

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

MARGARITA CASTILLO

Applicant

-and-

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC.,  
69096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and  
CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

**WRITTEN SUBMISSIONS OF THE RECEIVER**

Date: October 25, 2019

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
Suite 1800, Box 754  
181 Bay Street  
Toronto, ON M5J 2T9

**Steven L. Graff – LSUC No. 31871V**  
**Kyle B. Plunkett – LSUC No. 61044N**

Tel: (416) 863-1500  
Fax: (416) 863-1515  
Email: [sgraff@airdberlis.com](mailto:sgraff@airdberlis.com)  
[kplunkett@airdberlis.com](mailto:kplunkett@airdberlis.com)

*Lawyers for KSV Kofman Inc., in its capacity as  
Court-appointed receiver and manager of Xela  
Enterprises Ltd.*

**WRITTEN SUBMISSIONS OF THE RECEIVER,  
KSV KOFMAN INC., in its capacity as Court-appointed receiver of  
Xela Enterprises Ltd.**

**PURPOSE OF SUBMISSIONS**

1. Pursuant to a motion made by Margarita Castillo (the “**Applicant**”), KSV Kofman Inc. (“**KSV**”) was appointed as receiver and manager (in such capacity, the “**Receiver**”) under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “**CJA**”), without security, of the assets, undertakings and property of Xela Enterprises Ltd. (the “**Debtor**”) by Order of the Honourable Justice McEwen dated July 5, 2019 (the “**Appointment Order**”).
2. The terms of the Appointment Order were negotiated between the Debtor and the Applicant, without involvement of the Receiver.
3. The Appointment Order, among other things, empowered and authorized the Receiver to take all of the actions and/or steps set out in the Appointment Order to the extent necessary or desirable for the Receiver to fulfil and discharge its duties. The Appointment Order also included certain additional provisions in paragraph 4 therein that restricted the Receiver from taking any steps to interfere with the Global Litigation (as defined below) until December 31, 2019.
4. The purpose of these written submissions is to request clarity from the Court on Paragraph 4 of the Appointment Order, which provides as follows:

*“4. THIS COURT ORDERS that, notwithstanding any other provision in this Order, the Receiver shall not take any steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between the Debtor and its subsidiaries and/or affiliates and any third party, including the litigation involving or related to the Avicola companies (as defined and further set out in the affidavit of Juan Guillermo Gutierrez (“Juan”), sworn June 17, 2019). Such steps shall include but not be limited to:*

*a) selling or publicly marketing the shares of Lisa S.A., Gabinvest S.A., or any shares owned by these entities;*

*b) publicly disclosing any information about the above-mentioned litigation and/or the Receiver’s conclusions or intentions, provided that the Receiver may disclose such information to Juan and Margarita Castillo (“Margarita”) and their counsel upon Juan and Margarita each executing a non-disclosure agreement in a form reasonably acceptable to the Receiver, and if the Receiver does disclose such information, conclusions or intentions, the Receiver shall disclose equally to Juan and Margarita;*

*c) replacing counsel in the above mentioned litigations; and*

*d) engaging in settlement negotiations or contacting opposing parties in the above-mentioned litigation.*

*This paragraph applies only until December 31, 2019 or such other date as this Court may order.”*

## **OVERVIEW**

5. The Debtor, and certain of its subsidiaries and affiliates, are involved in litigation in various jurisdictions, including Canada, the United States of America, the Republic of Panama, the Republic of Guatemala, Barbados, Bermuda and the Bolivarian Republic of Venezuela (collectively referred to herein as the “**Global Litigation**”). The Global Litigation primarily relates to the Debtor’s indirect equity interest in the Avicola companies (collectively, the “**Avicola Group**”). The Avicola Group is a successful, family-owned, vertically integrated poultry business based in Central America.

6. The only remaining asset of significant value held by the Debtor is its indirect interest in the Avicola Group. The Debtor’s indirect equity interest is held as follows:

(a) 25% through its wholly owned indirect subsidiary, Lisa, S.A. (“**Lisa**”), a Panamanian holding company, which in turn is wholly-owned by Gabinvest S.A. which in turn is wholly-owned by the Debtor; and

(b) 8.3% through Villamorey S.A., a Panamanian holding company.

7. The Receiver and the Debtor have disputed the scope and intent of Paragraph 4 of the Appointment Order as it pertains to the Receiver’s involvement in directing and settling or participating in the settlement of any part of the Global Litigation.

8. Despite attempts to find a common ground without the need for Court intervention, the Debtor and the Receiver have been unable to reach an agreement on the scope of the Receiver’s involvement and the breadth of the Receiver’s powers as it relates to the Global Litigation.

9. Pursuant to Paragraph 28 of the Appointment Order, the Receiver may from time to time apply to the Court for advice and direction in the discharge of its powers and duties. Accordingly, the Receiver scheduled a motion returnable October 29, 2019 to seek, *inter alia*, advice and direction from the Court regarding the scope and intent of Paragraph 4 of the Appointment Order.

10. On October 2, 2019, the parties attended before Justice McEwen to discuss the purpose of the Receiver’s motion scheduled on October 29, 2019. Justice McEwen issued an Endorsement requesting that each of the Debtor, the Applicant and the Receiver deliver to the Court written submissions regarding their respective positions and views on the scope and intention of the Paragraph 4 of the Appointment Order (the “**Endorsement**”).

11. The Receiver delivers these written submissions respectfully requesting the advice and direction of this Court, pursuant to the Endorsement, to provide the parties with clarity on the Receiver's view as to the appropriate scope of its involvement as it relates to the Global Litigation.

#### **TRANSACTIONS UNDER REVIEW**

12. Since its appointment, the Receiver has been collecting and reviewing the Debtor's books and records, to the extent that they have been made available. Over the past few months, the Receiver has made several requests for information and disclosure from various related parties and their advisors, including legal counsel. To this end, the Receiver met with Juan Guillermo Gutierrez ("**Juan Guillermo**"), the President of the Debtor, and Torys LLP ("**Torys**"), legal counsel to the Debtor<sup>1</sup>.

13. As set out in the Receiver's First Report to Court dated October 17, 2019, the Receiver is reviewing a transaction involving certain of the Debtor's former subsidiaries, being BDT Investments Inc. ("**BDT**"), Preparados Alimenticios Internacionales C.A. ("**PAICA**"), and Corporacion Arven, S.A. ("**Arven**"), whereby the shares of each of BDT and Arven were sold, assigned or transferred for potentially inadequate consideration from a wholly-owned subsidiary of the Debtor to Juan Arturo Gutierrez ("**Juan Arturo**"), the father of the Applicant and Juan Guillermo for potentially inadequate consideration. The shares of BDT and Arven were subsequently sold, assigned or transferred by Juan Arturo to The ARTCARM Trust (the "**Trust**") in and around April 2016 (the "**EAI Transaction**"). Juan Guillermo's children are the beneficiaries of the Trust.

14. Prior to the EAI Transaction, the Receiver understands that BDT and Arven (through revenues generated by PAICA) generated significant revenues from its management and interest in a fast food chicken chain called Arturo's, which is primarily operated in Venezuela, and is still operating. The details of the EAI Transaction are still under review by the Receiver, as it has continued to request and obtain additional information from the parties involved.

15. The Debtor also caused its wholly-owned indirect subsidiary, Lisa, to enter into an assignment agreement dated January 24, 2018 transferring "all causative actions of all current and future lawsuits involving the AVICOLA holdings" to BDT (the "**Assignment Transaction**"). The Assignment Transaction grants BDT the right to 70% of the net proceeds of the Avicola Group litigation after BDT is reimbursed for debts purportedly owed by the Debtor and Lisa. It is unclear whether Lisa received any consideration for entering into the Assignment Agreement.

---

<sup>1</sup> For clarity, Torys is legal counsel to the Debtor, but not the Receiver.

16. As a result of the EAI Transaction and the Assignment Transaction, it appears that the majority of the economic interest in the Debtor has been transferred from the Debtor to the Trust. The EAI Transaction and the Assignment Transaction were completed at a time when Juan Guillermo was litigating with the Applicant, who is owed approximately \$4.1 million under a judgement debt by the Debtor and owns \$14.0 million in preference shares of the Debtor.

17. To date, the Receiver has requested certain information, but has been met with resistance from Juan Guillermo and the Trust. The Receiver has been unable to fulfil and discharge its duties as required by the Appointment Order.

***The Respondent's position re Paragraph 4 of the Appointment Order completely prohibits the Receiver's involvement in any of the Global Litigation***

18. The Debtor and Torys have taken the position that Paragraph 4 of the Appointment Order prohibits the Receiver from any involvement or oversight in respect of any aspect of the Global Litigation, and that no approval is required by this Honourable Court with respect to any settlement involving the primary asset of the Debtor.

19. In accordance with this position, the Debtor and Torys have refused to:

- (a) acknowledge and involve the Receiver in any strategy and discussions regarding litigation and/or settlement discussions;
- (b) agree and acknowledge that the Receiver is required to be consulted with respect to any decisions made by the Debtor and its subsidiaries pertaining to the Global Litigation; and
- (c) acknowledge and agree that, to the extent there is a settlement of any part of the Global Litigation, the approval of this Court is required.

20. The Receiver fundamentally disagrees with this position for the reasons stated herein.

***The Receiver's view regarding Paragraph 4 of the Appointment Order***

21. Although the Receiver was not involved in negotiating paragraph 4 of the Appointment Order, the Receiver is of the view that notwithstanding the restrictions provided in that paragraph, the intent cannot be that the Receiver has no role and/or oversight of the Global Litigation.

22. It would make little sense that the main asset of the Debtor, being the Avicola Group, which is the primary asset at issue in the Global Litigation, be beyond the oversight of the Receiver, including any

proposed settlements thereof or that the Receiver should not be consulted regarding any steps taken by the Debtor and its subsidiary regarding same. Such a position would undermine the entire purpose of the receivership, rendering the Receiver as an observer and adding little to no value to the receivership.

23. The Receiver acknowledges that paragraph 4 of the Appointment Order was negotiated by the Applicant and the Debtor with the aim of preventing any interference with the successful completion of the litigation. The Receiver has fully complied with the restrictions imposed by paragraph 4 of the Appointment Order.

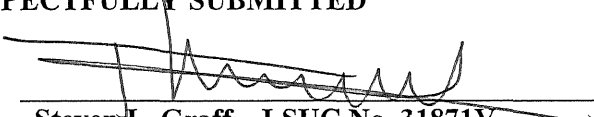
24. The Receiver is concerned that if it has no oversight or involvement with respect to any aspect of the Global Litigation, and/or any settlement of the Avicola Litigation is not subject to the Court's approval, the proceeds generated from any such settlement could be placed and distributed outside of the Debtor's corporate organization to the detriment of the Debtor's stakeholders without the Receiver having the opportunity to complete its review of the Assignment Transaction and/or the EAI Transaction. In the Receiver's view, this would defeat the purpose of the receivership.

25. The Receiver submits that accepting the position advanced by the Debtor and its legal counsel would permit the Debtor's agents to strip the Debtor of its only valuable asset, leaving the Debtor devoid of value and defeating the essential purpose of the Appointment Order.

26. For the reasons stated herein, the Receiver respectfully asks this Court to provide guidance and direction as to the meaning and applicability of Paragraph 4 of the Appointment Order to the current proceedings, including the scope of the Receiver's power as it relates to its consultation, approval and involvement in the Global Litigation.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Date: October 25, 2019

  
Steven L. Graff – LSUC No. 31871V  
Kyle B. Plunkett – LSUC No. 61044N

*Lawyers for KSV Kofman Inc. in its capacity as  
Court-appointed receiver and manager of Xela  
Enterprises Ltd.*

Tab A

## **SCHEDULE A**

### **List of Authorities and References**

1. *Receivership Order of the Honourable Justice McEwen dated July 5, 2019*
2. *First Report of the Receiver dated October 17, 2019*



# Tab B

## **SCHEDULE B**

### **List of Rules and Statutes**

#### *s. 101 of Courts of Justice Act*

##### **Injunctions and receivers**

**101** (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

##### **Terms**

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

#### *Rule 41.05*

##### **DIRECTIONS**

**41.05** A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee. R.R.O. 1990, Reg. 194, r. 41.05.

**MARGARITA CASTILLO**  
Applicant

and

**XELA ENTERPRISES LTD., Et al.**  
Respondents

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

---

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
**PROCEEDING COMMENCED AT TORONTO**

---

**WRITTEN SUBMISSIONS OF THE RECEIVER,  
KSV KOFMAN INC., in its capacity as Court-  
appointed receiver of XELA ENTERPRISES LTD.**

---

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
Suite 1800, Box 754, 181 Bay Street  
Toronto, Ontario M5J 2T9

Tel: 416.863.1500

Fax: 416.863.1515

Email: [sgraff@airdberlis.com](mailto:sgraff@airdberlis.com) /

[kplunkett@airdberlis.com](mailto:kplunkett@airdberlis.com)

**Steven L. Graff – LSUC No. 31871V**

**Kyle B. Plunkett – LSUC No. 61044N**

*Lawyers for KSV Kofman Inc., in its capacity as Court-  
appointed receiver and manager of Xela Enterprises  
Ltd.*