

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.

SUPPLEMENTARY MOTION RECORD OF THE RECEIVER
(SUBSTITUTION OF FORENSIC EXPERT)

February 1, 2021

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**ONTARIO
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B E T W E E N:

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Respondents

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

**SUPPLEMENTARY NOTICE OF MOTION
(Substitution of Forensic Expert)**

KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all the assets, undertakings and properties (collectively, the “**Property**”) of Xela Enterprises Ltd. (the “**Company**”), will make a motion to the Honourable Justice McEwen of the Commercial List on March 22, 2021 at 10:00 a.m. EST, 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) Replacing “Duff & Phelps” with “Epiq Global” as the Receiver’s forensic specialist in connection with the two orders issued by the Court on October 27, 2020—respecting each of Arturo’s Technical Services Ltd. (“ATS”) and Juan Guillermo Gutierrez (“**Juan Guillermo**”).

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

- (a) This Court issued two consent Orders on October 27, 2020 which authorize and permit Duff & Phelps to image certain devices in the possession of ATS and Juan Guillermo;
- (b) Duff & Phelps has imaged the devices but has not reviewed any data on the devices;
- (c) Juan Guillermo’s devices in the possession of Duff & Phelps are password protected, and Duff & Phelps does not have the password or passwords;
- (d) The devices remain in Duff & Phelps possession pursuant to the October 27, 2020 orders;
- (e) Following the imaging of the devices, Juan Guillermo alleged that the Receiver’s forensic specialist, Duff & Phelps, is in a conflict of interest;
- (f) Duff & Phelps has no actual or apparent conflict of interest;
- (g) The Receiver proposes that Epiq Global replace Duff & Phelps in the October 27th Orders to avoid any perceived conflict of interest;
- (h) Epiq Global is a recognized eDiscovery provider with no actual or perceived conflicts;

- (i) *The Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (j) *The Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and
- (k) Such further and other grounds as counsel may advise and this Court may permit.

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

1. The Supplement to the Fourth Report of the Receiver; and
2. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

February 1, 2021

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

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**Supplement to the Fourth Report of
KSV Restructuring Inc.
as Receiver and Manager of
Xela Enterprises Ltd.**

February 1, 2021

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COURT FILE NO.: CV-11-9062-00CL

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Respondents**AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.****SUPPLEMENT TO THE FOURTH REPORT OF KSV RESTRUCTURING INC.****FEBRUARY 1, 2021**

1.0 Introduction

1. This report (the “**Supplemental Report**”) supplements the Fourth Report of the Receiver dated January 18, 2021 (the “**Fourth Report**”).
2. Capitalized terms used have the meaning provided to them in the Fourth Report unless otherwise defined herein.
3. The purposes of the Supplemental Report are to:
 - a. address the conflict of interest allegation made by Juan Guillermo relating to the Receiver’s forensic agent, Duff & Phelps; and
 - b. recommend that the Court replace “Duff & Phelps” with “Epiq Global” as the Receiver’s forensic specialist in connection with the two orders issued by the Court on October 27, 2020 (respecting each of ATS and Juan Guillermo), as discussed in more detail below (the “**October 27th Orders**”).¹

¹ The Receiver will also provide the Court with a revised draft Investigative Order (which is being sought at the Receiver’s motion, returnable March 22, 2021) which replaces “Duff & Phelps” with “Epiq Global.”

1.1 Overview

1. Juan Guillermo alleges that the Receiver's forensic specialist, Duff & Phelps, is in a conflict of interest and should not be conducting the forensic work which is the subject of the October 27th Orders.
2. The Receiver has reviewed the alleged conflict of interest and has concluded that there is no merit to the allegations. Nevertheless, to address Juan Guillermo's suggestion that there is a conflict, the Receiver proposes that Epiq Global replace Duff & Phelps in the October 27th Orders.

1.2 Restrictions

1. This Supplemental Report is subject to the restrictions in the Fourth Report.

1.3 Receivership Materials

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

2.0 Alleged Conflict of Interest

2.1 The Allegation

1. In a draft proposed cross motion dated January 18, 2021 Juan Guillermo alleges that the Receiver's forensic specialist, Duff & Phelps, is in a conflict of interest. The alleged conflict is that Duff & Phelps' subsidiary, Kroll, Inc. ("**Kroll**"), has historically² been retained to conduct surveillance work adverse to Juan Guillermo and further that the Receiver failed to disclose the conflict.

2.2 Duff & Phelps' Background

1. Duff & Phelps is a multinational financial consultancy firm with approximately 4,000 employees and offices around the world. Duff & Phelps has several divisions, including Valuation, Mergers & Acquisitions, Tax Services and Consulting, among many others. Each division is further broken down into smaller teams.
2. In March 2018, Duff & Phelps acquired Kroll, an investigations and risk-consulting firm. The acquisition was publicly announced.

² Juan Guillermo also alleges, without any evidence, that Kroll may continue to work for the Cousins.

3. In August 2020, Duff & Phelps performed a conflict check for the Receiver with respect to the Company and advised that there were no conflicts. In October 2020, the Receiver retained members of Duff & Phelps' Cyber Risk Division to assist it in imaging the devices in accordance with the October 27th Orders (the "**Receiver's Mandate**").
4. Although the Duff & Phelps Cyber Risk Division employees have @kroll.com email addresses, both groups are Duff & Phelps' employees.

2.3 No Allegations until the Receiver Sought Compliance with Orders

1. One of the October 27th Orders deals with the Servers under ATS's control and the other deals with Juan Guillermo's devices:
 - a. the ATS Order:
 - i. authorized Duff & Phelps to make a single disk image of certain servers located at Cogent;
 - ii. required ATS to provide Duff & Phelps with possession of three non-operational servers; and
 - iii. required Duff & Phelps to maintain the images and servers—but not analyze or review the images or data—without further Court order or the written consent of ATS.
 - b. the Juan Guillermo Order:
 - i. authorized Duff & Phelps to "make a single forensic image" of Juan Guillermo's devices;
 - ii. required Duff & Phelps to "make no additional copies or images" of those devices;
 - iii. authorized Duff & Phelps to conduct deletion analyses of the images of those devices;
 - iv. authorized Duff & Phelps to upload the data on the Relativity document review platform; and
 - v. established a protocol to address Juan Guillermo's objections to disclosure to the Receiver of any documents based on privilege, personal information or any other reasonable basis.
2. On October 27, 2020, Cambridge consented to the October 27, 2020 Order respecting Juan Guillermo.
3. On October 27, 2020, WeirFoulds consented to the October 27, 2020 Order respecting the Servers in ATS' control.

4. In the weeks that followed, Cambridge sent and received numerous emails to the Duff & Phelps' employees working on this matter at their @kroll.com email addresses, and WeirFoulds sent and received numerous emails to one Duff & Phelps' employee at his @kroll.com email address.
5. Two Duff & Phelps' employees imaged the Servers from November 5 to 7, 2020. One Duff & Phelps' employee imaged Juan Guillermo's devices on January 5, 2021.
6. On January 10, 2021, when the Receiver requested compliance with the protocol established in the October 27, 2020 Order (respecting Juan Guillermo's devices) and insisted on obtaining the passwords to unlock the images of Juan Guillermo's devices, Cambridge, on behalf of Juan Guillermo, alleged that Duff & Phelps has a conflict of interest.
7. Duff & Phelps has not analyzed or reviewed any of the images subject to the October 27th Orders. The images are in the possession of Duff & Phelps in accordance with the Orders.

2.4 No Conflict of Interest

1. The Receiver made an inquiry of Duff & Phelps, following the allegation of a conflict of interest.
2. The Receiver was advised that the only work conducted by Kroll's Business Intelligence and Investigations team for parties adverse to Juan Guillermo was closed in 2017 ("**Closed File**"), prior to Duff & Phelps' acquisition of Kroll.
3. Neither the Receiver nor the Duff & Phelps' Cyber Risk Division assigned to the Receiver's Mandate was aware of the Closed File until the further conflict inquiry was made in January 2021.
4. No present or former Kroll employee who was assigned to the Closed File is involved in the Receiver's Mandate.
5. The images are maintained by the Cyber Risk Division in a secured laboratory in Toronto which is accessible only by members of the Cyber Risk Division. No present or former Kroll employee from the Business Intelligence and Investigations team assigned to the Closed File is a member of the Cyber Risk Division which has access to the images.
6. In all of the circumstances, the Receiver is of the view that there is no actual or apparent conflict of interest.

2.5 No Prejudice

1. The imaged Servers and the images of Juan Guillermo's devices are locked in Duff & Phelps' Cyber Risk Division secure laboratory.
2. Duff & Phelps has not reviewed the images of the Servers or uploaded them to the Relativity document review platform. Images of Juan Guillermo's devices are password protected, and the images cannot be accessed by anyone else at Duff & Phelps. As such, Duff & Phelps has neither performed the deletion analyses nor uploaded the data from Juan Guillermo's devices onto the Relativity document review platform.

2.6 Epiq Global

1. Epiq Global is a worldwide provider of eDiscovery solutions and has expertise in restructuring and bankruptcy matters.
2. Epiq Global has performed an extensive and global conflicts check and advises that it has no real or perceived conflicts.
3. Epiq Global advises that it is willing and able to perform the work set out in the Court's October 27th Orders and the Order being sought by the Receiver in its motion returnable March 22, 2021.
4. Duff & Phelps will deliver a chain of custody to Epiq Global, which will be preserved and updated by Epiq Global.

3.0 Conclusions and Recommendation

1. Based on the foregoing, the Receiver recommends that the Court make an order granting the relief detailed in Section 1.0(3)(b) of this Supplemental Report.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) MONDAY , THE 22ND
)
JUSTICE MCEWEN) DAY OF MARCH , 2021

B E T W E E N:

(Court Seal)

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.

ORDER

THIS MOTION, made by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property of Xela Enterprises Ltd. (the “**Company**”) was heard virtually this day via the Zoom videoconferencing platform by judicial videoconference at Toronto, Ontario due to the COVID-19 crisis.

WHEREAS, on October 27, 2020, this Court made an Order authorizing Duff & Phelps to make a single disk image of certain servers under the control of Arturo’s Technical Services Ltd. (“**ATS**”) (the “**ATS Order**”),

WHEREAS, on October 27, 2020, this Court made an Order authorizing Duff & Phelps to make a single forensic image of Juan Guillermo Gutierrez’s (“**Juan Guillermo**”) devices (the “**Juan Guillermo Imaging Order**”),

ON READING the material filed by the parties, and on hearing the submissions of the lawyers for the Receiver and such other counsel as were present and listed on the Counsel Slip.

SERVICE

1. **THIS COURT ORDERS** that the time for service of this Motion and the Motion Record herein are properly returnable today and hereby dispenses with further service thereof.

INVESTIGATIVE POWERS

2. **THIS COURT ORDERS** that the Receiver is granted expanded investigative powers, including the authority to:

(a) investigate, identify, quantify and take all steps necessary, in the opinion of the Receiver, to review:

(i) the sale, conveyance or transfer in 2016 by Empress Arturo International (“**EAI**”) of the shares of BDT Investments Ltd. (“**BDT**”) and Corporacion Arven, Limited (“**Arven**”) to Juan Arturo Gutierrez, and then from Juan Arturo Gutierrez to the ARTCARM Trust, a Barbados domiciled trust;

- (ii) the assignment in January 2018 by Lisa, S.A. (“**Lisa**”) of the proceeds from the litigation arising from shareholder disputes involving the Avicola Group (the “**Avicola Litigation**”) to BDT (“**Assignment Transaction**”);
- (iii) the sale, conveyance, transfer or assignment of Lisa’s interest in the Avicola Group to BDT in early 2020 (the “**Lisa Transfer**”);
- (iv) the assignment of the right to control the Avicola Litigation (“**Litigation Assignment**”);

(collectively, the “**Reviewable Transactions**”), and to conduct such review and investigation of the Reviewable Transactions that the Receiver deems necessary;

- (b) conduct such additional review and investigation of the business and affairs of the Company and its current and former direct and indirect subsidiaries, affiliates, customers, directors, officers and employees as it deems necessary (collectively the “**Investigation**”);
- (c) examine under oath persons whom the Receiver deems appropriate on any matters relating to the Company, the Reviewable Transactions and the Investigation, as the Receiver deems necessary; and
- (d) take any steps reasonably incidental to the exercise of these powers.

IMAGING ORDERS

3. **THIS COURT ORDERS** that Duff & Phelps shall forthwith deliver to Epiq Global, the Images made and the Schedule B Servers held pursuant to the ATS Order (the “**ATS Images and**

Servers”) and the hard-drives held and images made pursuant to the Juan Guillermo Imaging Order (the “**Juan Guillermo Images**”), together with a copy of any chain of custody information.

4. **THIS COURT ORDERS** that following the transfer of the ATS Images and the Juan Guillermo Images (collectively, the “**Images**”) to Epic Global, Duff & Phelps shall have no further responsibility for or access to the Images pursuant to the ATS Order or the Juan Guillermo Imaging Order.

5. **THIS COURT ORDERS** that Epiq Global shall replace Duff & Phelps for the purposes of carrying out the ATS Order and the Juan Guillermo Imaging Order and shall have all the powers, rights and obligations of Duff & Phelps as set out in those Orders.

JUAN GUILLERMO DEVICES

6. **THIS COURT ORDERS** that Juan Guillermo Gutierrez shall immediately provide the Receiver and Epiq Global with all encryption codes, keys, passwords or any other such information or knowledge necessary to unlock and access the data on the Juan Guillermo Images, including but not limited to the DataShield Fantom Drive.

COMPANY RECORDS

7. **THIS COURT ORDERS** that, within five days of this Order, ATS shall identify the location of the images of the “Blue Network Servers” (as identified by Julio Fabrini in his interview dated November 26, 2020) on the ATS Images by identifying the file names, paths, and any other information necessary to identify the Blue Network Server images.

8. **THIS COURT ORDERS** that Epiq Global and the Receiver shall, without any limitation whatsoever, be authorized and permitted to copy, analyze, access and review the Blue Network Servers on the ATS Images including any content of the images.

9. **THIS COURT ORDERS** that Epiq Global shall otherwise maintain and preserve the ATS Images until further order of this Court or written consent of the Receiver and ATS.

10. **THIS COURT ORDERS AND DECLARES** that, within 14 days of this Order, ATS shall provide the Receiver with an electronic copy of all emails sent or received by Juan Guillermo Gutierrez (regardless of the email address to which it was forwarded and regardless of whether the email was sent directly to him or it was one on which he was copied) at any email address maintained on the ATS servers to the date of this Order, along with any encryption codes, keys or passwords used to secure the emails.

11. **THIS COURT ORDERS AND DECLARES** that, within 30 days of this Order, Harald Johannessen Hals, Calvin Shields and Lester C. Hess Jr. shall provide the Receiver with all available information or documents in their control relating to:

- (a) shares, share registers, accounting, correspondence and related information of Lisa;
and
- (b) the Reviewable Transactions.

12. **THIS COURT ORDERS AND DECLARES** that, within 30 days of this Order, Harald Johannessen Hals, Jose Eduardo San Juan and David Harry shall provide the Receiver with all available information or documents in their control relating to:

- (a) shares, share registers, accounting, correspondence and related information of Gabinvest, S.A. (“**Gabinvest**”); and
- (b) the Reviewable Transactions.

13. **THIS COURT ORDERS AND DECLARES** that the Receiver and its agents in Panama, Hatstone Abogados (“**Hatstone**”), are authorized to take any steps reasonably required in relation to Alfaro, Ferrer & Ramirez Abogados (“**AFRA**”), as former resident agent of Gabinvest and Lisa in Panama, to arrange for AFRA to deliver to the Receiver their entire file, including but not limited to, all information related to the constitution, shares issued, KYC (know your client), correspondence, instructions given to AFRA and all information related to Gabinvest and Lisa.

14. **THIS COURT ORDERS AND DECLARES** that the Receiver and its agents in Panama, Hatstone, are authorized to take any steps reasonably incidental to the recognition and enforcement of this Order and any other Orders issued by this Court in this matter in Panama.

APPROVAL OF FEES AND DISBURSEMENTS

15. **THIS COURT ORDERS AND DECLARES** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$282,961.50 (excluding HST) as set out in the Affidavit of Noah Goldstein, sworn January 18, 2021, are hereby approved.

16. **THIS COURT ORDERS AND DECLARES** that the fees and disbursements of the Receiver’s legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$192,792.36 (excluding HST) as set out in the Affidavit of Sam Babe, sworn January 18, 2021, are hereby approved.

17. **THIS COURT ORDERS AND DECLARES** that the fees and disbursements of the Receiver’s legal counsel, Lenczner Slaght Royce Smith LLP, being fees and disbursements totalling \$235,218.33, plus HST of \$30,528.35, totalling \$265,746.68 as set out in the Affidavit of Monique J. Jilesen, sworn January 18, 2021, are hereby approved.

RECOGNITION BY FOREIGN JURISDICTIONS

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

(Signature of Judge)

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

ORDER

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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

SUPPLEMENTARY MOTION RECORD OF THE
RECEIVER
(Substitution of Forensic Expert)

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