su desacuerdo con la decisión asumida, informarle que la misma puede ser revisada por el Juez de Garantías si así lo solicita.

**QUINTO:** Désele salida en la Plataforma Tecnológica del Portal del Sistema Penal Acusatorio.

**FUNDAMENTO DE DERECHO:** Artículos 22, 68, 110, 275 del Código Procesal Penal y Artículos 2 y 3 del Código Penal, de la República de Panamá.

COMUNIQUESE Y CÚMPLASE,

  
**LCDA. ELBA MARLENE AROSEMENA**  
 Fiscal Adjunta de la Sección de Delitos Contra la Fe Pública  
 Fiscalía Metropolitana.

MINISTERIO PÚBLICO  
 FISCALÍA METROPOLITANA  
 SECCIÓN DE DELITOS CONTRA LA FE PÚBLICA  
 En Panamá, a las 3:41 de la Tarde  
 del día 23 de agosto del año 2022  
 Fijado para comunicarse a [Signature]  
 y para comunicarse a [Signature]

MINISTERIO PÚBLICO  
 FISCALÍA METROPOLITANA  
 SECCIÓN DE DELITOS CONTRA LA FE PÚBLICA  
 CERTIFICO QUE LO ANTERIOR ES UNA COPIA FIEL DEL ORIGINAL  
 En Panamá el día 23 de agosto del año 2022  
  
 [Signature]



This is **Exhibit "B"** to the Affidavit of **Grace Tsakas** sworn remotely on November 23, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

**Mis datos** **Consultar gestión del caso**

**CASO # 202100003611**

Caso | Versiones | Datos | Personas | Bienes - Elementos | Documentos | Casos relacionados | Formas relacionadas | Actuaciones | Usuario caso | Reprimir

Fecha Registro | Fecha-Hora Registro | Fecha-Hora Profiere | Fecha Realización | Nombre Actuación | Usuario Registro | Usuario Profiere | Observación | Estado Actuación | Reservado | Número de Resolución | Limpiar

2022/02/04 | 2022/03/20 | 2022/08/23 | 2022/10/14 14:38:30 | 2022/10/14 14:39:42 | 2022/10/13 14:00:00 | 2022/10/13 14:59:00 | 2022/10/15 |

**Detalle Requirere - Ordena Mantener El Archivo Provisional Del Caso. Art. 275**

**Observación:** Se ordena mantener el Archivo decretado por el Ministerio Pública, pues los hechos **Oficina que Profiere:** Juez de Garantías del Primer Circuito Judicial - Despacho 21 querrellados, no tipifican el delito de falsedad querrellado.

**Fecha de Realización:** 2022/10/14 14:38:30 **Fecha de Registro:** 2022/10/14 14:39:42

▼ Audiencia asociada (1)

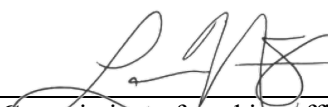
Numero Audiencia	Estado	Reservada	Fecha Hora Inicio	Fecha Hora Liberación
2454874	Programada	---	2022/10/13 14:00:00	2022/10/13 14:59:00

▼ Actuacion Caso asociado (1)

Actuacion Caso Relacionada	Fecha Hora Realizacion	Estado	Oficina Profiere	Observacion
Revisión del archivo provisional a solicitud de la víctima Art. 275	2022/08/23 16:40:13	Activa	calle primera el carmen, P.H. Mar del Sur ,Piso 5	SE SOLICITA AUDIENCIA DE REVISION DE ARCHIVO

**Cerrar**

This is **Exhibit "C"** to the Affidavit of **Grace Tsakas** sworn remotely on November 23, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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A Commissioner for taking affidavits

Lauren Nixon  
P14847



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

**CASE CONFERENCE BRIEF OF THE RESPONDENT, JUAN GUILLERMO  
GUTIERREZ**

**Introduction**

1. The Receiver, KSV Restructuring Inc. (“KSV”), is engaged in a serious, ongoing breach of the Court’s Order dated October 27, 2020 (the “**Production Order**”), placing all of the data on Mr. Gutierrez’s personal devices at undue risk of duplication or other unauthorized access. As detailed below, KSV instructed Epiq, its IT consultant, to unlock the hard drive and upload Mr. Gutierrez’s personal data to the Relativity platform for Mr. Gutierrez’s preliminary review. Indeed, Epiq expressly told Brian Greenspan and David Burton (Mr. Gutierrez’s IT consultant) that those were its instructions before Mr. Greenspan transmitted the passcode to Epiq on August 30, and again after the passcode was supplied and the hard drive was unlocked. However, at some time unknown to Mr. Gutierrez, KSV had actually instructed Epiq *not* to upload the data to Relativity. Thus, the data is presumably now on Epiq’s servers where it might be duplicated or otherwise accessed without any of the Relativity auditing safeguards that would have identified any such malfeasance.

2. Not only has KSV's conduct stalled the review process completely, but it has also created the very circumstance Mr. Gutierrez has decried from the outset, which is that his personal, confidential information must not be exposed to risk, owing to the historical theft of Xela electronic documents by the Applicant's husband and delivery of same to Mr. Gutierrez's cousins in Guatemala.

3. KSV was aware of these circumstances at the Case Conference on September 13 but declined to inform the Court or to tell Mr. Gutierrez's counsel until after the Case Conference had concluded. Neither did KSV or its counsel alert the Court on September 13 that, as a consequence of KSV's instructions to Epiq, no progress whatsoever would be made toward compliance with the document review process in advance of the follow-up Case Conference on September 27.

4. The aforementioned conduct is a further indicator of KSV's lack of concern for Mr. Gutierrez's rights and provides additional support for scheduling Mr. Gutierrez's motion to recuse and replace KSV. Moreover, the Court should issue an Order requiring Epiq immediately to explain the status of the data and to permanently delete the data from its servers until such time as the Receiver decides whether to upload the data to Relativity, whereupon the hard drive can be unlocked again for treatment consistent with the Production Order.

### **Facts**

5. At 9:15 a.m. on August 30, 2022, Mr. Greenspan and Mr. Burton held a Zoom conference call with Laura Clawley, the Epiq representative tasked with unlocking the hard drive and uploading the data to Relativity. During that call, Ms. Clawley confirmed that her instructions were indeed to upload the data to Relativity once the hard drive was unlocked, and that the entire process might take as long as 48 hours. Relying on that representation – along with everybody's collective understanding that KSV was demanding the passcode for the purpose of unlocking the hard drive and uploading the data to Relativity – Mr. Greenspan gave Ms. Clawley the passcode. She then confirmed that she had unlocked the hard drive and would proceed to upload the data to Relativity. The three participants agreed that once the upload was completed, Mr. Burton would be allowed to relock the hard drive, which would remain in Epiq's possession. They further agreed that Mr. Burton would go to Epiq's offices in two days' time to perform that

function, with the understanding that Ms. Clawley would alert Mr. Burton if the upload to Relativity was completed sooner.

6. Two days later, on September 1, 2022, Mr. Burton went to Epiq's offices as agreed, having not heard sooner from Ms. Clawley. There, Mr. Burton was given access to the hard drive, which he relocked with a new passcode and returned to Epiq, where it remains. Epiq did not tell Mr. Burton at that time (or at any other time) that the upload to Relativity had not actually been performed, nor did Epiq explain why Mr. Burton had not been called to come relock the hard drive sooner. After relocking the hard drive with a fresh passcode, Mr. Burton conveyed that passcode to Mr. Greenspan.

7. On September 13, 2022, the parties attended a Case Conference in this matter. There, Mr. Gutierrez's counsel asked the Court to schedule his motion to recuse and replace KSV as Receiver. KSV resisted that request and the Court agreed because (in part) His Honour wished to review the status of compliance with his prior orders, referring to the progress of Mr. Gutierrez's document review. Although the hard drive had been unlocked and a copy had presumably been transferred to Epiq's servers some two weeks earlier without uploading the data to Relativity, counsel for KSV declined to inform the Court of those facts. Neither did KSV's counsel inform the Court that Mr. Gutierrez would be unable to make *any* progress reviewing the data in the interim because the data had never been uploaded to Relativity. Within an hour after the September 13 Case Conference concluded, KSV's counsel alerted the parties to the actual circumstances.

8. Mr. Gutierrez has long expressed grave concerns about the sensitivity of the personal data on his electronic devices. Indeed, he has submitted evidence under oath detailing the role played by the Applicant's husband in the theft of all Xela electronic documents in 2010 and their subsequent delivery to Mr. Gutierrez's cousins by their wholesale attachment as an exhibit to an unrelated legal pleading in Toronto. Considering that background and the contentious, decades-old litigation involving hundreds of millions of dollars in dividends improperly withheld by Mr. Gutierrez's cousins, it was important that any access to the data by KSV or the Applicant be monitored electronically and auditable. The Relativity software contains safeguards that would

preclude or at least identify any improper duplication of or other unauthorized access to the data, while Epiq's servers do not.

9. KSV's counsel has asserted that the data was never uploaded to Relativity because KSV is no longer in funds. However, even if it were permissible for KSV to instruct Epiq to maintain the data on its servers without uploading it to Relativity, the Receiver's current financial posture stems in no small measure from KSV's own misconduct in Panama and its decision to pursue a contempt citation against Mr. Gutierrez, among other fruitless tasks.

10. Whether Mr. Greenspan was intentionally misled on August 30 so that Epiq could duplicate the data and/or maintain it on its servers without adequate safeguards, as Mr. Gutierrez believes, it was at least reckless on the part of KSV. This latest incident further confirms that the relationship between Mr. Gutierrez and KSV has soured to the point that it is impossible for KSV to accomplish the purpose of the receivership. The Court should promptly schedule Mr. Gutierrez's motion to replace KSV as Receiver, to facilitate a course that might actually lead to collection of the monies necessary to satisfy the Applicant's judgment.

**Relief Requested**

11. In the meantime, KSV must provide full transparency into the status of the data, and – although it may now be impossible to return to the *status quo ante* – the data must be made as secure as possible. In that regard, Mr. Gutierrez respectfully requests that the Court issue an Order requiring Epiq immediately to delete all of the data from its servers and to provide a detailed report certifying the complete destruction of the data. Should the Receiver subsequently elect to upload the data to Relativity, the locked hard drive remains in Epiq's possession, and Mr. Greenspan has the passcode.

12. Mr. Gutierrez further requests an Order requiring Epiq to supply a sworn statement by a knowledgeable Epiq representative, within five business days, containing at least the following information:

- a. The name of the person who instructed Epiq not to upload data to Relativity, and the date and time of those instructions;

- b. A fulsome explanation of precisely what functions were performed with the data, and when;
- c. A fulsome explanation of the precise location of the data;
- d. The names of all Epiq representatives who have had the ability to access the data since the hard drive was unlocked;
- e. Whether the data has been duplicated in any way, and if so, precisely how many duplicates and the whereabouts of said duplicate(s);
- f. Whether the data has been accessed in any way, and if so, precisely what access has been had, and by whom.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26th day of September 2022.



September 26, 2022

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Fax: 289.812.7385

Lawyers for the Respondent  
Juan Guillermo Gutierrez

TO: **THE SERVICE LIST**

This is **Exhibit "D"** to the Affidavit of **Grace Tsakas** sworn remotely on November 23, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L Nixon', written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

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, Executor of the Estate of Juan  
Arturo Gutierrez

Respondents

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

**CASE CONFERENCE MEMORANDUM OF THE RECEIVER  
(Case Conference returnable September 27, 2022)**

September 26, 2022

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TO: **THE SERVICE LIST**

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## A. INTRODUCTION

1. KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of Xela Enterprises Ltd. (“**Xela**”), provides this case conference memorandum to update the Court on the status of the receivership, to provide submissions on Juan Guillermo Gutierrez’s (“**Juan Guillermo**”) request to schedule a motion to replace the Receiver, and to seek dates for a further case conference.

2. The parties last attended at a case conference on September 13, 2022. The Receiver advised of a funding issue in respect of its fees and costs (including those of its legal counsel) and advised that it was considering asking the Court to schedule a motion to conduct a sales process. Mr. Gutierrez sought to schedule a motion to replace the Receiver. This Court deferred the scheduling because “funding may become available for the Receiver and...to see Mr. Gutierrez’ Notice of Motion and review the status of compliance with prior order.” A case conference was scheduled for September 27, 2022.

3. On June 29, 2022, Conway J. held that Juan Guillermo breached the July 5, 2019 Order of McEwen J. (the “**Appointment Order**”) when Juan Guillermo swore a declaration on December 3, 2020 (the “**Declaration**”) in support of a criminal complaint against the Receiver’s representatives in Panama (“**Hatstone**”). The sentencing hearing was heard on September 22, 2022. Justice Conway is to provide her decision on October 17, 2022.

4. The Receiver asks this Court to schedule a further case conference at the end of October or early November, 2022, to allow for additional time to:

- (a) obtain the sentencing decision;

- (b) address longer term funding for these proceedings; and
- (c) address Juan Guillermo's motion to replace the Receiver, which the Receiver believes is an abuse of process and lacks any evidence.

## **B. UPDATE**

5. On July 21, 2022, the parties and the Receiver attended a case conference before McEwen J. Juan Guillermo sought to schedule his motion to replace the Receiver. Justice McEwen declined to schedule Juan Guillermo's motion because:

- (a) the notice of motion was only provided in draft form;
- (b) costs remained outstanding;
- (c) a finding of civil contempt against Juan Guillermo had been made by Conway J. on June 29, 2022; and
- (d) Juan Guillermo "has still, inexplicably, failed to comply with my productions orders, long outstanding, nor did he provide any explanation ... for failing to do so".<sup>1</sup>

6. On July 26, 2022, Juan Guillermo paid the outstanding costs order in the amount of \$5,000.<sup>2</sup>

<sup>1</sup> July 22, 2022 Endorsement of McEwen J., Brief of Documents to the Receiver's September 26, 2022 Case Conference Memorandum (the "**Brief**"), Tab 1.

<sup>2</sup> These costs were ordered by the Divisional Court on May 6, 2022 following Juan Guillermo's abandoned motion for leave to appeal this Court's March 25, 2022 Order.

7. On August 30, 2022, Juan Guillermo provided the Receiver's IT agent ("**Epiq**") with the password to unlock the hard drive containing images of Juan Guillermo's devices (the "**JG Hard Drive**")—as required by this Court's March 25, 2021 Order and its March 25, 2022 Order.
8. On September 12, 2022, Juan Guillermo delivered a final version of his notice of motion.
9. On September 13, 2022, Arturo's Technical Services Ltd. ("**ATS**") provided Epiq with Juan Guillermo's emails on ATS's servers—as required by the March 25, 2021 Order and the March 25, 2022 Order.
10. In light of the funding issues, the Receiver has not asked Epiq to process the JG Hard-Drive or the emails from ATS. Epiq cannot yet advise whether it has been provided with the data in the format it requires to upload the data to Relativity (the document review platform).
11. On September 22, 2022, Juan Guillermo and the Receiver appeared before Conway J. for the penalty phase of the contempt hearing. Her Honour is scheduled to deliver the decision on October 17, 2022.
12. At present:
  - (a) Hatstone continues to face criminal jeopardy. The Panamanian investigations are proceeding slowly and are not expected to conclude soon;
  - (b) the Receiver has made significant progress resolving the funding issues, but due to the significant expense resulting from the numerous disputes in these proceedings, the Receiver requires certainty that funding is available for its future fees and costs in these proceedings. If the Receiver is unable to finalize satisfactory funding

arrangements, it intends to make a recommendation to the Court as to its views of the appropriate next steps in these proceedings; and

(c) Justice Conway's decision on penalty remains outstanding.

### C. SUBMISSIONS REGARDING JUAN GUILLERMO'S MOTION

13. The Receiver submits that Juan Guillermo should not be permitted to schedule a motion to replace the Receiver considering the nature of Juan Guillermo's allegations, the lack of any evidence, and the finding of contempt. Although this issue can be addressed at a later case conference, brief submissions are set out below.

#### (i) *Juan Guillermo is in Contempt of this Court*

14. A party to litigation ought not to be able to schedule motions when they are in contempt of the Court. It is the Receiver's position that Mr. Gutierrez has not purged his contempt. It is expected the issue of whether the contempt has been purged will be addressed in Conway J.'s penalty decision. No motion ought to be scheduled prior to that decision.

#### (ii) *Juan Guillermo's Motion is an Abuse of Process*

15. The September 12, 2022 notice of motion:

(a) alleges that the Receiver is uninterested in Xela's beneficial interest in the dividends owed to Xela's wholly-owned, indirect subsidiary, LISA S.A. ("LISA").<sup>3</sup> This is unsupported by any facts and is contrary to the Receiver's actions to-date. The Receiver is interested in obtaining information from LISA to

<sup>3</sup> Juan Guillermo's September 12, 2022 Notice of Motion, at para. n, Brief Tab 2.

consider the *bona fides* of transactions that deprived Xela of all its assets (the “**Reviewable Transactions**”) in order to consider whether Xela still indirectly owns the interest in the Avicola Group, or whether that interest was properly conveyed to the ARTCARM Trust to the benefit of Juan Guillermo’s family. The Receiver has explicitly and repeatedly stated that it has not made a determination as to the appropriateness of those transactions and has been seeking disclosure from Juan Guillermo, ATS, Gabinvest S.A., and LISA (and others) since the early days of these proceedings. It is the Receiver’s view that Juan Guillermo intentionally interfered with the Receiver’s efforts to investigate the Reviewable Transactions, including when he swore the Declaration in support of the criminal complaint;

- (b) alleges that the Receiver is engaged in a “fishing expedition in coordination with” Juan Guillermo’s cousins (or nephews)<sup>4</sup> because the investigation into the Reviewable Transactions involve assets in which Xela had (or has) no beneficial interest. It further alleges that the Receiver has “engaged in numerous regular discussions with the Cousins [or Nephews] throughout the course of the receivership.”<sup>5</sup> This allegation was made at the March 25, 2021 motion. There is no substance to these allegations. This Court has addressed and refused to schedule motions with these allegations in the past.<sup>6</sup> The March 25, 2022 Endorsement,

<sup>4</sup> Juan Guillermo’s September 12, 2022 Notice of Motion, at para. m, Brief Tab 2.

<sup>5</sup> Juan Guillermo’s September 12, 2022 Notice of Motion, at para. o, Brief Tab 2.

<sup>6</sup> March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at paras. 6, 9, and 14, Brief Tab 3; March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at paras. 32, 40-41, Brief Tab 4.

provides that “there is no reasonable basis to suggest that the Receiver has in some way colluded with ‘the Nephews’”;<sup>7</sup>

- (c) alleges that the Receiver’s reports are “riddled with inaccurate” statements, such as “unfairly casting” Juan Guillermo as “uncooperative.”<sup>8</sup> The failure to comply with production orders for over two years can fairly be described as uncooperative. This Court has described the failure to comply as “inexplicable”;<sup>9</sup>
- (d) alleges that the Receiver’s attempts to achieve compliance with this Court’s August 28, 2020 Order, October 27, 2020 Order, March 25, 2021 Order, and March 25, 2022 Order are an improper attempt to access Juan Guillermo’s “emails and his personal electronic devices”.<sup>10</sup> These are Orders made and repeatedly affirmed by this Court (in some cases after contested motions) and cannot form the basis for a motion that the Receiver acted improperly. Juan Guillermo sought leave to appeal the March 25, 2021 Order and the March 25, 2022 Order. The Divisional Court dismissed the former, and Juan Guillermo abandoned the latter;
- (e) alleges that the Receiver interfered with a 2019 loan to pay the judgment owed to Ms. Castillo.<sup>11</sup> Juan Guillermo has been making this allegation for years, including in the motion heard in March 2021 and the case conference held on March 25, 2022.<sup>12</sup> In the March 25, 2021 Endorsement, this Court directed that, if the loan

<sup>7</sup> March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at para. 14, Brief Tab 3.

<sup>8</sup> Juan Guillermo’s September 12, 2022 Notice of Motion, at para. r, Brief Tab 2.

<sup>9</sup> July 22, 2022 Endorsement of McEwen J., Brief Tab 1.

<sup>10</sup> Juan Guillermo’s September 12, 2022 Notice of Motion, at para. s, Brief Tab 2.

<sup>11</sup> Juan Guillermo’s September 12, 2022 Notice of Motion, at para. v, Brief Tab 2.

<sup>12</sup> March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at para. 32, Brief Tab 4; March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at paras. 7 and 19, Brief Tab 3.



was legitimate, “full particulars and terms of payment should be provided. To date this has not occurred.”<sup>13</sup> The March 25, 2022 Endorsement, again makes clear that no particulars about any loan had been provided;<sup>14</sup>

- (f) alleges that the motion for contempt was a “retaliation” and alleges that Conway J. erroneously concluded that Mr. Gutierrez was in criminal contempt. This is an improper collateral attack against the finding of Conway J.; and
- (g) alleges that “Mr. Kofman has admitted under oath that KSV instructed Hatstone. Consequently, KSV and/or Mr. Kofman may themselves be exposed to potential criminal prosecution in Panama.”<sup>15</sup> This appears to be a not so veiled threat against the Receiver and should not be countenanced.

16. The doctrine of abuse of process “engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some way bring the administration of justice into disrepute.”<sup>16</sup> Juan Guillermo’s motion is an abuse of process and should not be scheduled.

#### **D. DIRECTION REQUESTED**

17. The Receiver respectfully requests that:

- (a) a case conference be scheduled subsequent to the contempt sentencing decision;

<sup>13</sup> March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at para. 41, Brief Tab 4.

<sup>14</sup> March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at para. 19, Brief Tab 3.

<sup>15</sup> Juan Guillermo’s September 12, 2022 Notice of Motion, at para. aa, Brief Tab 2.

<sup>16</sup> *Currie v. Halton Regional Police Services Board*, 179 O.A.C. 67 (ONCA), at [para. 16](#), Brief Tab 5.

- (b) Juan Guillermo's motion be barred as an abuse of process; and
- (c) in the alternative, Mr. Gutierrez should deliver any evidence in support of the motion, prior to this Court considering whether the motion be scheduled.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26th day of September 2022.



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Monique J. Jilesen

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Applicant

-and-

XELA ENTERPRISE LTD. et al.  
Respondents

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

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

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**CASE CONFERENCE MEMORANDUM OF  
THE RECEIVER  
(Case Conference returnable September 27, 2022)**

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Lawyers for the Receiver

This is **Exhibit "E"** to the Affidavit of **Grace Tsakas** sworn remotely on November 23, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'L. Nixon', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon  
P14847

**From:** [Monique Jilesen](#)  
**To:** [Chris Macleod](#); [Derek Knoke](#)  
**Cc:** [Joan Kasozi](#); [Brian Greenspan](#)  
**Subject:** RE: Epiq and document review  
**Date:** September 13, 2022 10:08:52 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)

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Chris,

Until this morning, we had not yet heard that all of the ATS data has yet been uploaded. We need to confirm that information with Epiq.

In any event, paragraph 8 of the October 27, 2020 Order provides that “at the request of the Receiver, [Epiq] will be authorized to load the data onto the Relativity document review platform.

In light of the funding issue, the Receiver has not requested that Epiq load the data onto Relativity. As a result, the timetable starting in paragraph 10 of the October 27, 2020 Order has not yet begun to run. We will provide with notice if and when the data is loaded onto relativity in accordance with the Order.

Thanks

Monique

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**From:** Chris Macleod <[cmacleod@cambridgellp.com](mailto:cmacleod@cambridgellp.com)>  
**Sent:** Tuesday, September 13, 2022 8:38 AM  
**To:** Monique Jilesen <[mjilesen@litigate.com](mailto:mjilesen@litigate.com)>; Derek Knoke <[dknoke@litigate.com](mailto:dknoke@litigate.com)>  
**Cc:** Joan Kasozi <[jkasozi@cambridgellp.com](mailto:jkasozi@cambridgellp.com)>; Brian Greenspan <[bhg@15bedford.com](mailto:bhg@15bedford.com)>  
**Subject:** Epiq and document review

**EXTERNAL MESSAGE**

Monique and Derek-

Who do we coordinate with at Epiq to review the uploaded documents on relativity?

Thanks,

Chris

**Chris Macleod**

Partner, Cross-Border Litigation & Business Litigation Groups

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MARGARITA CASTILLO  
Plaintiff

-and- XELA ENTERPRISES LTD. et al.  
Defendants

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

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

PROCEEDING COMMENCED AT TORONTO

**AFFIDAVIT OF GRACE TSAKAS  
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the Receiver

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XELA ENTERPRISES LTD. et al.  
Respondents

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

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

PROCEEDING COMMENCED AT  
TORONTO

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**MOTION RECORD ON BEHALF OF  
THE RESPONDENT JUAN GUILLERMO  
GUTIERREZ**  
*(Motion for leave to appeal)*

**VOLUME 2 OF 2**

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