

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

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.

**RECEIVER'S SUPPLEMENTARY BRIEF
RE ORDERS AND ENDORSEMENTS
(Motion for Leave to Appeal)**

April 28, 2022

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Lawyers for the Receiver, KSV Restructuring Inc.

TO: THE SERVICE LIST

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N:

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**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) TUESDAY, THE 27th
)
JUSTICE MCEWEN) DAY OF OCTOBER, 2020

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 CASE CONFERENCE, requested 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.

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.

1. **THIS COURT ORDERS** that within seven days of the Order, Arturos Technical Services Ltd. (“ATS”) will schedule a mutually convenient date with Duff & Phelps, the Receiver’s Forensic Specialist, for the purpose of providing the Forensic Specialist access, in accordance with this Order, to certain servers more particularly described in Schedules “A” and “B” (collectively the “Servers”).

2. **THIS COURT ORDERS** that upon being provided with the access contemplated in paragraph 1 of this Order, Duff & Phelps be and is hereby authorized and directed to make a single disk image of each of the Servers listed in Schedule “A” (together, the “Images”) to be held by Duff & Phelps in accordance with the terms of this Order.

3. **THIS COURT ORDERS** that upon being provided with the access contemplated in paragraph 1 of this Order, ATS shall deliver up the Servers at Schedule “B” to Duff & Phelps (the “Schedule B Servers”) to be held by Duff & Phelps in accordance with the terms of this Order.

4. **THIS COURT ORDERS** that Duff & Phelps will make no additional copies or images of the Servers or any of the Images.

5. **THIS COURT ORDERS** that Duff & Phelps shall maintain and preserve the Images and Schedule B Servers until further order of this Court or written consent of the Receiver and ATS.

6. **THIS COURT ORDERS** that Duff & Phelps shall not conduct, or permit any other person to conduct, any analysis or review of the Images or Schedule B Servers or any data contained in the Images or Schedule B Servers, without a further order of this Court or written consent of the Receiver and ATS.

A handwritten signature in black ink, appearing to read "McE T.", positioned above a horizontal line.

(Signature of Judge)

SCHEDULE “A”

Description of Servers

Servers located at Cogent Canada, Inc., 245 Consumers Rd., Suite 300, North York, ON M2J 1R3:

1. XL88-5, serial number: KQYWHNG
2. XL88-15, serial number: 06KN471
3. XL88-25, serial number: KQ63ZVA
4. XL88-1, serial number: KQYWHNA
5. XL88-20, serial number: KQ6930H
6. XL88-30, serial number: KQ8X0LK
7. XL88-35, serial number: E2BG115

SCHEDULE "B"

Description of Additional Servers described as non-operational

	Hardware	Serial #
1.	IBM System x 3650 M3 7945-AC1 7945N2U	KQYWHPF
2.	IBM System x3550 7978 7978CCU	99L6433
3.	IBM System x3550 7978 7978CCU	99L6432

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

27 Oct 20

Order to go on consent as per the draft filed and signed.



ORDER

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Lawyers for the Receiver

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) TUESDAY, THE 27th
)
JUSTICE MCEWEN) DAY OF OCTOBER, 2020

B E T W E E N:

(Court Seal)

MARGARITA CASTILLO

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XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH
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Respondents

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

ORDER

THIS CASE CONFERENCE, requested 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.

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.

JUAN GUILLERMO'S DEVICES

1. **THIS COURT ORDERS** that within seven (7) business days of the Order, Juan Guillermo Gutierrez (“**Juan Guillermo**”) will provide the Receiver’s Forensic Specialist, Duff & Phelps, with possession of all devices used by him, including, but not limited to, cellphones, iPads, and computers which do or may include Xela information or data (including its subsidiaries, affiliates, or former subsidiaries and affiliates) (the “**Devices**”).
2. **THIS COURT ORDERS** that Juan Guillermo will confirm under oath that the Devices are the only devices in his power, possession, or control which do or may include Xela information or data (including its subsidiaries, affiliates, or former subsidiaries and affiliates).
3. **THIS COURT ORDERS** that Duff & Phelps will be authorized to make a single forensic image of each of the Devices (the “**Images**”) in the presence of Juan Guillermo or his agent and an IT expert of Juan Guillermo’s choice within seven (7) business days of the Order.
4. **THIS COURT ORDERS** that Duff & Phelps shall be permitted to employ whatever methods it deems appropriate to image the Devices without interference by Juan Guillermo or his IT expert.
5. **THIS COURT ORDERS** that forthwith after imaging the Devices, Duff & Phelps shall return the Devices to Juan Guillermo.
6. **THIS COURT ORDERS** that Duff & Phelps will make no additional copies or images of the Devices or any of the data extracted therefrom except as necessary to comply with this Order.

7. **THIS COURT ORDERS** that, at the request of the Receiver, Duff & Phelps will be authorized to conduct forensic analyses of the Images to determine whether, when, and how many files have been deleted from the Devices. Upon completion of the analyses, Duff & Phelps shall be authorized to provide the result of such analyses (but no documents shall be released to the Receiver unless such documents are released pursuant to the protocol below) to the Receiver and Juan Guillermo.

8. **THIS COURT ORDERS** that, at the request of the Receiver, Duff & Phelps will be authorized to load the data onto the Relativity document review platform (the “**Platform**”).

9. **THIS COURT ORDERS** that once the data is loaded onto the Platform, Duff & Phelps shall grant Juan Guillermo and his authorized agents access to the Platform.

10. **THIS COURT ORDERS** that Juan Guillermo, but not the Receiver or its agents, shall have thirty-five (35) days after Duff & Phelps grants Juan Guillermo and his authorized agents access to the Platform to assert any objections to disclosure to the Receiver of any documents on the Platform based on privilege, personal information, or any other reasonable basis (the “**Objections**” or the “**Objections Date**”).

11. **THIS COURT ORDERS** that a motion for an extension of the Objections Date may be made by Juan Guillermo by motion served no less than five days before the Objections Date. Such motion for an extension must be returnable within 7 (seven) days of the Objections Date, subject only to the Court’s availability (collectively, the “**Extension Deadlines**”).

12. **THIS COURT ORDERS** that, after the Objections Date, or if a motion for extension of the Objections Date is made in accordance with the Extension Deadlines, then after the Court’s judgment thereon, the Receiver shall be given access to all the documents on the document review platform except for Objections documents. If the Receiver has not received Objections by the

Objection Date or Juan Guillermo fails to comply with any of the Extension Deadlines, the Receiver will be entitled to review all documents in the document review platform.

13. **THIS COURT ORDERS** that Juan Guillermo, in advance of the Objections date, shall prepare and provide to the Receiver, a list of documents objected to (the “Objections Documents”). The list of all Objections Documents shall include, subject to paragraph 14 below, at a minimum, the following fields: date, date sent, author, sender, all recipients, title and subject.

14. **THIS COURT ORDERS** that Juan Guillermo may assert privilege over portions of the title and/or subject descriptions by the Objections Date. Duff and Phelps shall redact the subject and/or title line in all cases where privilege has been asserted over the title and/or subject. For all claims of privilege over the title or subject, Juan Guillermo shall within 14 days of the Objections Date or extension, provide the Receiver with a basis for the assertion of privilege.

15. **THIS COURT ORDERS** that the Receiver shall be permitted to challenge any of the Objections and claims of privilege. The parties shall attempt to resolve any such challenges within three (3) business days, failing which the Receiver may address any such challenges before the Court. In the event of a challenge, the challenged document shall be provided to the Court for non-public, confidential review outside the presence of any person(s) other than counsel for the Receiver and counsel for Juan Guillermo.

16. **THIS COURT ORDERS** that the Receiver and Duff & Phelps shall not use any files from the Devices for any purpose other than the Receivership.

17. **THIS COURT ORDERS** that the Receiver shall preserve Xela and its subsidiaries privilege, except where the Receiver deems it necessary to fulfill its mandate.

18. **THIS COURT ORDERS** that the Receiver shall not disclose any files from the Devices to anyone other than its agents without approval of the Court, except as necessary to fulfill the Receiver's mandate. Agents include individuals or entities that represent and/or are retained by the Receiver to fulfill its mandate.

19. **THIS COURT ORDERS** that, upon the discharge of this receivership, Duff & Phelps shall delete the subject database in its entirety, and the Receiver shall destroy all documents and/or data retrieved from the Devices.

A handwritten signature in black ink, appearing to read "McE T.", is positioned above a horizontal line.

(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
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PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Receiver

27 Oct 20

Order to go on consent as per the draft filed and signed.



Court File Number: CU-11-9062-0001

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprises Ltd et al
Defendant(s)

Case Management Yes No by Judge: McBrien

Counsel	Telephone No:	Facsimile No:
(see attached)		

- Order Direction for Registrar (No formal order need be taken out)
 Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: _____
 Time Table approved (as follows): _____

This motion, brought by the Receiver KSV Restructuring Inc (the Receiver), seeks a number of orders.

I will deal with each below.

① The first deals with the Receiver's attempts to have Juan Guillermo Gutierrez (Juan Guillermo) deliver his electronic devices for analysis.

I previously granted an order to

25 March 21
Date

McBrien
Judge's Signature

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which Juan Guillermo consented, on August 28/20 in which Juan Guillermo was to (amongst other things) deliver to the Receiver all company devices.

Thereafter, I granted another order on October 27/20, to which Juan Guillermo also consented, setting out a protocol for the imaging and review of Juan Guillermo's devices.

Juan Guillermo, contrary to the terms of the above order, has refused to permit the devices to be imaged, without being uploaded to a password protected drive. He primarily submits that he wishes to review the data, provide the Receiver with a mirror image, and then advise what he is prepared to produce - subject to claims of privilege and relevancy.

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Judges Endorsment Continued

I am not prepared to alter the terms of my previous order where a protocol has been agreed to by the Receiver and Juan Guillermo.

The relationship between the Receiver and Juan Guillermo has become extremely acrimonious (as will be outlined further below). To allow for further alterations to my order will delay matters and possibly undermine the Receiver's legitimate investigations.

I urge the Receiver and Juan Guillermo to work co-operatively on this issue and to proceed in an economic fashion, but the terms of the above negotiated consent order stand and shall be adhered to. Thus, Juan Guillermo is to provide the

**Superior Court of Justice
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Judges Endorsment Continued

password so that Epic Global (who I agree will succeed Duff & Phelps) can load the data onto the Relativity platform. Thereafter, the protocol concerning Juan Guillermo's objection, can proceed, as per the Order.

(2) The second issue concerns access to certain computer servers.

By way of background Arturo's Technical Services Inc (ATS) purchased certain assets from Xela in June 17, subsequent to the judgment against Xela, Juan Guillermo and others. Juan Guillermo's sons - Thomas and Andres - are directors and officers of ATS.

The Receiver has asked ATS to deliver, amongst other things, digital records.

The August 28/20 order ~~was~~^{made} which was ^{made} an notice to ATS, but

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Judges Endorsment Continued

ATS did not appear) provided, inter alia, that the Receiver be entitled to conduct forensic examination of Xela devices; and that ATS provide assistance; and that no privilege claim could be asserted in respect of any Xela documents or devices.

It has now been ascertained that Xela servers were transferred to ATS. These Xela servers have been called the "blue network" by ATS and contain data related to Xela's business. This includes the Xela.com server, financial records and information concerning former clients of Xela.

The Receiver seeks unrestricted access to the blue servers in accordance with the terms of the August 28/20 order and the 2nd October 27/20 order (the October

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Judges Endorsment Continued

order was not opposed and was obtained after negotiations between counsel for the Receiver and ATS.)

An impasse has arisen between the Receiver and ATS.

ATS has suggested a protocol, taking the position that the blue servers also contain information of third parties and this is not captured by the Appointment Order.

I do not agree with ATS.

First, the third party information identified by ATS (and in Andres' cross-examination) consists of information regarding Xtra's subsidiaries (customers' including Greenpack - a related company / officers and employees who uploaded personal information onto the blue servers.

In my view, this is captured

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Judges Endorsment Continued

by paragraph 6 of the Appointment Order which refers to unfettered access to records of any kind related to the business or affairs of Xela.

It is not surprising that client records are on those servers as they were related to Xela's business.

The Receiver's position is supported by the decision of D. Brown J, as he then was, in GE Real Estate vs. Liberty Assisted Living 2011 ONSC 5741 at para 19, wherein he held that the company's records were not limited to documents owned by the company. He added that it was "inevitable" that the Receiver in that case would have to inspect and consider documents owned by companies related to the company in question.

~~So~~ I do not accept ATS's

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Judges Endorsment Continued

position that G.E Real Estate is distinguishable as it speaks to broad principles.

Second, without casting aspersions at this time, it cannot be ignored that ATS is operated by Juan Guillermo's sons. They have been the beneficiaries of what the Receiver has identified as being, Reviewable Transactions. In these circumstances the provisions of my earlier orders should be adhered to without modification by ATS or Juan Guillermo.

I should note that at the motion, a debate broke out about the process should be carried out and whether ATS and for the Receiver was acting reasonably. ATS referred to what

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Judges Endorsment Continued

I considered to be, a complicated protocol. It is expected that ATS and the Receiver and their experts can agree on a sensible method of providing the Receiver with access to the blue servers.

Third, I also do not accept the argument of ATS / Juan Guillermo that the nature of the Receivership should preter access. The Receivership was granted pursuant to s. 101 of the QIA which allows for broad powers if appropriate - it is appropriate here to grant unfettered access to the blue servers.

Last, with respect to both issues ① and ②. I should note that Juan Guillermo has submitted that the Receiver should not be pursuing access to devices, or granted access

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to devices, since it has received a settlement offer from BOT.

I disagree.

BTS, a Barbadian company is a former subsidiary of Xelq. It has refused to attain to the jurisdiction of this Court. Andres, Juan Guillermo son, is a director.

The offer does not involve a payment but rather a promissory note, conditional on the future receipt of proceeds ~~of~~^{of} an apparent Panamanian judgment involving the oft-noted "Autosola Litigation" (involving Juan Guillermo and others) that has been going on for over two decades.

I accept the Receiver's position that the offer ought not be accepted where there is no payment, no timeline for payment, ~~and~~^{and} is

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likely unenforceable and involves a related company in which Andres is a director.

③ The third issue involves the Receiver seeking to expand its powers.

This requires some discussion about the above noted acrimonious relationship between the Receiver and Juan Guillermo Xela.

Juan Guillermo and ATIS take the position that the Receiver has acted inappropriately and failed to pursue sensible ways of collecting funds.

These include:

- Prioritizing the pursuit of LISA dividends.

- Communicating with "the Nephews" who Juan Guillermo accuses of wrongly withholding dividends owed

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Judges Endorsment Continued

- to LISA which is Xelac subsidiary
- Preventing LISA from closing a loan which would have satisfied the Castillo Judgment
- Rejecting the aforementioned BDT proposal
- Focusing on the Reviewable Transactions which may not result in realization
- Generally, inappropriate pursuing Juan Guillermo and his family, including the scheduled contempt ~~and~~ motion.

In addition to the above Juan Guillermo (and ATS) make a number of other allegations which I have reviewed.

The Receiver submits that it has not had any real, legitimate co-operation from Juan Guillermo, Xelac or ATS.

The Receiver points to a ~~number~~ ^{Mr} ~~number~~ ^{Mr}

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number of instances, including but not restricted to:

- Contradictory evidence received from Juan Guillermo and his sons concerning electronic devices / servers
- Juan Guillermo exercising control over Xela subsidiaries and related companies
- Suspicious financial dealings involving Lisa / Xela / BDT / Arwen
- Juan Guillermo's brother-in-law (Hals) who is the President of Xela's subsidiary LISA filed a criminal complaint against the Receiver agents in Panama when they attempted to implement an order made by me. The complaint was based on a declaration sworn by Juan Guillermo. I subsequently ordered that Juan Guillermo and Hals take steps to withdraw the complaint as

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being, prima facie, a collateral attack
on my order.

Additionally, the history of the
litigation cannot be ignored.

Justice Newbould in his Oct/15
decision made substantial findings
of oppression in granting judgment
to Castillo.

Subsequently, shares of the Xela
subsidiaries BDT & Arca were
transferred to a trust (the EAI
Transaction) benefiting Juan Guillermo's
family. ATS was incorporated as
a subsidiary to BDT with the same
as directors and officers. Xela
was essentially shut down with
certain assets sold to ATS. LISA
assigned most of the proceeds
from the Arca action (the
Assignment Transaction) to BDT.

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Subsequently the Receiver the appointed

In light of all of the above it is reasonable to expand the investigative powers of the Receiver.

It is not up to Xela/Tuan Guillermo to dictate how the Receiver, a court officer, should direct the investigation. If in fact the LISA loan or BDT offer is meaningful, full particulars and terms of payment should be provided. To date this has not occurred.

The EAI and Assignment Transactions are worthy of further investigation, as is the LISA transfer concerning the assignment of Lisa's interest in the Avicola Group to BDT.

Accordingly, I am authorizing the relief sought in paragraph (a)

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(i) - (ii) of the Notice of Motion.

I am not, at this time, authorizing examination under oath of any person as requested in subpoena (iii). If problems arise concerning co-operation of witnesses I can be spoken to. Subpoena (ii) provides for the ability to conduct interviews. TM

I am also authorizing that (f) the information sought in subpoena (g) be granted. It is consistent with my previous orders and Cabinvest, a Kela subsidiary, wholly-owns LISA.

For similar reasons I am granting the relief sought in subpoena (g). AFRA was LISA's / Cabinvest's registered agent in Panama until Feb/20. It maintained these companies' share register and other information. They have advised that they require a

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Court order to release the information.

In my view, the above expanded powers are reasonable, fair and the Receiver has demonstrated that there is sufficient reason to believe that a financial benefit will be gained.

The expansion, therefore, is consistent with the C.A. jurisprudence in *Weig vs Weig* 2012 ONSC 7262 and *Akapi v Synergy Group* (2000) 2015 ONCA 368.

Overall, I am satisfied that the extensive inter-corporate transactions involving Xela related companies warrant further investigation, particularly where there is evidence in the record of ongoing participation by Iven Guillermo and his family in these companies.

④ I am also satisfied that a foreign recognition order is fair

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and reasonable particular in light of what transpired in Panama with respect to the Receiver's assets.

Neither Juan Guillermo nor JATS strenuously object although they submit that one should have been sought earlier. That may be the case, but the Receiver cannot be faulted for not anticipating the problems that have developed in this Receivership, which now warrant such an order.

⑤ The Fees of the Receiver and its counsel. In my view, they should be approved.

I have considered the relevant Factors: CIBC v. Urbancorp 2017 ONSC 4205 at para 57; Re Martel 2017 ONSC 673 at paras 14-15

The Receiver's undertaking is a

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significant as given the complicated structure of the Xela related Corporation, the after judgment transactions and LISA's Aurcola interest.

I also agree that the Receiver has faced a number of hurdles in dealing with Juan Guillermo, the Xela Subsidiaries and Hals.

While I am concerned about the amounts expended, I am not of the view that the Receiver or its counsel has acted in anything other than a neutral position, to date. In this regard I rely on my comments above, particularly concerning the alleged LISA loan and BTS settlement offer.

I also reject Juan Guillermo's submission that the costs issue should be directed to a reference.

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This would only add more costs and delay to an already complicated situation.

⑥ I agree that Duff + Phelps be replaced with Epiz Global. This relief is unopposed and settles a debate over whether Duff + Phelps had a conflict of interest, which was denied.

There were a number of orders included in the Receiver materials.

The order beginning at p. A183 of the materials, requesting assistance, appears to accord with this endorsement.

I am prepared to sign it unless parties wish to make submissions as to form and content.

The order beginning at p. A176 deals with a number of issues also appears to accord with this endorsement.

Again I am prepared to sign it

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Judges Endorsment Continued

subject to submissions as to Form and content.

last, the Order beginning at p. A1626 deals with the replacement of Duff + Phelps. It should go as it is proposed, ~~open~~ⁱⁿ subject to submissions as to Form and content.

I stress, however, that the review of the Order is not an invitation to relitigate issues that have been before me and decided upon, on at least one occasion.

If the parties cannot agree on costs I can be spoken to.



McEwen, Mr. Justice Thomas John (SCJ)

From: Derek Knoke <dknoke@litigate.com>
Sent: March 22, 2021 2:03 PM
To: McEwen, Mr. Justice Thomas John (SCJ); Anissimova, Alsou (MAG); JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Cc: Monique Jilesen
Subject: Counsel Slip - CV-11-9062-00CL [LS-LSRSGDOCS.FID635496]

Dear Justice McEwen,

The following counsel appeared at the hearing:

- *Counsel for the Receiver:* Monique Jilesen and Derek Knoke
- *Counsel for ATS:* Philip Cho and Michael Ly
- *Counsel for Juan Guillermo Gutierrez:* Chris MacLeod and Joan Kasozi
- *Counsel for Margarita Castillo:* Jeff Leon and Jason Woycheshyn
- *Counsel for the Avicola Group and each of Juan Luis Bosch Gutierrez, Felipe Antonio Bosch Gutierrez, Dionisio Gutierrez Mayorga, and Juan Jose Gutierrez Moyorga:* Aaron Kreaden

Derek



Derek Knoke*

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This e-mail may contain legally privileged or confidential information. This message is intended only for the recipient(s) named in the message. If you are not an intended recipient and this e-mail was received in error, please notify us by reply e-mail and delete the original message immediately. Thank you. Lenzner Slaght Royce Smith Griffin LLP.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE MCEWEN

)
)
)

THURSDAY , THE 25TH
DAY OF MARCH , 2021

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.

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**”); and
- (c) 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 (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, Republic of Colombia 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.

A handwritten signature in black ink, appearing to read 'McE T.', positioned above a horizontal line.

(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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Lawyers for the Receiver

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISE LTD. et al.
Respondents

Divisional Court File No.: 189/22
Superior Court File No. CV-11-9062-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

PROCEEDING COMMENCED AT
TORONTO

**RECEIVER'S SUPPLEMENTARY BRIEF
RE ORDERS AND ENDORSEMENTS
(Motion for Leave to Appeal)**

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