

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

BETWEEN:

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

**FACTUM OF THE RECEIVER
(Motion returnable on March 24, 2020)**

Date: March 19, 2020

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TO: ATTACHED SERVICE LIST

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TAB 1

**ONTARIO
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PART I – NATURE OF THE MOTION

1. This is a motion for a contempt order against the respondent, Juan Guillermo Gutierrez (“**Juan Guillermo**”), pursuant to Rule 60.11 or, in the alternative, Rule 60.18(5), of the Ontario *Rules of Civil Procedure*.

PART II – STATEMENT OF FACTS

2. The Applicant, Margarita Castillo (“**Margarita**”), commenced an application against the Respondents on January 18, 2011, seeking, among other things, relief from oppression against her father, Juan Arturo Gutierrez (“**Juan Arturo**”), and brother, Juan Guillermo, with respect to

her status as a director and minority shareholder of Tropic International Limited, a family company majority owned by Xela Enterprises Ltd. (“**Xela**”).¹

3. Pursuant to a judgment issued October 28, 2015, and a series of cost orders issued December 21, 2015, December 30, 2016, and March 27, 2017, respectively, Xela, Juan Guillermo and Juan Arturo became jointly obligated to pay Margarita \$5,083,866.04 (plus accrued interest and reimbursable enforcement expenses, the “**Judgment Debt**”).² The outstanding balance of the Judgment Debt is approximately \$4.1 million, plus interest and costs which are accruing.³

4. Pursuant to an Order of Justice McEwen dated July 5, 2019 (the “**Appointment Order**”), KSV Kofman Inc. (“**KSV**”) was appointed as receiver and manager, without security, of all of the assets, undertakings and property of Xela (in such capacity, the “**Receiver**”).⁴ Among other things, the Appointment Order requires all Persons (as defined in the Appointment Order, and including Juan Guillermo) to: (a) advise the Receiver of the existence of any corporate records; (b) provide the Receiver with unfettered access to such corporate records; (c) permit the Receiver to make copies of such corporate records; and (d) refrain from interfering with the Receiver or these receivership proceedings without written consent of the Receiver or the leave of this Court. The Appointment Order also gives the Receiver the power to exercise of Xela’s rights as 100% shareholder of Gabinvest, which power is exclusive once exercised.⁵

5. Xela is or was the parent company of more than two dozen subsidiaries, located predominantly in Central America and the Caribbean, that carry on or carried on business in the

¹ Second Report of the Receiver dated February 18, 2020. [**Second Report**]

² Second Report, section 1.0.2.

³ Second Report, section 1.0.3.

⁴ Receivership Order, Second Report, Appendix “A”.

⁵ Receivership Order, at paragraphs 3(q) and 5, Second Report, Appendix “A”.

food and agricultural sectors.⁶ Presently, Xela's most significant asset is its indirect, one-third interest in a group of family-owned Guatemalan-based poultry companies (collectively, the "**Avicola Group**"), which interest is held as follows:

- (a) 25% through Xela's wholly-owned, indirect subsidiary, Lisa S.A. ("**Lisa**"), a Panamanian holding company; and
- (b) 8.3% through a second Panamanian holding company and subsidiary of Lisa, Villamorey S.A. ("**Villamorey**").⁷

6. Xela's indirect equity interest in the Avicola Group is currently the subject of litigation in the jurisdictions of Canada, the State of Florida, the Republic of Panama, the Republic of Guatemala, Barbados, Bermuda, and the Bolivarian Republic of Venezuela (collectively, the "**Avicola Litigation**"). The Avicola Litigation has been ongoing, in one aspect or another, for over twenty years.⁸

7. Prior to April, 2016, Xela also wholly owned, through its subsidiary Barbados company, Empress Arturo International ("**EAI**"), and EAI's subsidiaries BDT Investments Ltd. ("**BDT**") and Corporacion Arven, Limited ("**Arven**"), which apparently operated a profitable Venezuelan restaurant chain, known as "Arturos".⁹ In April 2016, EAI transferred its shares in BDT and Arven to Juan Arturo, allegedly in partial repayment of a debt owed by EAI to Juan Arturo, and Juan Arturo then transferred the shares to the ARTCARM Trust (the "**Trust**"), a Barbados

⁶ Second Report, section 1.1.1.

⁷ Second Report, section 1.1.2.

⁸ Second Report, section 1.1.4.

⁹ Second Report, sections 1.2.1 and 1.2.2.

domiciled trust, the beneficiaries of which are Juan Guillermo's children (collectively, the "**EAI Transaction**").¹⁰ Alexandria Trust Corporation ("**ATC**") is the trustee of the Trust.

8. The Receiver is concerned that EAI may have received inadequate consideration when it sold, conveyed or transferred the shares of BDT and Arven to Juan Arturo as part of the EAI Transaction.

9. The Receiver is also concerned that, in January 2018, Xela caused or allowed Lisa to assign all or a considerable portion of its interest in the Avicola Litigation to BDT for inadequate consideration when it assigned such interest in return for litigation funding and a covenant to pay Lisa 30.0% of any litigation proceeds net of costs and any amounts owing by Lisa to BDT (the "**Lisa Transaction**" and, together with the EAI Transaction, the "**Reviewable Transactions**").¹¹

10. As a result of the Reviewable Transactions, which all took place after Margarita obtained judgement in these proceedings, the majority of the economic value of Xela has been transferred to the Trust for the benefit of Juan Guillermo's children.

11. Another transfer of value by Lisa to BDT was made when Lisa consented to a 2012 Panamanian judgment in favour of BDT for approximately US\$25,323,773, allegedly in respect of debts owed by Lisa to BDT, Arven and an Arven subsidiary for litigation funding connected to the Avicola Litigation (the "**BDT Judgement**").¹² The BDT Judgement was consented to at a time when both BDT and Lisa were wholly-owned, indirect subsidiaries of Xela under the management of Juan Guillermo.

¹⁰ Second Report, section 1.2.4.

¹¹ Second Report, section 1.2.5.

¹² Second Report, section 1.2.3.

12. Pursuant to the Appointment Order, the Receiver is entitled to access any and all information relating to the business or affairs of Xela in the possession or control of (i) Xela, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of the Appointment Order.¹³ The Receiver has made numerous information requests to Juan Guillermo about the Reviewable Transactions and the alleged debts underlying the BDT Judgement. These requests have been refused by individuals and entities taking direction from Juan Guillermo.¹⁴

13. As a result of the Receiver's inability to obtain information about the Reviewable Transactions, the Receiver moved for, and was granted, an Order dated October 29, 2019 requiring Lisa, BDT, Arven, the Trust and ATC to deliver information to the Receiver about the Reviewable Transactions (the "**Disclosure Order**").¹⁵ The Disclosure Order requires all current and former directors, officers, employees, agents, accountants and shareholders of EAI, the Trust, Arven, BDT or Lisa, and all other persons acting on their instructions or behalf, and any other party having notice of the Disclosure Order to provide to the Receiver any and all information and records in their possession or control relating to the Reviewable Transactions.¹⁶ BDT, Arven and the Trust have failed and/or refused to provide any of the information required by the Receiver under the Disclosure Order.¹⁷

¹³ Receivership Order, paragraph 5.

¹⁴ Second Report, section 2.1.

¹⁵ Disclosure Order, Second Report, Appendix "D".

¹⁶ Disclosure Order, paragraphs 5 to 10.

¹⁷ Second Report, section 2.1.

14. During a conference call in which Juan Guillermo participated, Lisa's international litigation counsel advised the Receiver that Juan Guillermo directed and represented Lisa despite not being an officer or director, but that the Receiver should contact Lisa's board of directors to obtain any information required under the Disclosure Order. Lisa's counsel also advised the Receiver that Lisa had obtained a US\$18.0 million judgment against Villamorey in 2012 in Panama, for unpaid dividends (the "**Alleged Panamanian Judgement**"), which judgment debt now totalled approximately US\$25.0 million and would soon be paid out to Lisa. Lisa's counsel did not provide a copy of the Alleged Panamanian Judgement, despite the Receiver's request for it, and the Receiver's Panamanian counsel, Hatstone Group ("**Hatstone**"), has been unable to locate it in its searches of Panamanian court office or any proceedings connected therewith.

15. Upon request by the Receiver for information relating to the Lisa Transaction, Lisa's counsel provided only a copy of the assignment agreement (a copy of which had already been obtained by the Receiver), but no information, evidence or documentation relating to confirmation of advances purportedly made by BDT to or on behalf of Lisa in consideration for the assignment, as the Receiver requested.

16. On December 31, 2019, new purported Canadian counsel to Xela, Cambridge LLP, served a motion seeking an extension of the effect of paragraph 4 of the Appointment Order (the "**Extension Motion**") pursuant to which paragraph the Receiver could not, among other things, involve itself in Xela's foreign litigation proceedings until December 31, 2019. The terms of this provisions automatically expired on December 31st. Xela's basis for the Extension Motion was an alleged third party loan that Lisa had procured in order to repay the Judgement Debt and the costs of the receivership proceedings (the "**Loan**").

17. In an Endorsement dated January 9, 2020, Justice McEwen declined to amend paragraph 4 of the Appointment Order or schedule the Extension Motion. Despite repeated requests by the Receiver for more information about the Loan so that the Receiver could consider its effects on Xela's business and stakeholders, none of Juan Guillermo, counsel to Xela or counsel to Lisa provided any useful information to the Receiver. The Receiver has no information about the current status of the Loan or any advances to Lisa thereunder.

18. On January 16, 2020, pursuant to its authority under paragraph 3(q) of the Appointment Order to exercise Xela's shareholder rights, the Receiver passed a resolution of Xela as the sole shareholder of Lisa's parent, Gabinvest S.A. ("**Gabinvest**"), replacing the directors of Gabinvest with three lawyers from Hatstone (the "**Gabinvest Resolution**").

19. On January 22 and 27, 2020, with the consent of, and after discussion with, the Receiver, the new Gabinvest board caused Gabinvest to resolve, by way of shareholder meetings, to increase the maximum number of directors of its wholly-owned subsidiary, Lisa, from five to six and then to appoint the same three Hatstone lawyers who are directors of Gabinvest to act as new directors while leaving the existing three directors in place (collectively, the "**Lisa Resolutions**").

20. The initial purpose of the Gabinvest Resolution and the Lisa Resolutions was to allow the Receiver access to the books and records of Lisa to uncover any evidence of consideration given by BDT for the Lisa Transaction and any evidence of the loans by BDT and its subsidiaries on which the BDT Judgement was based. In response to the Gabinvest Resolution and the Lisa Resolutions:

- (a) Juan Guillermo instructed Panama counsel to make filings on the public registry that have reversed the effect of the Lisa Resolutions and will undo the effect of the Gabinvest Resolution; and
- (b) the non-Hatstone directors of Lisa have threatened criminal and civil litigation against the newly appointed directors from Hatstone.

21. In addition to the steps he has taken, or has caused others to take, to frustrate the appointment of the new directors of Gabinvest, Juan Guillermo has advised Hatstone that he, purportedly on behalf of Gabinvest, will not agree to the Gabinvest board changes made by the Receiver and instead has proposed a split board comprised of equal numbers of appointees by the Receiver and by himself. The non-Hatstone directors have also frustrated attempts by Hatstone to obtain corporate records from Lisa's and Gabinvest's Panamanian registered corporate agent, leading the corporate agent to resign without having provided any of the requested information.

22. Juan Guillermo, a Toronto resident, has caused, or directed, the non-Hatstone directors of Lisa and Gabinvest and professionals representing Lisa, BDT and the Trust to not cooperate and to generally frustrate the Receiver's exercise of its powers under the Appointment Order and the Disclosure Order, and has further exploited the foreign jurisdictions of Lisa, Gabinvest, BDT, Arven and the Trust for this purpose. Juan Guillermo's interference with the Receiver has been to the ultimate benefit of himself and his children, who are the beneficiaries of the Trust that has profited, or stands to profit, from the Reviewable Transactions and the BDT Judgement.

PART III – THE ISSUE

23. The issue before this Honourable Court is whether a contempt order against Juan Guillermo should be granted pursuant to Rule 60.11 or, in the alternative, Rule 60.18(5), of the Ontario *Rules of Civil Procedure* and is appropriate in the circumstances.

PART IV – THE LAW AND ARGUMENT

24. The Receiver submits that Juan Guillermo's conduct meets the test for civil contempt and that the circumstances warrant the imposition of punitive sanctions.

25. Rule 60.11(1) of the *Rules of Civil Procedure* provides that:

60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

26. Rule 60.05 of the *Rules of Civil Procedure* provides that:

60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11.

27. The three part test for civil contempt is well established, as described by the Supreme Court of Canada in *Carey v Laiken*:¹⁸

- (a) the order alleged to have been breached must state clearly and unequivocally what should and should not be done;

¹⁸ *Carey v Laiken*, 2015 SCC 17, [2015] 2 SCR 79, at paras 32-35.

- (b) the party alleged to have breached the order must have had actual knowledge of it;
and
- (c) The party allegedly in breach must have intentionally done the act that the order prohibits, or intentionally failed to do the act that the order compels.

Each of these elements is met in this case.

The orders breached were clear and unequivocal

28. The first element of the test is met in that both the Appointment Order and the Disclosure Order clearly and unequivocally state what should and should not be done. The Appointment Order states clearly and unequivocally that all Persons (as defined in the Appointment Order, and including Juan Guillermo) shall, forthwith:

- (a) advise the Receiver of the existence of any corporate records;
- (b) provide the Receiver with unfettered access to such corporate records;
- (c) permit the Receiver to make copies of such corporate records; and
- (d) refrain from interfering with the Receiver without written consent of the Receiver or the leave of this Court.¹⁹

29. Likewise, the Disclosure Order states clearly and unequivocally that:

¹⁹ Receivership Order, at paras 5-7 and 11.

- (a) all current and former directors, officers, employees, agents, accountants and shareholders of EAI, the Trust, Arven, BDT or Lisa, and all other persons acting on their instructions or behalf; and
- (b) any other party having notice of the Disclosure Order;

were to forthwith provide to the Receiver any and all information and records in their possession or control relating to the Reviewable Transactions.

There was clear notice of the Orders and an understanding of the obligations thereunder

30. The second element of the test is satisfied because Juan Guillermo had actual knowledge of both the Appointment Order and the Disclosure Order since the dates on which they were issued.

31. At all times, Juan Guillermo was represented by sophisticated counsel, all of whom have been actively involved in the receivership.

The terms of the Orders have been repeatedly breach

32. The third element of the test is met because Juan Guillermo intentionally failed to do what that the Appointment Order and the Disclosure Order compel. In contravention of the Appointment Order, Juan Guillermo has repeatedly:

- (a) failed to advise the Receiver of the existence of corporate records relating to the Reviewable Transactions;
- (b) failed to provide the Receiver with unfettered access to such corporate records;

- (c) failed to permit the Receiver to make copies of such corporate records; and
- (d) engaged in substantial interference with the lawful activities of the Receiver,

and has directed others to do the same.

33. Notwithstanding Juan Guillermo's active participation in these receivership proceedings by email correspondence and calls in an attempt to create the impression that he is complying with the Orders, the Receiver has received little to no actual cooperation or information despite the Court orders to do so.

34. In contravention of the Disclosure Order, Juan Guillermo has repeatedly failed to provide to the Receiver information and records in his possession and control relating to the Reviewable Transactions and has directed others to do the same.

35. In *Greenberg v. Nowack*, the Ontario Court of Appeal held that, even in the absence of intent, a mere failure to comply with the terms of an order (in that case requiring production of financial documents) was sufficient to satisfy the third element of the test for civil contempt.²⁰

36. Absent a contempt order, Juan Guillermo will likely continue obstructing the Receiver's attempts to perform its duties. Juan Guillermo's actions thus far evidence a clear pattern of evasion. Despite the Orders of this Court, he has repeatedly failed to produce information relating to the Reviewable Transactions. The Receiver has taken numerous steps to impose deadlines and repeatedly attempted to encourage compliance but has been unable to do so. The Receiver therefore submits that a contempt order is warranted in the face of repeated non-compliance with the Orders of this Court.

²⁰ *Greenberg v. Nowack*, 2016 ONCA 949, at paragraph 29.


PART V – RELIEF REQUESTED

37. The Receiver respectfully requests that this Honourable Court make an Order in the form sought:

- (a) declaring Juan Guillermo to be in contempt of the Appointment Order and the Disclosure Order; and
- (b) ordering Juan Guillermo to perform specific tasks to comply with those Orders,

and grant such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of March, 2020.



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TAB A

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Carey v Laiken*, 2015 SCC 17, [2015] 2 SCR 79
2. *Greenberg v. Nowack*, 2016 ONCA 949

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

RULE 60.05 OF RULES OF CIVIL PROCEDURE, R.R.O. 1990, REGULATION 194

60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11.

RULE 60.11(1) OF RULES OF CIVIL PROCEDURE, R.R.O. 1990, REGULATION 194

60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

TAB 3

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**FACTUM OF THE RECEIVER
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