

**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

**REPLY RECORD
(Security For Costs, returnable November 24, 2022)**

November 23, 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) 865-9010

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Fax: (416) 865-9010

Email: dknoke@litigate.com

Lawyers for the Defendant,
Xela Enterprise Ltd.

TO: **THE SERVICE LIST**

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INDEX

Tab	Description	Page No.
1	Affidavit of Grace Tsakas, sworn November 23, 2022	1
A	Official Translation re Suspension of Criminal Proceedings, November 21, 2022	4
B	Screen capture [Captura de pantalla SPA Temix]	24
C	Case Conference Memo of J. G. Gutierrez, September 26, 2022	26
D	Case Conference Memo of the Receiver, September 26, 2022	33
E	Email Exchange between Mr. McLeod and Ms. Jilesen, September 13, 2022	46

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**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



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.

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 21st, 2022.



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.

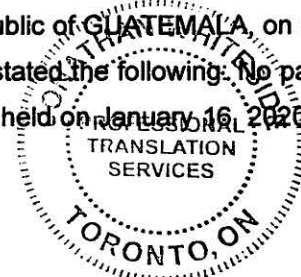
In this line of argument, on April 29, 2020, ALVARO ALMENGOR and MANUEL CARRASQUILLA, acting as President and Secretary respectively (illegally) of the company GABINVEST S. A., signed a Minutes of the Shareholders' Meeting of the aforementioned company, wherein they indicated "that due to the exceptional 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. 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: **Due to the events occurred in the changes made to the Panamanian companies GAVISMENTS, S.A. 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

(Seal: Republic of Panama
Attorney General's Office
Metropolitan Prosecutor's Office
Crimes Against Public Trust Department)



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



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.

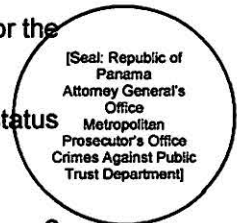
The following are crimes of public action dependent on private instance:

- 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



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 23rd 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 23rd 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, señaló 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, 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,

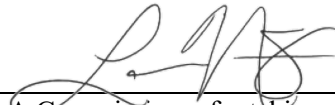
Elba Marlene Arosemena
LCDA. ELBA MARLENE AROSEMENA
Fiscal Adjunta de la Sección de Delitos Contra la Fe Pública
Fiscalía Metropolitana.

MINISTERIO PÚBLICO
FISCALÍA METROPOLITANA
SECCIÓN DE DELITOS CONTRA LA FE PÚBLICA
En Panamá, a las 3:41 de la tarde
del 23 de agosto del año 2022.
Fiscalía
y para constancia.
[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]
FISCALÍA METROPOLITANA
Sección de Delitos Contra la Fe Pública



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 **Consultas gestión del caso**

CASO # 202100003611

[Caso](#)
[Versiones](#)
[Dolios](#)
[Personas](#)
[Bienes - Elementos](#)
[Documentos](#)
[Casos relacionados](#)
[Formas relacionadas](#)
[Audencias](#)
[Actuaciones](#)
[Usuario caso](#)
[Reservar](#)

[Fecha Registro](#)
[Fecha-Hora Registro](#)
[Fecha-Hora Profiere](#)
[Fecha Realización](#)
[Nombre Actuación](#)
[Número Actuación](#)
[Detalle](#)
[Reservada](#)
[Estado](#)
[Fecha Hora Inicio](#)
[Fecha Hora Liberación](#)

[Actuación](#)
[Observación](#)
[Observación](#)
[Observación](#)
[Observación](#)

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)

Número Audiencia	Estado	Reservada	Fecha Hora Inicio	Fecha Hora Liberación
2454874	Programada	---	2022/10/13 14:00:00	2022/10/13 14:59:00

▼ Actuación Caso asociado (1)

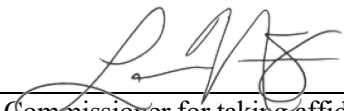
Actuación Caso Relacionada	Fecha Hora Realización	Estado	Oficina Profiere	Observación
Revisión del archivo provisional a solicitud de la víctima Art. 275	2022/08/23 16:40:13	Activa	calle primera el carmen, P.H. Mar del Sur ,Piso 5	SE SOLICITA AUDIENCIA DE REVISIÓN DE ARCHIVO

[[[11-15/15]]]

Cerrar

- Gestión casos asignados
- Gestión del caso
- Búsqueda
- Actuaciones
- Estrategia defensiva
- Medidas cautelares
- Administración de penas y suspensiones
- Consultas públicas
- Agenda y citaciones
- Historico
- Comunicaciones
- Estadísticas y reportes

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.



A Commissioner for taking affidavits

Lauren Nixon
P14847

**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

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

Christopher MacLeod (LSO# 45723M)
Tel: 647.346.6696 (Direct Line)
cmacleod@cambridgellp.com
N. Joan Kasozi (LSO# 70332Q)
jkasozi@cambridgellp.com

Tel: 416.477.7007
Fax: 289.812.7385

Lawyers for the Respondent
Juan Guillermo Gutierrez

TO: **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', is written over a horizontal line.

A Commissioner for taking affidavits

Lauren Nixon
P14847

**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

LENCZNER SLAGHT LLP

Barristers

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

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

TO: **THE SERVICE LIST**

TABLE OF CONTENTS

A. Introduction.....1
B. Update.....2
C. Submissions Regarding Juan Guillermo’s Motion4
 (i) Juan Guillermo is in Contempt of this Court.....4
 (ii) Juan Guillermo’s Motion is an Abuse of Process.....4
D. Direction Requested.....7

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”.¹

6. On July 26, 2022, Juan Guillermo paid the outstanding costs order in the amount of \$5,000.²

¹ July 22, 2022 Endorsement of McEwen J., Brief of Documents to the Receiver’s September 26, 2022 Case Conference Memorandum (the “**Brief**”), Tab 1.

² 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**").³ 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

³ 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)⁴ 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.”⁵ 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.⁶ The March 25, 2022 Endorsement,

⁴ Juan Guillermo’s September 12, 2022 Notice of Motion, at para. m, Brief Tab 2.

⁵ Juan Guillermo’s September 12, 2022 Notice of Motion, at para. o, Brief Tab 2.

⁶ 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’”;⁷

- (c) alleges that the Receiver’s reports are “riddled with inaccurate” statements, such as “unfairly casting” Juan Guillermo as “uncooperative.”⁸ 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”;⁹
- (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”.¹⁰ 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.¹¹ 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, 2022.¹² In the March 25, 2021 Endorsement, this Court directed that, if the loan

⁷ March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at para. 14, Brief Tab 3.

⁸ Juan Guillermo’s September 12, 2022 Notice of Motion, at para. r, Brief Tab 2.

⁹ July 22, 2022 Endorsement of McEwen J., Brief Tab 1.

¹⁰ Juan Guillermo’s September 12, 2022 Notice of Motion, at para. s, Brief Tab 2.

¹¹ Juan Guillermo’s September 12, 2022 Notice of Motion, at para. v, Brief Tab 2.

¹² 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.”¹³ The March 25, 2022 Endorsement, again makes clear that no particulars about any loan had been provided;¹⁴

- (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.”¹⁵ 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.”¹⁶ 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;

¹³ March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at para. 41, Brief Tab 4.

¹⁴ March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at para. 19, Brief Tab 3.

¹⁵ Juan Guillermo’s September 12, 2022 Notice of Motion, at para. aa, Brief Tab 2.

¹⁶ *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.



Monique J. Jilesen

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

Derek Knoke (75555E)

Tel: (416) 865-3018

Fax: (416) 865-2876

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

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISE LTD. et al.
Respondents

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

ONTARIO

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**CASE CONFERENCE MEMORANDUM OF
THE RECEIVER**
(Case Conference returnable September 27, 2022)

LENCZNER SLAGHT LLP

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

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

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](#)

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

From: Chris Macleod <cmacleod@cambridgellp.com>
Sent: Tuesday, September 13, 2022 8:38 AM
To: Monique Jilesen <mjilesen@litigate.com>; Derek Knoke <dknoke@litigate.com>
Cc: Joan Kasozi <jkasozi@cambridgellp.com>; Brian Greenspan <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

CAMBRIDGE LLP

333 Adelaide Street West, 4th Floor

Toronto, ON, M5V 1R5

Phone: [\(416\) 477 7007 Ext. 303](tel:(416)4777007)

Direct: [\(647\) 346 6696](tel:(647)3466696)

Email: cmacleod@cambridgellp.com

Website: www.cambridgellp.com



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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
(sworn November 23, 2022)**

LENCZNER SLAGHT LLP

Barristers

Suite 2600

130 Adelaide Street West

Toronto ON M5H 3P5

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 Moving Party,
the Receiver

MARGARITA CASTILLO
Plaintiff

-and-

XELA ENTERPRISE LTD. et al.
Defendants

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

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

PROCEEDING COMMENCED AT TORONTO

REPLY RECORD

LENCZNER SLAGHT LLP

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

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Email: dknoke@litigate.com

Lawyers for the Defendant,
Xela Enterprise Ltd.

Email for parties served:
TO THE SERVICE LIST