

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

NOTICE OF CROSS-MOTION

The Respondent Juan Guillermo Gutierrez (“**Mr. Gutierrez**”), will make a Motion to the Honourable Justice McEwen presiding over the Commercial List on _____ at 10:00 a.m., or as soon after that time as the Motion can be heard.

PROPOSED METHOD OF HEARING: The Motion is to be heard

In writing under subrule 37.12.1(1) because it is
[insert on consent, unopposed or made without notice];

In writing as an opposed motion under subrule 37.12.1(4);

In person;

By telephone conference;

[X] By video conference.

at the following location:

330 University Avenue, Toronto, Ontario

THE MOTION IS FOR:

- a) An Order varying the Order dated July 3, 2019 (**the “Appointment Order”**) substituting KSV Restructuring Inc. (**“KSV”**) as receiver, with a Receiver to be determined;
- b) an Order directing KSV in its capacity as court-appointed receiver (the **“Receiver”**) of the assets, undertakings and properties of Xela Enterprises Inc. (the **“Company”**) to return, or direct its agents to return, to Arturo’s Technical Services (**“ATS”**) the hard-drive images (*i.e.*, copies) of the Xela servers previously provided to KSV’s agents, and ordering that no person other than ATS may access the data thereon, until further Order after the conclusion of BDT’s Motion for Full or Partial Discharge of the Receiver (**the “BDT Motion”**);
- c) an Order that no person, including without limitation, the Receiver and/or its agents, shall access the data contained on hard-drive images of Mr. Gutierrez’s personal electronic devices until further Order after the conclusion of the BDT Motion;
- d) an Order directing Duff & Phelps (**“D&P”**) to provide Mr. Gutierrez with copies of the hard-drive images of his personal electronic devices;
- e) an Order suspending the deadlines set out in the Court’s Order dated October 27, 2020, until further Order after the conclusion of the BDT Motion;

- f) an Order compelling the Receiver to substitute D&P with a new IT consultant, to be named on or before the return of this Motion;
- g) an Order compelling KSV to disclose to Mr. Gutierrez: (a) particulars in respect of the funds received for the conduct of this receivership, including sources, dates and amounts; (b) copies of all communications between the KSV and/or its counsel, on the one hand, and the “Cousins” and/or their counsel, on the other hand; and
- h) such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

- i) KSV’s conduct in the receivership has been such that it has become, as a practical matter, impossible under KSV’s authority to achieve the objective of the receivership, which is to satisfy the judgment of Margarita Castillo (**the “Castillo Judgment”**);
- j) KSV’s conduct throughout the course of the receivership has been antagonistic and hostile toward Mr. Gutierrez;
- k) Contrary to what KSV has both asserted and implied – Mr. Gutierrez has fully cooperated with the Receiver;
- l) The only reasonable source of monies to satisfy the Castillo Judgment is litigation in Panama (**the “Panama Litigation”**) to collect tens of millions of U.S. dollars in unpaid dividends owed to LISA, S.A., a Panama corporation and an indirect subsidiary of Xela (**“LISA”**), by Villamorey, S.A., a Panama corporation (**“Villamorey”**), in which LISA holds a 1/3 stake;

- m) The Panama Litigation is being prosecuted by BDT Investments Inc., a Barbados corporation (“**BDT**”), which owns the rights to collect LISA’s unpaid dividends by virtue of a settlement agreement that resolves substantial unpaid debt previously owed by LISA to BDT, dating to 2005;
- n) The Panama Litigation includes an order requiring Villamorey to pay all of LISA’s unpaid dividends, regardless of where in the world they may be held, and that said order is full and final, and in its collection phase;
- o) The Panama Litigation includes a separate action by LISA for damages against Villamorey, including damages stemming from non-payment of dividends, and a default judgment has been entered in LISA’s favor in those proceedings;
- p) Villamorey’s corporate agent in Panama has admitted to Panamanian prosecutors that Villamorey maintains its official books and records in Guatemala, not in Panama as required by Panama law;
- q) Villamorey and its majority shareholders are under criminal investigation in Panama in connection with Villamorey’s non-payment of dividends owed to LISA and their failure to maintain accurate financial records with its corporate agent in Panama;
- r) In the 18 months since its appointment, the Receiver has taken no meaningful steps to pursue the Panama Litigation, or to secure a commitment from BDT regarding the proceeds of the Panama Litigation;
- s) LISA secured a loan commitment in December 2019 sufficient to satisfy the Castillo Judgement in its entirety, along with all receivership expenses;

- t) LISA informed the Receiver in December 2019 about the loan commitment, and requested a payout amount from the Receiver;
- u) Upon learning of the LISA loan commitment that would have resulted in a discharge of the receivership, the Receiver improperly inserted itself into the loan transaction by attempting to reconstitute LISA's board of directors in Panama without taking any steps to cause the Order dated July 3, 2019 (**the "Appointment Order"**) to be recognized in Panama;
- v) the Receiver retained counsel in Panama, without seeking any recognition orders, and instructed it to file documents with the Panama Public Registry to the effect that LISA's board of directors had been properly reconstituted in accordance with Panama law, which was false and misleading;
- w) the Receiver instructed its counsel in Panama to file documents with the Panama Public Registry without first giving its agents a proper power of attorney signed by a person duly authorized and recognized by the Panama courts;
- x) Conduct by the Receiver's agents in Panama has been reported to the criminal authorities in Panama by LISA;
- y) the Receiver has demanded that LISA's president withdraw LISA's criminal complaint against KSV's agents in Panama, which itself calls for LISA to commit a criminal act in Panama in that LISA is under a legal duty to report criminal activity that bears on the administration of governmental matters in Panama;
- z) The conduct of the Receiver's agents in Panama resulted in a refusal by the Panama Public Registry to certify that LISA's board of directors had been reconstituted;

- aa) When the Receiver learned that its agents in Panama had not succeeded in taking control of LISA's board of directors, the Receiver attempted to secure the same outcome by conditioning meetings with Mr. Gutierrez – which Mr. Gutierrez had been requesting – upon LISA's voluntary accession to the Receiver's demands, despite the fact that Mr. Gutierrez was divested of authority to act on Xela's behalf by virtue of the receivership;

- bb) After failing to reconstitute LISA's board, the Receiver brought a motion for contempt against Mr. Gutierrez for ostensible failure to cooperate with the Receiver, erroneously implying that the Receiver's conduct had been proper and/or that Mr. Gutierrez had improperly instructed LISA not to accede to the Receiver's demands regarding the LISA board;

- cc) The so-called "reviewable transactions" under investigation by the Receiver for the past 18 months have yielding nothing of value and have little promise of leading to collection of any funds that could satisfy the Castillo Judgment, yet those investigations have generated legal and other professional fees of approximately \$1 million, which presumably will be charged to Xela;

- dd) None of the Receiver's reports to this Court contain any mention of the [status of?] Panama Litigation;

- ee) the Receiver's reports to this Court contain numerous inaccuracies and are incomplete, and the Receiver has failed to correct its reports after being informed of their flaws via sworn affidavits;

- ff) the Receiver's investigative strategy in the receivership is consistent with the strategy of the majority shareholders of Villamorey (**the "Cousins"**) to deplete LISA's resources in order to avoid ever paying the dividends rightfully owed to LISA;

gg) the Receiver has taken no interest in the loan transaction given to Ms. Castillo by a Guatemala Bank friendly to the Cousins (**the “GT Loan”**), which appears to have been secured by LISA unpaid dividends and repaid by foreclosure of the collateral rather than repayment by Ms. Castillo, such that, if true, the Castillo Judgment has long since been satisfied;

hh) the Receiver has never requested a copy of the GT Loan documents from Ms. Castillo, despite repeated requests by Mr. Gutierrez, nor has it mentioned the GT Loan in its reports to this Court;

ii) The Receiver has taken no steps to collect against a promissory note signed by Ms. Castillo’s husband, Roberto Castillo, [who is an Ontario resident,?] in favor of Xela, nor has it mentioned said promissory note in its reports to this Court;

jj) The Receiver has taken no steps to pursue the pending litigation by Xela in Toronto, alleging damages caused by Ms. Castillo, who is an Ontario resident, in an amount that would more than offset the Castillo Judgment, nor has it mentioned said pending litigation in its reports to this Court;

kk) the Receiver’s investigation into the so-called “reviewable transactions” includes recent discovery requests targeting computer servers previously owned by Xela, currently maintained by Arturos Technical Services (“**ATS**”), which contain emails and other sensitive data that would be useful to the Cousins in their improper efforts to avoid payment of dividends owed to LISA, both in Panama and in Guatemala;

ll) the Receiver’s investigation into the so-called “reviewable transactions” also includes recent discovery requests to review Mr. Gutierrez’s personal electronic devices for potential

documents belonging to Xela – to which Mr. Gutierrez consented in an effort to cooperate with the Receiver – but which necessarily implicates potential exposure of personal, privileged and/or non-Xela documents to which the Receiver is not entitled, and which are sensitive and potentially useful to the Cousins;

mm) the Receiver engaged Duff & Phelps (“D&P”) to copy (*i.e.*, “image”) and to supervise the review of Mr. Gutierrez’s personal devices, as well as the Xela servers now owned by ATS, without disclosing that the work would actually be performed by Kroll, a subsidiary of D&P;

nn) A conflict of interest exists in that Kroll has a long history of working for the Cousins, including conducting investigative surveillance of Mr. Gutierrez and his family, including his children;

oo) the Receiver failed to disclose the relationship between D&P and Kroll;

pp) All data on Xela’s computer servers was previously stolen by a former Xela employee and provided to the Cousins, who improperly used some of the stolen documents to attempt to exclude LISA from Villamorey and from the related poultry group in Guatemala in which LISA also holds a 1/3 stake (**the “Avicolas”**);

qq) Prior to the discovery of D&P’s relationship with Kroll, ATS provided Xela’s servers to Kroll for imaging without any security measures that would prevent Kroll from reviewing or copying the data, despite the fact that neither Kroll nor D&P nor any other person is entitled to access the data at this stage;

rr) Mr. Gutierrez provided images of his personal electronic devices to Kroll on a locked hard drive to which Kroll does not have the passcode;

ss) Mr. Gutierrez has requested duplicates of the images of his personal devices from the Receiver in order to conduct his preliminary review pursuant to the Order dated October 27, 2020 without exposing the data to Kroll, which is not entitled to review the data at this stage;

tt) The Receiver has refused Mr. Gutierrez's request for duplicates of the images of his own personal devices;

uu) Aside from an emergency trip to Guatemala beginning on October 26, 2020 – forced by unexpected cancer surgery and resulting complications with his mother-in-law, who subsequently passed away as a consequence, Mr. Gutierrez has complied with the requirements of the Court's Order dated October 27, 2020;

vv) The data contained on Mr. Gutierrez's personal devices and on the Xela servers maintained by ATS is extensive and requires substantial review and translation prior to any analysis by the Court concerning its discoverability by the Receiver;

ww) The BDT Motion would moot the need for any further investigation by the Receiver into the so-called "reviewable transactions" or any other transaction, including without limitation any pending discovery sought by the Receiver; and

xx) Mr. Gutierrez's counsel has requested on multiple occasions copies of all communications between the Receiver and/or its counsel, on the one hand, and the Cousins and/or their counsel, on the other hand;

yy) the Receiver's counsel has not denied that the Receiver has been communicating with the Cousins, but instead flatly refused to acknowledge any duty to disclose communications or provide copies.

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

- (a) Affidavit of Juan Guillermo Gutierrez to be sworn

- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 18, 2021

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

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