

**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.

**THIRD SUPPLEMENTARY MOTION RECORD OF THE RECEIVER
(Contempt - Penalty Hearing returnable September 22, 2022)**

September 16, 2022

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Lawyers for the Receiver, KSV Restructuring Inc.

INDEX

Tab	Description	Page
1	Affidavit of Robert Kofman, sworn September 16, 2022	1
A	Exhibit A - Email of September 12, 2022 serving Notice of Motion	3
B	Exhibit B - Notice of Motion dated September 12, 2022	5
C	Exhibit C - Endorsement of McEwen J. effective September 13, 2022	18

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

**ONTARIO
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(COMMERCIAL LIST)**

B E T W E E N:

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Respondents

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

**AFFIDAVIT OF ROBERT KOFMAN
(sworn September 16, 2022)**

I, Robert Kofman, of the City of Toronto, in the Province of Ontario, MAKE OATH AND
SAY:

1. I am the President of KSV Restructuring Inc. (“**KSV**”). KSV is 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**”). As such, I have knowledge of the matters contained in this affidavit.

2. I swore affidavits in this proceeding on May 4, 2022 and September 8, 2022. This affidavit is supplementary to my first two affidavits.

3. As referenced at para. 59 of my September 8, 2022 affidavit, the parties and the Receiver attended a case conference before McEwen J. on July 21, 2022. As set out in McEwen J.'s July 21, 2022 endorsement (which is Exhibit EEE to my September 8, 2022 affidavit), His Honour scheduled a further case conference on September 13, 2022.

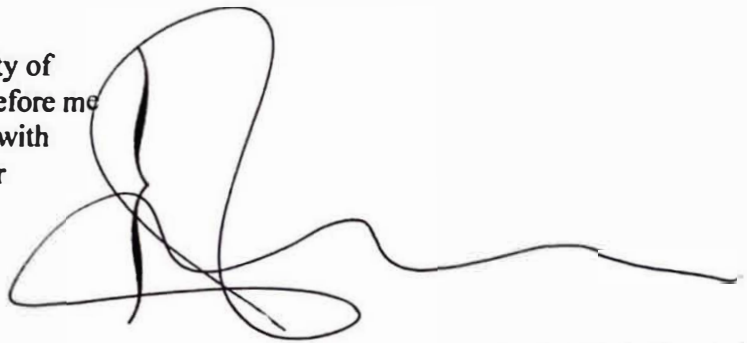
4. On September 12, 2022 at 5:12 pm, Mr. Gutierrez delivered a notice of motion to replace KSV as the Receiver of Xela. Attached hereto and marked as Exhibits "A" and "B" (respectively) are the cover email and the notice of motion.

5. On September 13, 2022, the Receiver and the parties attended for the case conference before McEwen J. The Receiver sought to schedule a motion for a sales process, pending funding for its fees and costs, which has become an issue in the proceeding. Mr. Gutierrez attempted to schedule his motion to replace the Receiver. His Honour deferred both motions and scheduled another case conference for September 27, 2022. Attached hereto and marked as Exhibit "C" is a copy of the September 13, 2022 Endorsement.

SWORN by Robert Kofman at the City of Toronto, in the Province of Ontario, before me on September 16, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



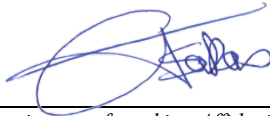
Commissioner for Taking Affidavits
(or as may be)



ROBERT KOFMAN

Grace Tsakas
Grace Maria Tsakas, a Commissioner, etc.,
Province of Ontario, for Lenczner Slaght LLP
Barristers and Solicitors.
Expires November 22, 2022

This is **Exhibit "A"** to the Affidavit of **Robert Kofman** sworn remotely at the City of Toronto, in the Province of Ontario, before me on September 16, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



A Commissioner for taking Affidavits (or as may be)

**Grace Maria Tsakas, a Commissioner, etc.,
Province of Ontario, for Lenczner Slaght LLP
Barristers and Solicitors.
Expires November 22, 2022**

Grace Tsakas

From: Nanda Singh <nsingh@cambridgellp.com>
Sent: September 12, 2022 5:12 PM
To: 'bkofman@ksvadvisory.com'; 'ngoldstein@ksvadvisory.com'; Peter Griffin; Monique Jilesen; 'kplunkett@airdberlis.com'; 'sbabe@airdberlis.com'; 'kevin.boyce@clarkes.com.bb'; 'shena-ann.ince@clarkes.com.bb'; 'alvaro.almengor@hatstone.com'; 'carl.oshea@hatstone.com'; 'leonj@bennettjones.com'; 'zweigs@bennettjones.com'; 'bortolinw@bennettjones.com'; 'jwoycheshyn@stewartmckelvey.com'; Chris Macleod; Joan Kasozi; 'bhg@15bedford.com'; 'mmb@15bedford.com'; 'Diane.Winters@justice.gc.ca'; 'KKay@stikeman.com'; 'AKreaden@stikeman.com'; 'robert.madden@alexandriabancorp.com'; 'Debbie.McDonald@alexandriatrust.com'; 'steven.groeneveld@ontario.ca'; 'maclaw@bellnet.ca'; 'pdoig@bdtinvestments.com'; 'pcho@weirfoulds.com'; 'mly@weirfoulds.com'; 'jcngrimas@gmail.com'; 'lopezalfaro@afra.com'; 'harald.johannessen1951@gmail.com'; 'H_Johannessen@granadavalley.com'; 'cal@calshields.com'; Grace Tsakas; Liza Nasir
Subject: Margarita Castillo v. Xela Enterprises Ltd., et al; Court file no. CV-11-9062-00CL
Attachments: Notice of Motion to Recuse KSV (filing1).pdf

EXTERNAL MESSAGE**To the Service List**

Dear Sir/Madam:

I attach a Notice of Motion which is hereby served upon you in accordance with the *Rules of Civil Procedure*.

Yours very truly

Nanda Singh

Law Clerk

CAMBRIDGE LLP

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Toronto, ON, M5V 1R5

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Email: nsingh@cambridgellp.com

Website: www.cambridgellp.com



This is **Exhibit "B"** to the Affidavit of **Robert Kofman** sworn remotely at the City of Toronto, in the Province of Ontario, before me on September 16, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



A Commissioner for taking Affidavits (or as may be)

**Grace Maria Tsakas, a Commissioner, etc.,
Province of Ontario, for Lenczner Slaght LLP
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Expires November 22, 2022**

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QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ
and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo
Gutierrez

Respondents

NOTICE OF MOTION

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

PROPOSED METHOD OF HEARING: The Motion is to be heard

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

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

In person;

By telephone conference;

[X] By video conference.

at the following location:330 University Avenue, Toronto, Ontario

THE MOTION IS FOR:

- a) An Order varying the appointment Order dated July 5, 2019 (the “**Appointment Order**”) to substitute Albert Gelman Inc. in place of KSV Restructuring Inc. (“**KSV**”) as receiver;
- b) An Order for costs in favor of Mr. Gutierrez, payable on a priority basis over the Applicant from funds collected by the receivership; and
- c) such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

- d) Pursuant to the Appointment Order, KSV was appointed receiver and manager over Xela Enterprises Ltd. (“**Xela**”) pursuant to the *Courts of Justice Act* to enforce a judgment dated October 28, 2015 (the “**Castillo Judgment**”), and a series of outstanding costs orders, in favour of the Applicant, Margarita Castillo (“**Ms. Castillo**”);
- e) Mr. Gutierrez is also a judgment debtor pursuant to the Castillo Judgment and the sole shareholder of Xela;
- f) At the time of the Appointment Order, approximately \$1.568 million had been paid against the Castillo Judgment – all from the liquidation of Mr. Gutierrez’s personal assets – and approximately \$4 million remained outstanding in respect of the Castillo Judgment;
- g) In its First Report to the Court dated October 17, 2019, KSV reported that Xela’s most

significant asset was its indirect one-third interest in certain businesses in Central America, referred to as the “Avicola Group,” and which was the subject of multi-year, multi-jurisdictional litigation relating to shareholder disputes (the “**Avicola Litigation**”);

h) KSV further reported that it was investigating certain transactions that it alleged had the effect of transferring the potential value of the Avicola Litigation to third parties (referred to as the “**EAI Transaction**” and the “**Assignment Transaction**”);

i) The EAI Transaction occurred in April 2016 and relates to the transfer by a Barbados corporation (EAI) of shares in two other Barbados corporations – BDT Investments Inc. (“**BDT**”) and Corporacion ARVEN Limited – to Mr. Gutierrez’ father, Juan Arturo Gutierrez (now deceased) (“**Arturo**”), and then subsequently to a Barbados trust, the ARTCARM Trust, as part of Arturo’s estate planning.

j) The Assignment Transaction occurred in January 2018 and describes a transaction between a Panamanian corporation, LISA S.A. (“**LISA**”), assigning its interest in the Avicola Litigation to BDT in consideration for BDT’s past and continued funding of the Avicola Litigation;

k) Xela was not a party to the EAI Transaction nor the Assignment Transaction, both of which involved foreign corporations;

l) A mutual lack of trust has developed between Mr. Gutierrez and KSV that has infected the proceedings. As a practical matter, it has become impossible under KSV’s authority to achieve the objective of the receivership, which is to satisfy the Castillo Judgment.

m) Mr. Gutierrez asserts that KSV has failed to act objectively and in good faith to seek satisfaction of the Castillo Judgment but has engaged in a fishing expedition in coordination

with Mr. Gutierrez's cousins (the "**Cousins**") – with whom Mr. Gutierrez and his family have been embroiled in highly contentious multi-jurisdictional Avicola Litigation for more than twenty years – that has no nexus to the potential receipt of funds and instead appears designed solely to inflict financial injury on Mr. Gutierrez.

n) During meetings with Mr. Gutierrez in the early days of the receivership, KSV's Bobby Kofman explicitly refused to discuss the only monies realistically available to satisfy the Castillo Judgment, which are the claims for an estimated US\$400 million in dividends improperly withheld by the Cousins from LISA, an indirect Panamanian subsidiary of Xela. After more than three years as receiver, KSV has yet to articulate a plan to address collection of the unpaid dividends but has rejected multiple requests by Mr. Gutierrez to discuss a coordinated, cooperative approach.

o) KSV has engaged in numerous regular discussions with the Cousins throughout the course of the receivership without disclosing the nature of those communications. Mr. Gutierrez became aware of the coordination between KSV's lawyers and the Cousins' lawyers solely as a result of billing records submitted by KSV to this Court for approval. Despite inquiries from Mr. Gutierrez, KSV refuses to disclose the content of or reasoning behind those discussions.

p) Rather than pursue the dividends withheld by the Cousins from LISA, KSV has focused exclusively on certain "reviewable transactions" that, even if reversed, would have no bearing on the potential collection of funds. Although KSV has already incurred more than a million dollars in professional fees investigating those transactions, it has not collected a single dollar in the receivership.

q) Conversely, KSV has taken no steps to collect an unpaid \$400,000 promissory note in favor

of Xela from a company owned by Ms. Castillo's husband. Neither has KSV investigated the evidence supplied by Mr. Gutierrez suggesting that Ms. Castillo received the full benefit of a US\$4.35 million loan in 2010 that was repaid with LISA dividends wrongfully pledged as collateral by the Cousins, effectively satisfying the Castillo Judgment.

r) KSV's official reports are riddled with inaccurate and/or incomplete statements and omissions, unfairly casting Mr. Gutierrez as uncooperative and giving little if any consideration to Mr. Gutierrez's legal rights. Although Mr. Gutierrez has corrected the record repeatedly with both sworn testimony and documentary evidence, KSV has not amended its reports accordingly. Further, KSV has made of practice of making sensitive documents public, seemingly without reason. For example, KSV recently posted on its website a copy of a SWIFT electronic funds transfer confirmation that contained personal information belonging to a Russian third-party lender who was transferring funds to Mr. Gutierrez's counsel to satisfy the Castillo Judgment. Those funds were subsequently held up by the U.S.-based intermediary bank identified in the SWIFT, further preventing satisfaction of the Castillo Judgment.

s) KSV has abused its broad discovery powers in search of documents potentially useful to the Cousins. Most notably, under the premise that it required additional information to review the transactions, KSV continued to insist on access to all of Mr. Gutierrez's emails and his personal electronic devices in a manner not available to ordinary civil litigants. Yet without advising the Court or the stakeholders, KSV had already commenced a civil claim in Ontario against Mr. Gutierrez and his family relating to the same "reviewable transactions" under investigation by KSV in the receivership. Consequently, KSV has now exposed highly confidential and personal information belonging to Mr. Gutierrez – not to Xela – to the risk of security breach, knowing that Xela's entire electronic database had been stolen and delivered

to the Cousins at least once before.

t) KSV has articulated no potential nexus between information in Mr. Gutierrez's emails/personal devices and the collection of funds. KSV's efforts to obtain the information over the last three years has been grossly disproportionate to any potential relevance of the evidence expected to be contained therein. The data uploaded to an electronic database maintained by KSV's agent constitute more than 60 gigabytes and hundreds of thousands of separate emails spanning more than 20 years. Proper review calls for a massive outlay of time and resources in the days ahead – all of which will undoubtedly be charged to Mr. Gutierrez, who has already lost all his personal assets to Ms. Castillo, including his family home and his ability to support his aging mother in Toronto, who receives no financial assistance from her daughter Ms. Castillo.

u) KSV took possession of all of Xela's physical documents without cataloguing them, creating unnecessary chain-of-custody concerns. KSV subsequently refused to address tax issues of certain Xela subsidiaries whose documents were seized by KSV.

v) In 2019, LISA secured a third-party loan commitment that would have satisfied the Castillo Judgement and all receivership expenses (the "**LISA Loan**"). KSV objected to the Lisa Loan on the ground that it could not evaluate the impact of the loan on the remaining Xela creditors (*i.e.*, other than Ms. Castillo). KSV has never explained the logic of that reasoning considering Paragraph 25 of the Appointment Order, which places the onus on Ms. Castillo to argue that the Receiver should not be discharged even if the Castillo Judgment were satisfied.

w) More importantly, in response to LISA's disclosure of the LISA Loan and its request for a payoff amount, the Receiver intentionally interfered with the loan and prevented its funding.

Even while KSV's lawyers were in discussions with LISA's lawyers concerning the LISA Loan, KSV quietly hired the Hatstone law firm in Panama ("**Hatstone**") and instructed it to take over LISA without first going through the process of seeking recognition in Panama consistent with Paragraph 30 of the Appointment Order. In order to achieve that objective, Hatstone filed an official public writing with the Panamanian corporate registry falsely representing that Gabinvest, S.A. ("**Gabinvest**"), LISA's parent company, had properly notified and conducted a shareholder meeting in Panama during which the Gabinvest board of directors was ostensibly reconstituted to give Hatstone representatives control. The public writing filed by Hatstone made no reference: (1) to Xela; (2) to KSV; (3) to the fact that – at least in Ontario, Canada – KSV had replaced Mr. Gutierrez as the acting shareholder of Xela; or (4) to the fact that the Appointment Order had not been recognized in Panama, and that KSV's authority to act as Xela's sole shareholder therefore did not extend to Panama.

x) Thereafter, Hatstone sought to cause Gabinvest to reconstitute the LISA board of directors to give Hatstone control of LISA. The scheme was uncovered by LISA's and Gabinvest's Panamanian lawyers before the changes could take effect. Still, the public controversy over LISA's board caused the third-party funder to withdraw its loan commitment. Consequently, Mr. Gutierrez was prevented from satisfying the Castillo Judgment and bringing a motion to discharge the receivership, and KSV's onerous investigation into the "reviewable transactions" took on new life and continues to the present.

y) As the Court knows, Hatstone is now facing criminal charges in Panama stemming from the misconduct. In the process, Mr. Gutierrez – still the only Xela shareholder recognized in Panama – truthfully affirmed that he had not participated in the Gabinvest shareholder meeting alleged by Hatstone. In response, this Court ordered Mr. Gutierrez to withdraw his affirmation

and to direct LISA to withdraw the criminal complaint in Panama, which he did. However, LISA declined on the ground that it was under a legal obligation in Panama to report criminal activity, and the prosecution against Hatstone continues.

z) KSV has never acknowledged its own misconduct in Panama. Instead, in apparent retaliation for the outcome in that country, KSV sought a finding of criminal contempt and incarceration against Mr. Gutierrez, which was heard before Justice Conway on May 30/31 and June 2, 2022. Although Justice Conway (erroneously) concluded that Mr. Gutierrez was liable in civil contempt, she found that he had not engaged in criminal conduct. However, sentencing is pending, and the potential injury to Mr. Gutierrez is still unknown.

aa) Although KSV failed to give Hatstone a power of attorney as required under Panama law, creating the appearance that Hatstone was acting alone, 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, exacerbating the conflict between KSV and Mr. Gutierrez. KSV should not continue to act as an Officer of the Court in a receivership where KSV and/or its principal may be charged criminally in connection with the conduct of the same receivership.

bb) The foregoing developments have created serious tensions and a mutual lack of trust between KSV and Mr. Gutierrez. There is a conflict of interest – or, at the very least, an appearance of conflict – with respect to KSV’s mandate as receiver given the undisclosed relationship with the Cousins, the potential for criminal sanctions in Panama, and the singular focus on Mr. Gutierrez’s personal emails and data. Under these circumstances, Mr. Gutierrez has found it challenging to fulfill his responsibilities under the Appointment Order while

safeguarding his own legal rights. All parties would seemingly benefit from a new receiver.

cc) Albert Gelman Inc. is a licensed insolvency trustee with extensive experience under similar mandates and has agreed to act, subject to satisfactory payment terms.

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

dd) Affidavit of Juan Guillermo Gutierrez to be sworn; and

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

September 12, 2022

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MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondents

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

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**PROCEEDING COMMENCED AT
TORONTO**

NOTICE OF MOTION

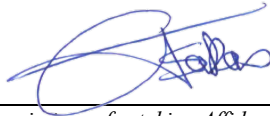
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Lawyers for the Respondent
Juan Guillermo Gutierrez

This is **Exhibit "C"** to the Affidavit of **Robert Kofman** sworn remotely at the City of Toronto, in the Province of Ontario, before me on September 16, 2022, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



A Commissioner for taking Affidavits (or as may be)

**Grace Maria Tsakas, a Commissioner, etc.,
Province of Ontario, for Lenczner Staght LLP
Barristers and Solicitors.
Expires November 22, 2022**



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-11-00009062-00CL DATE: September 14, 2022

NO. ON LIST: 2

TITLE OF PROCEEDING: Castillo v Xela Enterprises Ltd

BEFORE JUSTICE: MCEWEN, J

PARTICIPANT INFORMATION

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For Other, Self-Represented:

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I conducted a case conference today. The Receiver sought to schedule a motion concerning a Sales Process

Mr Gutierrez sought to, again, schedule a motion to replace the Receiver.

I deferred both schedulings for the reasons discussed - primarily that Funding may become available for the Receiver and I wanted to see Mr. Gutierrez's Notice of Motion and review the status of compliance with my prior orders, which I could not do as I did not receive the materials filed on Caselines.

Another case conference will be held on Sept 27/28
© Noon to review scheduling.

McInt

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

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Affidavit of Robert Kofman
(sworn September 16, 2022)

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Lawyers for the Receiver

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