

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

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES  
LTD.

**NOTICE OF MOTION  
(Costs and Fee Approval)**

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 of Xela Enterprises Ltd. (“**Xela**”), will make a motion to the Honourable Justice McEwen of the Commercial List as soon as it can be heard 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) abridging and validating (if necessary) the times for service and filing of this notice of motion and any other materials, and validating service thereof;
- (b) awarding costs of the Receiver and its counsel on a full indemnity basis against Juan Guillermo Gutierrez (“**Juan Guillermo**”) and Arturo’s Technical Services Ltd. (“**ATS**”) jointly and severally in an amount to be provided in the Costs Outline;
- (c) approving the fees and disbursements of the Receiver and its legal counsel, Lenczner Slaght LLP, for the periods referenced in their respective fee affidavits;
- (d) the costs of this motion; and
- (e) such further and other relief as to this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

*Overview*

- (a) for approximately eight months, Juan Guillermo and ATS have failed to comply with Court Orders. During that period, on multiple occasions, they and their counsel led the Court to believe that funds sufficient to discharge the Receiver were imminent. However, no funds were ever provided, and compliance with Court Orders remains outstanding. The Receiver and its counsel have incurred significant

costs for which an award of costs, in the scale and quantum sought, is fair and reasonable;

- (b) the Receiver requests Court approval of its fees and the fees of its counsel;

*Background*

- (a) on August 28, 2020, the Court made an Order, on notice to ATS, requiring Juan Guillermo, ATS, and others to provide the Receiver with all Xela documents, items, devices, computers, servers, iPads, tablets, magnetic tapes or discs, DVDs, CDs, USB devices, cell phones, or any other electronic storage or media device, including cloud-based storage (the “**Company Documents**” or “**Company Devices**”). The August 28, 2020 Order prohibited Juan Guillermo from asserting privilege with respect to any Company Documents and Company Devices;
- (b) on October 27, 2020, ATS consented to an Order to image servers in ATS’s possession on which were stored Company Documents. On the same date, Juan Guillermo consented to an Order to image his iPad and iPhone on which were stored Company Documents. Juan Guillermo’s October 27, 2020 Order provided a protocol by which Juan Guillermo could challenge production of certain files to the Receiver;
- (c) on November 5, 2020, the Receiver’s representative imaged ATS’s servers;
- (d) on January 5, 2021, the Receiver imaged Juan Guillermo’s iPad and iPhone. However, Juan Guillermo allowed the Receiver to do so on the condition that the

images be downloaded to a password protected hard-drive that the Receiver could not access (the “**JG Hard-Drive**”);

- (e) on March 25, 2021, the Court made an Order (the “**March 2021 Order**”), directing 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 the JG Hard-Drive;
- (f) as part of the March 2021 Order, the Court directed ATS to, within 14 days, provide the Receiver with an electronic copy of all emails sent or received by Juan Guillermo at any email address maintained on ATS’s servers to the date of the Order, along with any encryption codes, keys, or passwords used to secure the emails;
- (g) Juan Guillermo and ATS sought leave to appeal the March 2021 Order. The Divisional Court dismissed their motion for leave on July 9, 2021;

*Costs*

- (h) the Receiver again requested the passwords to the JG Hard-Drive and again requested Juan Guillermo’s emails on ATS’s servers. Juan Guillermo refused to provide the passwords to the JG Hard-Drive. ATS refused to provide Juan Guillermo’s emails on ATS’s servers;
- (i) to delay or avoid compliance with the March 2021 Order, Juan Guillermo and ATS made repeated promises to the Court, from September 2021 to March 2022, that

funding sufficient to discharge the Receiver was imminent. The parties attended before the Court seven times:

- (i) on September 17, 2021, the parties attended at a case conference. Juan Guillermo and ATS relied on an affidavit sworn by Taras Volgemut the day before the case conference to suggest that funding to terminate the receivership was imminent. A further case conference was scheduled for December 2021;
- (ii) on December 2, 2021, the parties attended at a second case conference. Juan Guillermo and ATS relied on a second affidavit sworn by Mr. Volgemut (again, sworn the day before the case conference) to suggest that “funding is now in place.” A further case conference was scheduled for January 2022;
- (iii) on January 24, 2022, the parties attended at a third case conference with the expectation that counsel would be in receipt of Mr. Volgemut’s promised funding. However, no funding had arrived. Juan Guillermo’s counsel, Cambridge LLP (“**Cambridge**”), advised that Mr. Volgemut could not transfer the money because he had contracted COVID-19 and was in quarantine in Dubai for 10 days. A further case conference was scheduled;
- (iv) on February 7, 2022, the parties attended at a fourth case conference. Again, no funding had arrived. A further case conference was scheduled;
- (v) on February 17, 2022, the parties attended at a fifth case conference. Juan Guillermo and ATS relied on a picture taken of a purported SWIFT code

receipt from a bank in Botswana sent two-days' prior as evidence that the promised funding was imminent. A further case conference was scheduled;

- (vi) on February 28, 2022, the Receiver delivered its fifth report, containing a detailed update for the Court;
- (vii) on March 2, 2022, the parties attended at a sixth case conference. The promised funding had not arrived. Cambridge advised that there was a "glitch" in the February 15, 2022 transfer. Cambridge said that the funds were returned to the sender because Mr. Volgemut had sent them from a USD account to Cambridge's CAD trust account. Cambridge advised that Mr. Volgemut would re-send the promised funds to Cambridge's USD trust account;
- (viii) later that day, following the case conference, the Court issued an endorsement, noting that the funds from Mr. Volgemut had still not arrived. The Court directed Juan Guillermo and ATS to comply with the March 2021 Order. A further case conference was scheduled to deal with compliance;
- (ix) on March 7, 2022, the Receiver delivered a Supplemental Report to the Receiver's Fifth Report, detailing the correspondence exchanged with Cambridge and ATS's counsel;
- (x) on March 9, 2022, the parties attended at a seventh case conference. No funds had arrived. Neither Cambridge nor ATS's counsel provided any rationale for why they were not in receipt of the promised funds from Mr.

Volgemut. The Court again directed Juan Guillermo to provide the Receiver with the passwords and again directed ATS to begin delivering documents to the Receiver. A further case conference was scheduled for March 17, 2022 to deal with compliance;

- (j) as of the date of this notice of motion, Juan Guillermo and ATS refuse to comply with the March 2021 Order. Juan Guillermo has not provided the passwords to the JG Hard-Drive. ATS has not provided the Receiver with any of Juan Guillermo's emails on ATS's servers;
- (k) as of the date of this notice of motion, the Receiver has received no confirmation that Cambridge has received the promised funding from Mr. Volgemut. As of the date of this notice of motion, Cambridge has provided no rationale for why it has not received the promised funding. As of March, 16, 2022, Cambridge asserted (without evidence) in a bench brief that the money is "already in transit";
- (l) the Receiver and this Court have been put to significant time and expense responding to Juan Guillermo and ATS's unfulfilled promises. Furthermore, their ongoing disregard for the March 2021 Order not only brings the administration of justice into disrepute but has cost the Receiver and the parties significant time and money;
- (m) it is fair and reasonable that Juan Guillermo and ATS—who have strung this Court along with unfulfilled promises for eight months—bear the Receiver's costs for the

time spent on this matter since the Divisional Court dismissed their motion for leave to appeal (July 9, 2021 to present);

- (n) the scale and quantum requested by the Receiver is also fair and reasonable in the circumstances;

*The Receiver's Fees & Disbursements*

- (o) the Court last approved the fees and disbursements of the Receiver and its counsel on March 25, 2021;
- (p) the Receiver has incurred time and expense as a result of its motion that led to the March 25, 2021 Order, as well as repeated appearances related to funding from Mr. Volgemut;
- (q) the matter is complex. Xela's multi-jurisdictional, corporate structure and the vast materials filed in this matter have required extensive resources and time;
- (r) the Receiver continues to seek compliance with Court Orders and to defend its representatives in Panama from criminal liability. However, the Juan Guillermo and ATS continue to frustrate the Receiver's efforts;
- (s) the rates and fees charged are consistent with other firms practicing in the areas of litigation and restructuring in the Toronto market, and they are reasonable in the circumstances;
- (t) section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;



- (u) the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and
- (v) 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 Fifth Report of the Receiver dated February 28, 2022, and supporting briefs (including fee affidavits);
- (b) the Supplement to the Fifth Report of the Receiver dated March 7, 2022;
- (c) the Brief of Correspondence between Counsel dated March 16, 2022; and
- (d) such further and other evidence as the lawyers may advise and this Honourable Court may permit.

March 16, 2022

**LENCZNER SLAGHT LLP**

Barristers  
Suite 2600  
130 Adelaide Street West  
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

Tel: (416) 865-2921

Email: pgriffin@litigate.com

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Email: dknoke@litigate.com

**AIRD & BERLIS LLP**

Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

Kyle Plunkett

Tel: (416) 863-1500

Email: kplunkett@airdberlis.com

Sam Babe

Tel: (416) 863-1500

Email: sbabe@airdberlis.com

Lawyers for 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

**NOTICE OF MOTION  
(COSTS AND FEE APPROVAL)**

**LENCZNER SLAGHT LLP**

Barristers  
Suite 2600,  
130 Adelaide Street West  
Toronto ON M5H 3P5  
Peter H. Griffin (19527Q)  
Tel: (416) 865-2921  
Email: pgriffin@litigate.com  
Monique J. Jilesen (43092W)  
Tel: (416) 865-2926  
Email: mjilesen@litigate.com  
Derek Knoke (75555E)  
Tel: (416) 865-3018  
Email: dknoke@litigate.com

**AIRD & BERLIS LLP**

Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9  
Kyle Plunkett  
Email: kplunkett@airdberlis.com  
Sam Babe  
Email: sbabe@airdberlis.com  
Tel: (416) 863-1500  
Fax: (416) 863-1515

Lawyers for the Receiver