

**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

**NOTICE OF MOTION
(Investigative Powers & Recognition Order)**

KSV Restructuring Inc. (“KSV”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “Receiver”), without security, of all the assets, undertakings and properties (collectively, the “Property”) of Xela Enterprises Ltd. (the “Company”), will make a motion to the Honourable Justice McEwen of the Commercial List on a date to be fixed by the registrar by judicial videoconference via Zoom or at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The Motion is to be heard orally.

1. **THE MOTION IS FOR** an order:

(a) expanding the Receiver’s investigative powers, including authority to:

- (i) investigate, identify, quantify, and take all steps necessary, in the opinion of the Receiver, to review:
 - (1) the sale, conveyance, or transfer in 2016 by Empress Arturo International (“**EAI**”) of the shares of BDT Investments Ltd. (“**BDT**”) and Corporacion Arven, Limited (“**Arven**”) to Juan Arturo Gutierrez, and then from Juan Arturo Gutierrez to the ARTCARM Trust, a Barbados domiciled trust (the “**EAI Transaction**”);
 - (2) the assignment in January 2018 by Lisa, S.A. (“**Lisa**”) of the proceeds from the litigation arising from shareholder disputes involving the Avicola Group (the “**Avicola Litigation**”) to BDT (“**Assignment Transaction**”);
 - (3) the sale, conveyance, transfer, or assignment of Lisa’s interest in the Avicola Group to BDT in early 2020 (the “**Lisa Transfer**”);
 - (4) the assignment of the right to control Lisa’s litigation with the Avicola Group (“**Litigation Assignment**”)(collectively, the “**Reviewable Transactions**”), and to conduct such review and investigation of the Reviewable Transactions that the Receiver deems necessary;
- (ii) conduct such additional review and investigation of the Reviewable Transactions as well as the business and affairs of the Company and its current and former direct and indirect subsidiaries, affiliates, customers,

directors, officers and employees as it deems necessary (collectively the “**Investigation**”);

- (iii) examine under oath persons whom the Receiver deems appropriate on any matters relating to the Company, the Reviewable Transactions, and the Investigation, as the Receiver deems necessary; and
 - (iv) take any steps reasonably incidental to the exercise of these powers;
- (b) requiring Juan Guillermo Gutierrez (“**Juan Guillermo**”) to immediately provide the Receiver with all encryption codes, keys, passwords or any other such information or knowledge necessary to unlock and access the data on any images or hard drives in the possession of the Receiver’s forensic agent, Duff & Phelps, LLC (“**Duff & Phelps**”) including but not limited to the DataShield Fantom Drive;
- (c) requiring Arturo’s Technical Services Ltd. (“**ATS**”) to identify the location of the images of the “Blue Network Servers” (as identified by Julio Fabrini, the Company’s former head of IT) in his interview dated November 26, 2020, discussed below) on the hard drives in the possession of Duff & Phelps by identifying the file names, paths and any other information necessary to identify the Blue Network Server images;
- (d) granting the Receiver, without any limitation whatsoever, authorization to access and review the images of the Blue Network Servers that are in Duff & Phelps’ possession further to the Order of this Court dated October 27, 2020, including any content of the images;

- (e) requiring ATS to provide the Receiver with an electronic copy of all emails sent or received by Juan Guillermo (regardless of the email address to which it was forwarded and regardless as to whether the email was sent directly to him or it was one on which he was copied) at any email address maintained on the ATS servers to the date of this Order, along with any encryption codes, keys, or passwords used to secure the emails;
- (f) requiring Harald Johannessen Hals, Calvin Shields, Lester C. Hess Jr., Jose Eduardo San Juan and David Harry to provide the Receiver with all available information or documents in their control relating to:
 - (i) shares, share registers, accounting, correspondence and related information of Gabinvest, S.A. (“**Gabinvest**”) and Lisa; and
 - (ii) the Reviewable Transactions;
- (g) requiring Alfaro, Ferrer & Ramirez Abogados (“**AFRA**”), as former resident agent of Gabinvest and Lisa in Panama, to deliver to the Receiver and its agents in Panama, Hatstone Abogados (“**Hatstone**”), their entire file, including but not limited to, all information related to the constitution, shares issued, KYC (know your client), correspondence, instructions given to AFRA and all information related to Gabinvest and Lisa;
- (h) authorizing the Receiver and its agents in Panama, Hatstone, to take any steps reasonably incidental to the recognition and enforcement of this Order and any other Orders issued by this Court in this matter in Panama;

- (i) seeking an Order to domesticate the July 5, 2019 Order (appointing the Receiver) in Panama and seeking the assistance of the Panamanian Courts to permit the Receiver to exercise control over the Company's subsidiaries and give effect to the Order requested herein as well as all Orders issued by this Court and other related relief;
- (j) approving the fees and disbursements of the Receiver and its legal counsel, Lenczner Slaght Royce Smith Griffin LLP and Aird & Berlis LLP, for the periods referenced in their respective fee affidavits;
- (k) seeking the aid and recognition of foreign courts to give effect to the Order requested herein; and
- (l) such further and other relief as to this Honourable Court may seem just.

2. **THE GROUNDS FOR THE MOTION ARE:**

Investigative Powers

Background

- (a) in 2015, a judgment debt was obtained against Juan Guillermo, Juan Arturo Gutierrez, and the Company (the "**Judgment Debt**");
- (b) a portion of the Judgment Debt remains outstanding;
- (c) various related-party transactions (the EAI Transaction and the Assignment Transaction) were completed for the benefit of Juan Guillermo's children;

- (d) as a result, the once-lucrative Company was suddenly devoid of cashflow and effectively ceased operations;
- (e) Juan Guillermo's children benefited while the Company's creditors and securityholders were prejudiced;
- (f) the Company does not have any assets to pay the Judgment Debt;
- (g) on July 5, 2019, the Receiver was appointed to manage and control the Company, its assets and its businesses;
- (h) where the Receiver takes any action under the Appointment Order it does so to the exclusion of any other party;
- (i) following the appointment of the Receiver, it appears that there has been a further transfer of Company assets out of the reach of the Receiver and the Company's creditors (the Lisa Transfer);

The Receiver's Investigation

- (j) since its appointment, the Receiver has attempted to investigate the Reviewable Transactions in an effort to satisfy the Company's financial obligations;
- (k) the Appointment Order:
 - (i) provides the Receiver with the usual powers to take possession of and exercise control over the property of the Company; and

- (ii) imposes a duty on persons with notice of the order to provide access and cooperation;
- (l) the Receiver has not been able to effect control over the Company's subsidiaries, Lisa and Gabinvest, which are located in Panama and which are the subject of the Reviewable Transactions;
- (m) the Receiver has not received cooperation from various parties to obtain information and documents relating to the Company and its subsidiaries with respect to the Reviewable Transactions;
- (n) the Receiver has made numerous requests from various parties who have or ought to have information concerning the Reviewable Transactions;
- (o) the Receiver has not received the requested information. Instead, it has received misleading information as well as threats of criminal complaints against its agent in Panama and other interference;
- (p) the Receiver has neither found evidence to support the Reviewable Transactions nor has it found evidence of a commercially reasonable basis for the Reviewable Transactions;
- (q) the Receiver has not received any documentation concerning the Lisa Transfer;

Juan Guillermo's Devices

- (r) on October 27, 2020, this Court ordered (on consent) Juan Guillermo to provide the Receiver with all devices used by him that might contain Company information

within seven business days of the Order for imaging by Duff & Phelps. The Order provided for a protocol for a review of the images;

- (s) the devices were not presented for imaging until January 5, 2021;
- (t) Juan Guillermo refused to permit the devices to be imaged or reviewed in accordance with the October 27, 2020 Order and instead required that the images of the devices be protected by password;
- (u) the passwords have not been provided to the Receiver;

Company Records

The Servers

- (v) on August 28, 2020, this Court issued an Order that required Juan Guillermo and ATS to provide the Receiver with access to Company devices and data as well as to provide the Receiver with necessary assistance to decode the data;
- (w) the August 28, 2020 Order was served on ATS;
- (x) ATS did not advise the Receiver that it was in the possession of servers which held exclusively Company data (the “**Blue Network Servers**”);
- (y) instead, ATS advised the Receiver that “The Xela documents you are seeking are maintained on the servers acquired from Xela that, although presently decommissioned, is integrated with the ATS network at large”;
- (z) on October 27, 2020, this Court ordered, on the consent of ATS, that ATS’ servers be imaged without any analysis or review without further Order of the Court;

- (aa) on November 26, 2020, the Receiver conducted an interview of Julio Fabrini, ATS' Chief Information Officer, who was the Company's former head of IT, who advised that the Blue Network Servers (which contain the Company's data) are not integrated with the ATS network at large – instead they are completely separate;
- (bb) Mr. Fabrini undertook to advise the Receiver which of the servers imaged are the Blue Network Servers. Neither Mr. Fabrini nor ATS has yet done so. Instead, they have rejected the Receiver's entitlement to the Blue Network Servers;

Information from the Directors of Gabinvest and Lisa

- (cc) Gabinvest had three directors as at January 1, 2020 (Harald Johannessen Hals, Jose Eduardo San Juan and David Harry);
- (dd) Lisa had three directors as at January 1, 2020 (Harald Johannessen Hals, Calvin Shields and Lester C. Hess Jr.);
- (ee) the Receiver requested information from Lisa's directors, but they have not provided the information requested by the Receiver;
- (ff) Mr. Hals, who is Juan Guillermo's brother-in-law, has specifically refused to recognize the Receiver's authority or to cooperate with the Receiver's requests for information, notwithstanding having sworn an affidavit in this proceeding;

Alfaro, Ferer & Ramirez Abogados (AFRA)

- (gg) AFRA was Lisa's and Gabinvest's registered agent in Panama to maintain those companies' share registers, accounting information and other documents;
- (hh) AFRA resigned as registered agent on February 17, 2020;
- (ii) the Receiver has requested documents directly from AFRA, but AFRA will only release Lisa and Gabinvest's documents to the Receiver by court order;

The Receiver's Fees & Disbursements

- (jj) the Court last approved the fees and disbursements of the Receiver and its counsel on March 24, 2020;
- (kk) the Receiver and counsel have undertaken extensive efforts to gain access to the Company's records and data and to investigate the Reviewable Transactions. The Receiver has been met with resistance and delay at every instance;
- (ll) the matter is complex. The Company's multi-jurisdictional, corporate structure and the extensive materials filed in this matter have required extensive resources and time;
- (mm) the rates and fees charged are consistent with other firms practicing in the insolvency and restructuring industry in the Toronto market, and they are reasonable in the circumstances;
- (nn) the Receiver requires the Court's assistance to permit it to fulfill the purposes for which it was appointed;

(oo) Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

(pp) the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and

(qq) such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. the Fourth Report of the Receiver;
2. the prior Reports of the Receiver in this proceeding;
3. Brief of Documents to the Fourth Report of the Receiver;
4. fee affidavits, to be affirmed; and
5. such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 15, 2021

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

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PROCEEDING COMMENCED AT
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