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

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, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

RESPONDING RECORD

March 22, 2020

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TAB 1

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

MARGARITA CASTILLO

Applicant

-and-

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

(Sworn March 22, 2020)

I, Juan Guillermo Gutierrez, resident of Toronto, Ontario, Canada, **MAKE OATH AND SAY:**

1. I am the President of Xela Enterprises Ltd., ("**Xela**"). I swear this Affidavit in support of the Debtor's Opposition to the Motion of the Receiver (returnable March 24, 2020) (the "**Motion**"), seeking approval of the Receiver's second report dated February 18, 2020 (the "**Second Report**").

2. The Second Report is erroneous and/or inaccurate in various material respects. Further, it omits relevant information that should properly be taken into consideration as the Court evaluates and guides the ongoing activities of the Receiver.

3. Significant questions remain concerning Xela's counterclaims against Applicant Margarita Castillo ("**Margarita**") – which are pending in the Court in Toronto – that have not yet been adjudicated. These pending claims, if sustained, would more than offset Margarita's judgment against Xela (the "**Castillo Judgment**"). Xela has emphasized these claims to the Receiver and their likely offset of the Castillo Judgment, but the Receiver has taken no discernible steps to pursue them.

4. Specifically, Xela has alleged that Margarita received an illegal US$4.35 million loan in 2010 from G&T Continental Bank ("**G&T**") in Guatemala (the "**Loan**"), funded by dividends improperly diverted from LISA, S.A. ("**LISA**"), an indirect subsidiary of Xela. The Loan was illegal because it was secured – without Xela's knowledge or consent – by a Certificate of Deposit in the sum of US$4,166,250, purchased with some of the improperly withheld dividends owed to one of Xela's subsidiaries. Xela asserts that Margarita was never required to repay the Loan, and that mere weeks after the Loan funded, the bank foreclosed the collateral, making itself whole and effectively laundering the misappropriated dividends by transferring them to Margarita. Xela further maintains that Margarita used some of the tainted Loan proceeds to fund the oppression action against Xela that eventually led to the Castillo Judgment.

5. Those allegations, which are supported below by specific references to evidence, have been asserted in separate counterclaims in a civil conspiracy lawsuit against Margarita that predate entry of the Castillo Judgment. If proved to be true, Xela would be entitled to a judgment of its own against Margarita that could more than offset the Castillo Judgment and the expenses of the receivership. Xela's claims against Margarita are both substantial and viable, and fairness suggests that any unresolved claims that might offset the Castillo Judgment should be resolved judiciously as part of the receivership process.

The Avicola Group

6. Arturo Gutierrez ("**Arturo**") laid the corporate foundation in 1965 for what is now a lucrative poultry conglomerate of 29 companies in Guatemala (collectively the "**Avicola Group**"). He gave a one-third ownership to each of his two siblings, keeping a 1/3 stake for himself. In 1974, his brother and brother-in-law were tragically killed in a small aircraft accident, and their interests passed to their respective heirs (referred to collectively here as the "**Nephews.**") Arturo remained President of the company and the single largest shareholder.

7. Beginning in 1982, Arturo began a transition to relocate his immediate family to Toronto. He resigned as President of the Avicola Group, leaving operations in the hands of the Nephews. He also formed LISA, S.A. ("**LISA**"), a Panama company, to which he transferred all of his shares in the Avicola Group. (LISA is wholly owned by Gabinvest, S.A., a Panama company ("**Gabinvest**"), which is in turn wholly owned by Xela.) By 1984, the transition was complete.

Initial Fraud by the Nephews

8. After the Nephews assumed operational control of the Avicola Group, Arturo and I gradually began to notice a decline in the growth rate of the business. We were unable to establish any definitive wrongdoing until the Nephews inadvertently gave Arturo a copy of an accurate Avicola Group financial statement in August 1997 containing information inconsistent with what had previously been reported. Eventually, the parties entered into a series of discussions over a potential acquisition by the Nephews. As a condition of the discussions, Arturo demanded an explanation about the apparent discrepancies in financial reporting. In response to that inquiry, at two separate meetings convened in Toronto in 1998 to discuss the value of Arturo's stake, two high-level corporate executives of the Avicola Group disclosed the details of the alleged fraudulent scheme to me. I lawfully videotaped the second meeting with the assistance of the Royal Canadian Mounted Police but without the knowledge of the executives.

9. The Avicola Group executives confessed on videotape that the Nephews had implemented a scheme to defraud the Guatemala tax authorities – as well as Arturo – by concealing the cash sales of up to 40% of the Avicola Group's chicken output. They explained that the scheme included under-reporting the revenues by concealing cash sales of live chickens, illegally laundering the unreported profits, and maintaining false accounting records to conceal the fraud. They told me that the Nephews had concealed the entire scheme from Arturo and the government by maintaining two sets of accounting records and two sets of financial statements, all of which resulted in the significant underpayment of Avicola Group dividends to LISA – which had been ranging between US$2 million and US$4 million per year – during the period 1985 through 2000.

Ongoing Theft of Dividends and Laundering of Illicit Proceeds

10. In 1999, the buy-out discussions having failed, Arturo began efforts to recover his unpaid dividends by commencing legal action in Florida and Bermuda, followed by a lawsuit in Panama against a company in which he held a 1/3 stake, Villamorey, S.A. ("**Villamorey**") – which owns 25% of the Avicola Group shares – and multiple lawsuits in Guatemala. In response, the Nephews suspended all Avicola Group dividend payments to LISA, while continuing to declare and pay dividends to themselves. Although the full amount has never been documented owing to the Nephews' failure to share financial reporting or data with LISA, LISA estimates the total sum of unpaid dividends from 1999 to the present to approach $400 million with interest (the "**Unpaid Dividends**").

11. Although the Nephews have successfully stalled legal proceedings and evaded judgment in most jurisdictions, the fraudulent scheme documented on videotape eventually became the subject of a three-week trial in Bermuda in 2008. There, the Court found that the Nephews had misappropriated LISA's dividends and converted them to their own use, laundering illicit cash receipts through the sale of bogus insurance policies at an inflated premium by a Bermuda-based reinsurance company that they owned. Judgment was entered in favor of LISA on September 5, 2008 (the "**Leamington Judgment**"), from

which the Nephews did not appeal. A true and correct copy of the Leamington Judgment is attached hereto as Exhibit A. Among other things, the Leamington Judgment establishes the following irrefutable facts:

a. That LISA was a victim of a conspiracy to defraud by the Nephews;[1]

b. That the Avicola Group used accounting records that recorded only a portion of its true income;[2]

c. That a substantial portion of the income generated by the Avicola Group was kept off the books and used to fund distributions to the Nephews but not to LISA;[3]

d. That the re-insurance policies at issue were not genuine;[4]

e. That some of the "black" money was being "whitened" by paying the insurance premiums that were then distributed as purportedly legitimate corporate profits, and that the Nephews intended to deprive LISA of its rightful share of the profits generated by the Avicola Group;[5]

f. That the Nephews used cash-only operations to conceal the Avicola Group's true earning from the Guatemalan tax authorities;[6]

g. That the Nephews intended to injure LISA through a fraudulent conspiracy;[7]

h. That LISA had been excluded from participating in the distributions made to the Nephews;[8]and

i. That the members, officers and directors of the various Avicola Group companies

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[1] Leamington Judgment, at ¶91.

[2] Leamington Judgment, at ¶55.

[3] Leamington Judgment, at ¶57.

[4] Leamington Judgment, at ¶63.

[5] Leamington Judgment, at ¶82.

[6] Leamington Judgment, at ¶62.

[7] Leamington Judgment, at ¶106.

[8] Leamington Judgment, at ¶109.

had "actual knowledge of all of the facts which made the conspiracy unlawful."[9]

12. Thus, the Nephews have systematically stolen LISA's dividends and laundered them through a series of false transactions benefitting the Nephews. In the Leamington case, those transactions were fake insurance contracts sold for excessive premiums by a company the Nephews owned.

Margarita's Breach of Fiduciary Duty and Theft of Xela Assets

13. After the Leamington case was decided, beginning in February 2009, the parties met through representatives more than a dozen times to discuss potential settlement of the dispute. The negotiations were tense and complex, owing to the extreme animosity and distrust that had developed between the branches of the family. It was during this extended period of negotiations that Margarita secretly joined forces with the Nephews, and conspired with them and others to attack Xela and its subsidiaries, in breach of her fiduciary duties as a Director of Xela.

14. Although Margarita's ensuing misconduct had multiple facets, perhaps her single most egregious act – and the transaction that is particularly relevant to this receivership – was her acceptance of what appears to be a tainted bank loan for US$4.35 million, funded by the Nephews through G&T Continental Bank in Guatemala ("**G&T Bank**") using LISA's unpaid 2010 Villamorey dividends as collateral (the "**Castillo Loan**"). As detailed below, the Castillo Loan appears to have been transacted through Margarita's nephew, Roberto Barillas ("**Roberto**") – who acted as her legal representative – and repaid through foreclosure of the collateral.

15. Specifically, G&T Bank and other records indicate the following:

    a. Villamorey declared in LISA's favor (but did not pay) dividends of US$4,166,250 in 2010. A true and correct copy of Villamorey's audited financial statements for 2009/2010 is attached hereto as Exhibit B.

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[9] Leamington Judgment, at ¶115.

b. On May 6, 2010, Juan Luis Bosch, one of the Nephews, used those dividends, without LISA's knowledge or consent, to open an account in Villamorey's name with G&T Bank. A true and correct copy of the opening statement for G&T Bank account No. 900051264, showing the initial deposit of US$4,166,250, is attached hereto as Exhibit C; and

c. On May 25, 2010, the initial deposit to Account No. 900051264 (*i.e.* LISA's dividends) was used to purchase Certificate of Deposit #010152676 in the amount of $4,166,250 (the "**CD**"). A true and correct copy of the CD is attached hereto as Exhibit D; see also Exhibit B, referencing CD #010152676.

16. Further, during meetings in September 2012 and November 2012, Mr. Jorge Porras – at the time an attorney for one of Xela's subsidiaries – provided information to Xela, of which he had personal knowledge, regarding an ongoing conspiracy between the Nephews and Margarita to injure Xela. During those meetings, Mr. Porras told Xela, among other things, that:

a. Roberto had executed the Castillo Loan documents on Margarita's behalf, under a power of attorney signed and delivered to Roberto by Margarita in Miami in March 2010;

b. The Castillo Loan was for a total of $4.35 million;

c. A portion of the Castillo Loan was to finance Margarita's oppression application in Toronto against Xela, our father and me; and

d. He (Mr. Porras) had attended meetings in Toronto with Margarita and her lawyers, Jeffery Leon and Jason Woycheshyn (Bennet Jones). Katherine Kay (Stikeman Elliot), who represents the Nephews in various legal matters, was also present during at least one of those meetings. The subject of the meetings was Margarita's oppression action against Xela, during which Margarita disclosed to her lawyers that the action would be financed through the Nephews.

17. Under cross-examination on April 17, 2012 in Toronto, Margarita admitted receiving the Castillo Loan and testified that G&T Bank had given her the Castillo Loan solely on the basis of her "net worth," as she had no assets in Guatemala and had not lived there in decades. A true and correct copy of an excerpt from Margarita's cross-examination is attached hereto as Exhibit E. However, in an affidavit dated September 9, 2011, Margarita testified that she had been struggling financially, and that she had asked the Nephews for "help" securing the Castillo Loan. A true and correct copy of that Affidavit is attached hereto as Exhibit F. In any case, Margarita confirmed in cross-examination that she used at least some of the Castillo Loan proceeds to pursue her oppression claims in Toronto against Xela, Arturo and Juan. (See Exhibit E hereto.)

18. In 2016, I participated in at least four meetings in Guatemala with high-level representatives of G&T Bank about the Castillo Loan. Initially, I spoke with Mr. Estuardo Cuestas, a member of the Board of Directors of G&T Bank and a close advisor to the President. I told him that I believed G&T Bank had given a loan to Margarita that was collateralized with LISA's Villamorey 2010 dividends, which she had used to fund litigation against me in Canada. Mr. Cuestas promised to look into the situation. During our second meeting, Mr. Cuestas confirmed that the Castillo Loan had indeed been collateralized with CD #010152676, and he seemed to recognize the seriousness of the situation. He arranged a meeting for me with Mr. Mario Granai, the President of G&T Bank. I shared my concerns with Mr. Granai, who provided no substantive commitment, although he seemed genuinely concerned about the bank's exposure.

19. Some weeks passed, after which Mr. Cuestas contacted me by telephone and informed me that G&T Bank would not be able to assist me, and that the Castillo Loan was "no longer an issue" for the Bank, as it had been "collapsed." I understood Mr. Cuestas' comments to signify that G&T Bank had satisfied the Castillo Loan by foreclosing the collateral (*i.e.*, using the CD purchased with LISA's 2010 Villamorey dividends), without Margarita being required to repay any part of the Castillo Loan.

20. At the time of the Loan, Margarita was sitting on the Board of Directors of Xela. Further, Margarita's oppression case was only one facet of a broader attack strategy, which included false criminal complaints against me in Guatemala. Those have all been dismissed with prejudice, but only at great expense and after significant damage to my reputation as well as to Xela's banking relationships.

21. This coordinated attack has benefitted the Nephews by depleting LISA's resources to pursue Unpaid Dividends. Further, I understand that lawyers for the Nephews have attended recent hearings in this receivership, obviously looking for an opportunity to close the loop on the conspiracy by purchasing LISA's claims for Unpaid Dividends at fire sale prices in exchange for satisfying the Castillo Judgment.

22. Although these facts should yield a judgment in Xela's favor that would likely more than offset the Castillo Judgment, they have yet to be adjudicated. I believe that in these circumstances, it would be unfair and inequitable to bar Xela from pursuing these outstanding questions to resolution. Indeed, the issue of Margarita's alleged wrongdoing should be addressed in a fair and equitable manner, under the Court's supervision, and within the confines of this receivership.

BDT Investments Ltd.

23. Beginning in 2005, LISA's efforts to collect the Unpaid Dividends, including litigating the Leamington action, were funded by BDT Investments Ltd., a Barbados corporation ("**BDT**"), which at the time was wholly owned by Xela. On January 5, 2009, LISA and BDT documented LISA's then-cumulative debt to BDT with a promissory note for US$16,910,000, secured by LISA's 1/3 stake in Villamorey. BDT eventually sued LISA in Panama on the promissory note, and in December 2012, it obtained a judgment against LISA in the amount of US$19,184,680, together with a lien against all of LISA's assets (collectively the "**BDT Judgment**").

24. In April 2016, as part of his estate planning, Arturo formed The ArtCarm Trust, a Barbados Trust (the "**Trust**"), to which he irrevocably transferred various assets, including BDT, for the benefit of certain family members, but excluding me. Meanwhile, BDT continued to fund LISA's claims to recover Unpaid Dividends, and LISA's debt to BDT grew to approximately US$50 million (the "**BDT Claim**"). Thus, at the time the Receiver was appointed, BDT was LISA's single largest creditor, with a claim approximately ten times the size of Margarita's Judgment. Still, BDT has consistently said that if LISA were to collect Unpaid Dividends, BDT would consider subordinating its rights under the BDT Judgment to the reasonable requirements of the receivership.

25. After the Receiver was appointed, I understand that LISA began to inquire into potential third-party loans sufficient to satisfy, among other things, the Judgment and the expenses of the Receivership. In December 2019, I was told that LISA had received a verbal commitment for such a third-party loan on terms acceptable to LISA (the "**Loan**"). All of the Loan details were managed and approved by LISA without my instigation, involvement or approval. I was told only the basic terms of the Loan, including that it was sufficient to satisfy the Castillo Judgment and the expenses of the receivership.

26. Upon learning of the lender's commitment to make the Loan, I understand that LISA informed the Receiver, stating specifically that the Loan was adequate to satisfy the Castillo Judgment and all reasonable expenses of the Receivership. The Receiver asked me for more details about the Loan, but I was unable to provide more information because I had not been told.

27. I understand that the Receiver has taken action in Panama to try to alter the composition of LISA's board of directors. I also understand that the Receiver's lawyers in Panama did not follow the required steps to make those changes, nor did they notify me of their plans. I also understand that when LISA's counsel in Panama observed that an unidentified person was trying to alter LISA's corporate structure, LISA quickly contested the

changes, which were officially rejected by the Corporate Registrar for failure to comply with applicable procedures.

28. I have offered multiple times to meet face-to-face with the Receiver to discuss the focus of his collection efforts as well as Xela's own counterclaims against Margarita. Most recently, those offers have been conveyed to the Receiver through LISA's lawyers in Panama. The Receiver initially implied that he would attend a meeting in Panama, but he later placed a precondition on any meeting with me, namely that LISA consent to the changes requested by the Receiver to LISA's Board of Directors.

29. Meanwhile, the Loan has not funded, for reasons that are unclear to me. What I understand, however, is that the failure to fund is related to the Receiver's attempts to intervene in the transaction.

30. I further understand that BDT has extinguished its debt to LISA in exchange for LISA's full 1/3 stake in the Avicola Group, including its claims for Unpaid Dividends. That proposal was not given to Xela or to me in advance, and neither Xela nor I consented to or approved of it. As I understand it, the decision to assign its remaining assets to BDT in exchange for cancellation of the debt was made solely and entirely by LISA.

31. Contrary to what the Second Report suggests, Xela has not withheld any information from the Receiver. Indeed, the only documents the Receiver claims Xela has not provided are records evidencing BDT's funding of LISA's litigation efforts. Although I believe that Xela's counsel has supplied records of this type to the Receiver, the request is moot in light of the U.S. District Court's finding that the BDT Judgment does not represent a fraud. Otherwise, to the best of Xela's knowledge, it has supplied all information in its possession requested by the Receiver.

32. From the outset of the receivership, I have repeatedly asked for face-to-face meetings with the Receiver to discuss how best to collect Unpaid Dividends from Villamorey and/ or the Avicola Group companies, and to discuss the validity of Xela's own civil

conspiracy claims against Margarita. Aside from one introductory meeting and one working meeting, the Receiver has rejected my requests, which I made directly to the Receiver during two separate teleconferences and also through Tory's, Xela's previous counsel. Lately, my requests have gone through LISA's President in Guatemala to the Receiver's counsel in Panama, during which LISA's counsel provided documentation to the Receiver's counsel concerning the fraudulent nature of the Nephews' Loan to Margarita, Xela's entitlement to a judgment that would probably more than offset the Castillo Judgment and the expenses of the receivership, along the Receiver's request to modify LISA's Board of Directors. Despite the evidence, the Receiver has consistently refused to meet. Recently, the Receiver has suggested through his

Panama lawyer that a meeting might be possible, but only on the condition that LISA first voluntarily consent to the Receiver's proposed changes to its Board of Directors.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on March 22, 2020.

Commissioner for Taking Affidavits
(or as may be)

N. Joan Kasozi
(LSO# 70332Q)

JUAN GUILLERMO GUTIERREZ

This is Exhibit "A" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT

1999: No. 108/ 2001 No. 79

B E T W E E N:

LISA S.A.

Plaintiff

- and -

LEAMINGTON REINSURANCE COMPANY LTD.

First Defendant

- and -

AVICOLA VILLALOBOS S.A.

Second Defendant

JUDGMENT

Dates of Trial: June 23-July 4, July 8-July 10, 2008
Date of Judgment: September 5, 2008

Mr. Narinder Hargun and Mr. Paul Smith,
Conyers Dill & Pearman, for the Plaintiff
Mr. John Riihiluoma, Appleby, for the First Defendant
Mr. Jan Woloniecki and Ms. Shade Subair,
Attride-Stirling & Woloniecki, for the Second Defendant

Introductory

1. *"Strong parents have strong children and strong children have strong opinions, and that usually leads to conflicts that they have difficulty in reconciling*", Atlanta Mayor Andrew Young recently observed in relation to a litigious dispute between

members of his city's most famous family. This observation might well explain the emotional underpinning of the present dispute. The trial of the present action, which commenced almost a decade ago, arises out of a commercial family falling-out amongst members of a prominent Guatemalan family, a dispute which has also spawned litigation in at least three other forums.

2. In my Ruling of February 10, 2006[1], I described the history of the present actions as follows:

> *"1. On March 26, 1999, the Plaintiff issued a Generally Indorsed Writ of Summons in Civil Jurisdiction 1999: 108 against the Defendants herein. The claim was a derivative proprietary claim against the First Defendant on behalf of the Second Defendant, who was joined to meet the procedural requirements under Bermuda law in relation to derivative claims brought by a shareholder on behalf of the company whose shares the Plaintiff holds.*
>
> *2. On the day the Writ was issued, Mitchell J granted a Mareva injunction. The First Defendant ("Leamington") provided discovery on April 28, 1999. The Plaintiff ("Lisa") applied ex parte for leave to serve the Second Defendant ("Avicola") out of the jurisdiction on May 14, 1999, but did not obtain such leave until Simmons J's Order was granted on December 23, 1999. In the meantime, Leamington had both applied to set aside the Mareva injunction on October 15, 1999, and obtained directions in relation to its application from Wade-Miller J on November 4, 1999.*

[1] On the trial of a preliminary issue and the Plaintiff's application for leave to re-amend its Statement of Claim.

3. On January 26, 2000, Leamington applied to strike-out the action, with directions being ordered by Storr AJ on February 10, 2000. On March 22, 2000, Lisa filed its Statement of Claim, and on July 31, 2000 applied ex parte to renew its Writ. The renewal order was granted that day by Simmons J, but Avicola applied to set aside that Order on July 31, 2001. Directions were given by Meerabux J on February 1, 2001. Lisa sought to sidestep a potentially fatal attack on action 1999: 108 by issuing a similar Generally Indorsed Writ in Civil Jurisdiction 2001: 79 on March 2, 2001, in which fresh action both Defendants in due course entered appearances. On March 26, 2001, Lisa applied for leave to serve Avicola outside the jurisdiction, which application was granted by Mitchell J on April 5, 2001. On April 9, 2001, Lisa applied to consolidate both actions.

4. This fancy legal footwork bore fruit when on June 7, 2001, Mitchell J set aside the ex parte writ renewal order on Leamington's application, but also granted Lisa's consolidation application. On November 8, 2001, Ward CJ granted Lisa's June 25, 2001 application for leave to amend its Statement of Claim. On February 15, 2002, Leamington filed its Amended Defence and Avicola its Defence. One year and nine months later, after filing a Notice of Intention to Proceed on October 3, 2003, Lisa applied on November 20, 2003 for Further and Better Particulars of Leamington's Amended Defence. I granted this application on December 4, 2003, and the relevant particulars were given on January 2, 2004. It was only after these numerous initial interlocutory skirmishes, that battle was joined on the issues which presently fall for determination.

5. On September 3, 2004, the Defendants applied for the trial of two preliminary issues, and after ordering directions on September 23, 2004, Ground CJ granted the application on December 2, 2004. On February 17, 2005, Lisa applied for leave to re-amend its Statement of Claim, again with a view to fending off a potentially lethal attack on its claim by the Defendants. And on April 6, 2005, Wade-Miller J ordered, inter alia, that both applications should be heard together.

6. *The three parties, musketeer-like, have moved their legal sword-play from one battleground to the next, with various interlocutory applications being heard over nearly seven years by eight different first instance judges. None of the interlocutory applications to date appear to have given rise to either a considered judgment or any appeal. The above summary does not include related proceedings which have taken place in the British Virgin Islands, Florida and (it seems[2]) Guatemala as well. The Defendants assert that they have been more proactive than the Plaintiff in this litigation, and invite the Court, in addition to other arguments, to have regard to the law of limitation and the doctrine of laches, or delay.*"

3. On March 10, 2006, I resolved a preliminary issue in favour of the Defendants, but granted leave to amend to the Plaintiff in the following terms :

> "*137. The Plaintiff is granted leave to re-amend to assert those claims which I have found to be arguable, but not in the form of the draft RASC presently before the Court. The theory of direct liability on which the Plaintiff now relies should be*

[2] The Defendants' Counsel suggested that Lisa had filed over 100 suits against Avicola and related entities in Guatemala; proceedings in the other two jurisdictions were directly referred to in evidence.

incorporated into a further draft RASC to meet the concerns which I have sought to clearly identify above..."

4. The Defendants appealed against this Ruling, and the Plaintiff cross-appealed against my decision that it had no standing to pursue a personal claim against the First Defendant, having heard extensive evidence on Guatemalan law. On November 22, 2006, the Court of Appeal dismissed the Defendants' appeal against my decision to permit the Plaintiff to amend its Statement of Claim, and allowed the Plaintiff's cross-appeal against my resolution of the preliminary issue in favour of the 1st Defendant based on the Amended Statement of Claim. The Court of Appeal apparently took the view that since various claims against the 2nd Defendant were going to be tried, it was undesirable to decide the overlapping issue of the 1st Defendant's liability in isolation from the totality of the evidence to be adduced at trial against the 2nd Defendant, although they expressed doubt as to whether the preliminary issue had any further relevance. To my mind my February 10, 2006 Ruling on the standing of Lisa to advance a personal claim against Leamington based on the pleadings as they were prior to the RASC has no present significance whatsoever. The merits of the claims against Leamington fall to be determined on their merits based on the case advanced in the RASC.

5. The 2nd Defendant did not contend before me in March 2006, nor (seemingly) the Court of Appeal in November, 2006, that the amendments should be refused because the averments were liable to be struck-out on the grounds asserted in the strike-out applications it filed on June 14, 2007. The attempt to strike-out the Re-Amended Statement of Claim altogether was, save for one pleading complaint which could not have been previously raised, difficult to comprehend. The Re-Amended Statement of Claim ("RASC") was filed on March 15, 2006, so the 2nd Defendant had an adequate opportunity to contend before the Court of Appeal last November, that the amendments ought to have been refused because the proposed re-amended pleading was itself liable to be struck-out on abuse of process or other grounds. These points were not taken. It may have been reasonable for the 2nd

Defendant to simply focus on dismissing the subsequently abandoned derivative claim, but these strike-out points, if serious, could have been advanced by the 1st Defendant at an early stage of the action. And if these issues only became relevant to Avicola when the personal claim was first asserted, it was first asserted in February 2005, when the application to re-amend was filed.

6. The second limb of the total strike-out application was, however, based on an averment only made in the Plaintiff's Reply to the Re-Amended Defence of the 1st Defence filed on February 22, 2007. But the Plaintiff voluntarily gave further and better particulars of this aspect of its case, with a view to meeting the 1st Defendant's complaints.

7. The partial strike-out application was, delaying tactics apart, no easier to comprehend. The complaint that three "background" frauds were not relevant to the Plaintiff's claim sought to strike-out portions of the RASC which had been pleaded from the outset in 1999. This point was not taken before me or the Court of Appeal in 2006, let alone in the previous six years of the litigation. The paragraphs of the RASC attacked, 8-11 and 15(i),(iii), were pleaded in the original Statement of Claim served in 2000. At the very latest, this point ought to have been taken, assuming it to be serious, as part of the 2nd Defendant's opposition to the Plaintiff's application for leave to re-amend.

8. Although the 2nd Defendant consented to pre-trial directions on March 13, 2007, it was less surprising that its new separate attorneys, who came on the record on April 26, 2007, should raise a point which had not previously been taken by the Defendants' joint attorneys, less than two months after the point could first have been taken. The original case, from 1999 until February 2007, was that the operating companies in the Avicola group were subsidiaries of the 1st Defendant, and that the Plaintiff was defrauded because they diverted funds which ought to have been "up-streamed" to the Plaintiff as dividends through the 2nd Defendant. The Plaintiff belatedly conceded that the operating companies, which are said to

have obtained fraudulent policies from the 1st Defendant, are not in fact subsidiaries of the 2nd Defendant. The 2nd Defendant was clearly entitled to know how the Plaintiff now put its case, on these materially different facts.

9. The third issue I was required to decide was whether the Plaintiff was entitled to obtain full disclosure in relation to the business operations of various companies in support of its case on the three "background" frauds. The 2nd Defendant complained, by way of alternative to its partial strike-out application, that the discovery requested was oppressive. The Plaintiff eventually agreed to adjourn its application in this regard, conceding that the request as formulated was oppressive.

10. The fourth issue I was required to decide was the 1st Defendant's application for further and better particulars of its case that the reinsurance policies issued by the 1st Defendant to operating affiliates of the 2nd Defendant. It was essentially agreed that the Plaintiff had not yet received and/or considered full discovery from the Defendants, and the Plaintiff undertook to advise the 2nd Defendant of whether it can supply the requested particulars without the need for a formal order, within 28 days.

11. On June 26, 2007, I resolved these issues as follows: (a) I dismissed the 2nd Defendant's total strike-out application, (b) I dismissed the 2nd Defendant's partial strike-out application, (c) I granted the Plaintiff's application for discovery in part, and reserved the position on the need to give effect to a narrower version of the oppressive discovery request, and (d) I reserved the issue of whether the Plaintiff should be ordered to give further particulars in relation to the reinsurance policies, because the scope of any potential order was presently unclear. I handed down Reasons on July 3, 2007. I refused leave to appeal against the strike-out rulings, and the Court of Appeal likewise refused leave.

12. At the pre-trial review, the scope of the trial fell to be considered. On June 9, 2008, I agreed with the 1st Defendant ("Leamington") that the Plaintiff's ("Lisa's") damages fell to be determined by reference to its pleaded claim to loss suffered by it as a shareholder of the 2nd Defendant ("AVSA") (i.e. the Avicola Group of Companies). Lisa had previously abandoned any independent claim as an indirect shareholder of Leamington through Villamorey. I also indicated that it was improbable that I would make positive findings that any criminal offences had been committed under Guatemalan law. However, I left open the possibility of deciding whether Lisa's indirect interest in Leamington had been sold to the extent that the parties had prepared to argue this point and had addressed it in their evidence.

13. In the event, the trial required the Court to consider whether Lisa was able to prove one or more causes of action under Bermuda and/or Guatemala law, having regard to not only ordinary factual evidence, but also considering expert evidence accounting evidence, expert evidence as to insurance practice and expert evidence as to foreign law.

Pleadings: Lisa's case

14. Lisa's case is essentially pleaded in the Re-amended Statement of Claim ("RASC") as read with the Further and Better Particulars of the Plaintiff's Re-Amended Statement of Claim and Replies ("FBPs"). Lisa's original RASC claim was based on the premise that AVSA was the parent of a group of 19 companies, including AVSA ("the Avicola Group"). Its ultimate claim was that AVSA is the *de facto* parent of a group which has always been regarded as a single economic unit. As a result, the RASC may for all economic or compensatory purposes be read as if references to "Avicola" are references to the Avicola Group.

15. Paragraph 5 of the RASC provides in material part as follows:

"...From inception, Avicola has been owned by the Gutierrez family comprised of Lisa representing the 25% shareholder interests of Don Arturo and his family. Trucha, S.A., a company incorporated in Panama, represents the 25% interest of Jean Luis Bosch Gutierrez ("Jean Luis") and his family. San Cristobal, S.A., a company incorporated in Panama, represents the 25% interest of Dionisio Gutierrez Mayorga ("Dionisio") and his family. Villamorey owns the remaining 25% shares in Avicola and Villamorey itself is owned equally by Lisa, Trucha, S.A. with the result that Lisa is a 1/3 owner of Avicola..."

16. Paragraph 7 of the RASC avers that in 1982 Don Arturo (who established the Avicola Group) and his family emigrated from Guatemala to Canada. Day to day control was assumed by Dionisio, Juan Jose Gutierrez, Juan Luis, Konrad Losen ("Losen"), Fernando Rojas ("Rojas"), Mauricio Bonifasi ("Bonifasi") and Roderico Rossell ("Rossell") who are described as the "Controllers". All of the foregoing individuals, Rossell apart, are also defined as the "administrators" of Avicola. Paragraph 8 alleges that soon after they assumed control of various family businesses, "*the Controllers embarked on a systematic scheme to defraud the Plaintiff of its share of the corporate profits of Avicola...*"

17. Various "background" or "feeder" frauds are then alleged by way of setting the scene for the substantive claims. The Pollos Vivos (Live Chickens) Fraud is said to have been admitted in a videotaped meeting by Rojas and Rossell in August 1998 (RASC paragraph 9). It involved not reporting live chicken sales and distributing the resultant Avicola profits to all shareholders save Lisa. The Los Cedros Fraud operated in a similar manner in relation to the sale proceeds of chicken manure and oranges (RASC paragraph 10). The Ancona Fraud is alleged to have involved the laundering of the proceeds of the two other background frauds and to have been admitted in the same manner (RASC paragraph 11).

18. It is then alleged, uncontroversially, that Leamington was incorporated in Bermuda on July 23, 1997 and that Rossell was at all material times its director and secretary[3]. The averment that Leamington is 100% owned by Villamorey is disputed, however (RASC paragraph 12). Leamington is a captive insurance company only reinsuring the risks of the Avicola and Multi Inversiones group of companies which were issued policies by fronting companies including El Roble Seguros Y Fianza ("El Roble"), a Guatemalan insurance company (RASC paragraphs 13-14). Paragraph 15 (excluding the Particulars of Fraud) provides as follows:

> *"15. The Plaintiff accepts that part of the risks reinsured by Leamington represent bona fide risks in respect of which Leamington has levied premiums at commercial rates. However, the Plaintiff contends that a substantial part of the reinsurance risks underwritten by Leamington are in respect of (i) non-existent risks; or (ii) risks which bear no relationship to the reinsurance premiums charges by Leamington. The Plaintiff contends that the primary object of ~~Leamington has been used in~~ this fraudulent scheme was to use Leamington as a vehicle to make distributions to the shareholders of Avicola ~~so as to (i) launder the proceeds of the illegal sales of live chickens; (ii) reduce the profits of Avicola; and (iii) reduce the dividends which would otherwise be payable to the Plaintiff.~~ The fraudulent payments made to Leamington were intended by the Controllers and Avicola to be distributions of profits to the shareholders of Avicola. However, in making these distributions to the shareholders, the Controllers and Avicola have deliberately and unlawfully excluded Lisa from receiving its appropriate share of these profits of Avicola. Leamington received the fraudulent payments from Avicola with the knowledge that they*

[3] Rossell himself admitted to being Treasurer and Secretary, and this was not apparently challenged by Lisa.

were intended by Avicola to be distributions to Avicola's shareholders. ~~*Further, the*~~ *The Controllers have ensured that any dividends paid by Leamington to Villamorey are not further distributed to Lisa as a shareholder of Villamorey by increasing the expenses of Villamorey which bear no relationship to the activities of Villamorey. During 1992 to 1998, Avicola used the fraudulent payments to Leamington as a means of making distributions to the shareholders of Avicola in the amount of US$1,964,691.92 in 1993, US $2,713,888.32 in 1994 US$6,184,486.88 in 1995, US$6,075,000.90 in 1996, US$6,324,431.00 in 1997 and US$6,594,894.00 in 1998. The controllers and Leamington have deprived Lisa of its share of these distributions made by Avicola to its shareholders.* "

19. The dollar amounts were, Mr. Hargun clarified in his closing submissions, intended to be read in Quetzales. The consequences of the fraud alleged in paragraph 15 are pleaded in paragraph 16 as follows:

"*16.* ~~*As a matter of Guatemalan law, Avicola is obliged to declare, by way of dividends, all its profits on an annual basis.*~~ *Further or in the alternative, as a matter of Guatemalan law, Avicola is obliged by Article 134 of the Guatemalan Commercial Code to hold an annual general meeting each year, at which true and accurate financial information about the condition of the company (including its profit/loss statement and balance sheet) is provided to the shareholders and at which (in the light of such financial information) the shareholders take appropriate decisions about the distribution of profits. Avicola has held no annual general meeting since 1982 and true and accurate financial information has not been provided to the shareholders.* ~~*The shareholders have thereby been prevented from exercising their rights under Guatemalan law to take appropriate decisions to distribute the profits of the company to themselves.*~~ *The Controller and/or Avicola failed to hold annual gerenal*

meetings as required by Guatemalan law in order to cover up the frauds set out above and/ or as part of their fraudulent scheme and conspiracy to defraud Lisa of its ~~true entitlement as a share holders of share of~~ the distributions made by Avicola. The effect of the fraudulent activities set out in ¶15 above is that ~~profits which would have been distributed to Lisa SA were retained in Avicola and partly transferred to Leamington in Bermuda~~ Lisa was deprived of its share of the distributions made by Avicola though the device of Leamington. Leamington knowingly participated in this fraudulent scheme. As a matter of ~~Bermuda and/or Guatemalan~~ law, Lisa has a personal and proprietary claim to the funds which ~~Avicola~~ Lisa should have ~~declared by way of dividends~~ received as its share of the distributions made by Avicola to its shareholders but has failed to do so. Lisa is entitled to maintain those personal and proprietary claims against Leamington."

20. The following additional and alternative causes of action are pleaded in paragraphs 17-19 of the RASC:

> *"17. Further, and in the alternative, the matters complained of in paragraph 15 and 16 hereof were committed by Leamington pursuant to a conspiracy between the Controllers (and in particular Rossell) and Leamington ~~and (by reason of the matters set out in paragraph 17C and 17F below) Avicola~~ to defraud Lisa of its true entitlement ~~as a shareholder of Avicola~~ of the distributions made by Avicola. The parties to the conspiracy included Losen, Rojas, Bonifasi, Rossell, ~~Avicola~~ and Leamington. Leamington joined the conspiracy after its incorporation on 23 July 1997.*
>
> *17A. Further, and in the alternative, the Controllers and/or Leamington and/or Avicola are obliged under Guatemalan law to compensate or infemnify Lisa for the damage causes to Lisa by the said frauds and*

conspiracy, which amount to intentional wrongdoing within the meaning of Articles 1646 ~~and/or 1653~~ of the Guatemalan Civil Code.

17B. Further, and in the alternative, the Controllers and/or Leamington have been wrongly enriched, without legitimate reason, by reason of the said frauds and/or conspiracy and are obliged under Article 1616 of the Guatemalan Civil Code and/ or Bermuda law to indemnify Lisa in respect of that wrongful enrichment.

17C. Further, and in the alternative, Leamington and/or Avicola are liable for the acts of the Controllers in committing the said frauds and/or conspiracy, ~~under Article 1664 of the Guatemalan Civil Code and/or~~ by reason of the Gautemalan doctrine of simulation and Article 1284 of the Guatemalan Civil Code.

17D. ~~Further, and in the alternative, the said frauds and/or conspiracy amount to wrongful abuse of corporate personality by Leamington and/or Avicola and/or the Controllers, which under Guatemalan law are tortious acts and for which Leamington and/or Avicola are liable to Lisa in damages.~~

17E. Further and in the alternative, ~~Leamington and/or~~ Avicola ~~and/or the Controllers are~~ in liable to Lisa for the said frauds and/ or conspricy under Articles ~~171, 172 and/or~~ 176 of the Guatemalan Civil Code.

17F. ~~Further and in the alternative, Leamington and/ or Avicola are liable for the said frauds and conspiracy as the alter ego of the Controllers.~~

18. Lisa SA asserts that the knowledge of Rossell, as president, director and secretary of Leamington, is to be attributable to Leamington

and/or Rossell has been at all material times the controlling mind of Leamington.

19. In the premises, all monies received by the fronting companies as premiums and transferred to Leamington as reinsurance premiums on account of non-existent risks or on account of grossly inflated premiums were and are held, up to the amount of Lisa's share of the distributions made by Avicola, by ~~the First Defendant~~ Leamington as a trustee for Lisa ~~Avicola and as a consequence of the fraud committed by the Controllers, Avicola has suffered loss and damages. The Plaintiff is unable to give full particulars of loss and damage until the completion of discovery.~~"

21. In Lisa's Closing Submissions, the causes of action relied upon were summarised as follows:

> *"81.1 Against both Leamington and Avicola, conspiracy by unlawful means, with the intention of injuring Lisa (Bermuda common law and/or Article 1645 of the Guatemalan Civil Code);*
>
> *81.2 Against both Leamington and Avicola for simulation (Article 1284 of the Guatemalan Civil Code (¶17C of RASC));*
>
> *81.3 Against Leamington only for equitable fraud in that Leamington has participated in a fraudulent scheme to defraud Lisa of its share of the corporate profits of, inter alia, Avicola (¶s 8 & 15 of RASC);*

81.4 Against Leamington only as a constructive trustee as a result of its dishonest assistance in Avicola's breach of trust or fiduciary duty to Lisa (¶s 16 & 19 of RASC). Furthermore, Leamington is liable as a constructive trustee as a result of its knowing receipt of monies from the Avicola group of companies, which should properly have been paid to Lisa ((¶s 16 & 19 of RASC);

81.5 Against Avicola only under Article 176 of the Commercial Code (¶17E of RASC)".

Pleadings: Leamington's Defence/AVSA's Defence

22. Leamington, in its Re-Amended Defence ("RAD"), denies each of Lisa's claims against the reinsurer, denies liability for the acts of the Controllers and in any event does not admit that Leamington is liable by virtue of the doctrine of simulation.

23. AVSA in its Amended Defence ("AD") also denies liability for each cause of action asserted against it and does not admit that it is liable by virtue of the doctrine of simulation.

Factual Evidence: Overview

24. Lisa's live factual witnesses were its principal, Mr. Juan Guillermo Gutierrez Strauss ("Juan Guillermo"), an accountant Mr. Lawrence Rosen and a translator, Esther Cecilia Crespo. A hearsay notice was served in respect of the now deceased Mr. Mario del Aguila Cancinos ("del Aguila") and in respect of the transcript of the August 20, 1998 Toronto meeting ("the Toronto Transcript").

25. Leamington called no live factual (i.e. non-expert) witnesses save, belatedly, Hector Rene Lopez Sandoval, who also gave expert evidence as to Guatemalan notarial practice. It served hearsay notices in respect of five witnesses who were

"*beyond the seas*", Lionel E. Asencio ("Asencio"), Hector Rene Tercero Soto ("Tercero"), Roderico Rossell Anzueto ("Rossell"), Jesus Briz Barillas ("Briz"), and Luis Fernando Villaverde ("Fernando").

26. AVSA called no live fact witnesses at all, serving hearsay notices prior to trial in respect of the following five persons who were also "*beyond the seas*": Silvia Maria Rossbasch Rheinbolt ("Rossbasch"), Luis Arturo Gutierrez Strauss ("Luis Arturo"), Jose Fernando Ramon Rojas Camacho ("Rojas"), Rene H. Perez Ordonnez ("Perez") and Alberto Antonio Morales Velasco ("Morales"). At the trial, further affidavits by Mario Rene Archila Cruz ("Archila") and Ana Lucrecia Palomo ("Lucrecia") were served to deal with an issue which arose in the course of the trial.

27. Juan Guillermo as the partisan *de facto* representative of Lisa's side of this family dispute was obviously a witness whose evidence needed to be treated with considerable care. In general terms, he was a credible witness whose evidence provided background to Lisa's central case rather than supporting it directly. Despite skilful and vigorous cross-examination by Mr. Woloniecki, I found his contention that he had not personally seen the "dividend" cheques before trial (and merely knew of their existence) to be credible. The Toronto Transcript supported his contention that this was the position when the August meeting took place. Although he initially is recorded as having said that he "*saw*" cheques were being made payable to the bearer, later in the Transcript he clarified what he meant by this stating: "*Fine, but I don't see the checks...That is, I see Carlos Vasquez'...report.*"[4] On the other hand, under withering cross-examination by Mr. Riihiluoma, Juan Guillermo was simply not credible when he testified that at the recorded Toronto meeting, he did not admit having seen minutes related to a Villamorey sale of shares and made reference to this transaction by way of fishing for information:

> "*24 Q Can we now start from the premise that at*

[4] Vol. E, page 369.

25 this point in time in the meeting you were having a
540
1 discussion with Mr. Rossell and Mr. Rojas about
2 minute books?
3 A We were discussing the minute books, yes.
4 Q And I will pick it up MV1 in the middle of
5 the page. "So on what date is the stockholder
6 meeting held?"
7 It has to be held, by law it has to be
8 prior to October. But those, um, they're going to
9 be available, right, um. Unless once again, you
10 want to ask for as many photocopies as there may
11 be."
12 The next voice, MV1, is you. "In any
13 event, we expected to receive at least the minutes
14 of the stockholders meetings, because we have never
15 seen the minutes for the stockholders meeting for, I
16 don't know, 15 years." Do you accept that that is
17 what you said?
18 A Yes. We haven't seen any minutes for --
19 in those days probably 15 years. Now it will be 20
20 years.
21 Q And you accept that MV1 is you; you are
22 the speaker?
23 A Yes.
24 Q "I don't know, 15 years, well, um, I saw a
25 couple there, that were related to, um, transaction
541
1 of what was done in February on Villamorey. I think
2 when the shares were transferred, when the sale in
3 '95 was made, right." You saw the minutes of

4 Villamorey.
5 A I didn't see the minutes of Villamorey.
6 If you read a little later in the next -- after that
7 paragraph you just read -- I believe it is MV3,
8 Mr. Rossell, probably he says, "no, I don't know.
9 Juan Guillermo, but if you want they can be made for
10 you."
11 Q Sir --
12 A That means the minutes were not made.
13 Q Sir, you said -- "I saw a couple there
14 that were related to the transaction that was done
15 in February, Villamorey, I think when the shares
16 were transferred, when the sale -- when the sale in
17 '95 was made." That is what you said.
18 A Remember that I was questioning them, and
19 I asked -- I made that comment to see what the
20 reaction was. In the next paragraph they say that
21 the minutes didn't exist. So I actually didn't see
22 my minutes. I was simply fishing for information.
23 Q Sir, that is a shameful answer, if I may
24 so say so. That is exactly what you said. You saw
25 the minutes of Villamorey, when, in February 1995
542
1 when the transfer was made.
2 A You can call my answer shameful, but that
3 is the truth. I was just fishing for information,
4 sir."[5]

28. Mr Rosen's evidence must also be treated with some caution, for the straightforward reason that having been employed as a forensic accountant by Lisa,

[5] Day 4, pages 539-542.

he has the entirely understandable emotional interest in Lisa's success that any professional person in his position might be expected to have. That said, he was a generally credible witness. One narrow aspect of his evidence, under cross-examination by Mr. Woloniecki, was unsatisfactory, however. This was the detailed description of a conversation Rosen said he had with del Aguila in Guatemala in late 1998 about banking arrangements for the proceeds of live chicken sales contained in his witness statement prepared almost ten years later but not recorded in any of his contemporaneous notes:

"25 Q So you say that that sentence "he told me
687
1 that these cash sales were never reported to Lisa
2 S.A, that Lisa didn't receive any shares of the
3 sales proceeds, "was written by you?
4 A Yes. Was signed by me.
5 Q Signed by you. Are you saying that you
6 put that in of your own initiative without any
7 discussion with anyone else?
8 A I certainly don't recall being pressured
9 to put it in, if that is what you are asking.
10 Q I am not asking you whether you were
11 pressured. I am asking whether you had a discussion
12 with anyone about that sentence.
13 A I would say, like I have signed hundreds
14 of affidavits, there is all back and forth between
15 lawyers and myself. And do I have perfect
16 recollection of those? The answer is no.
17 Q And, yet, you say you have perfect
18 recollection of Mr. del Aguila telling you this at
19 some meeting ten years ago, and it does not appear
20 in any of your notes?
21 A If you look at the notes, there are all

22 sorts of things that could have been there that were
23 not, because you're not doing a fraud investigation
24 at this point. I am trying to do a business
25 valuation."

29. Ms. Crespo the interpreter was cross-examined about some very narrow aspects of her translation of the Transcript. Her astonishing attempt to tell Mr. Woloniecki how to conduct his cross-examination appeared to me to be consistent with the fact that she was an experienced and extremely fastidious translator who was unaccustomed to having her work questioned or challenged and was genuinely offended by the suggestion that she might have made a mistake. I found her to be entirely credible and reject any suggestion that she was influenced in her work by having been employed from time to time by Lisa.

30. As far as those witnesses who could have been called by the Defendants but were not, the fact that their written evidence was not subjected to cross-examination obviously diminishes the weight to be attached to their evidence, on matters which are not supported by any other evidence. However, I bear in mind that it is for the Plaintiff to prove its case. And while in certain circumstances the Court may be entitled to draw adverse inferences from the failure to call a witness, the Defendants are not obliged to assist Lisa to bolster its case through cross-examination.

Expert evidence: overview

31. The Plaintiff and the Defendants called expert evidence as to forensic accounting matters (Joseph Gardemal and Maria Yip, respectively), insurance matters (Daniel Spragg and William Bailie, respectively), Guatemala law (Professor Michael Wallace Gordon and Marcos Jose Alfredo Ibarguen Segovia, respectively) and Guatemala notarial practice (Ida Rebecca Permuth Ostrowiak and Hector Rene

Lopez Sandoval, respectively). Mr. Lopez also gave factual evidence about the 1995 Villamorey shareholders meeting which he notarized.

32. In general terms I found all of the experts credible and not unreasonably reluctant to depart from the crucial opinions set out in their respective reports.

Legal and factual findings: was Lisa's indirect interest in Leamington through Villamorey sold in 1995?

33. This issue was addressed in argument and by way of evidence and is a discrete issue which may conveniently be dealt with at the outset. The following points arise for consideration: (a) did the Villamorey shareholders resolve on February 14, 1995 to sell that company's shares in Leamington to La Brana; (b) was an agreement for the sale of Lisa's Leamington stake consummated in or about 1995; and assuming the answers to both (a) and (b) are affirmative, (c) are there any Bermuda law impediments to this Court affirming such conclusions?

34. I find that Mr. Lopez did notarize a Villamorey shareholders meeting which approved the sale of the Leamington shares to La Brana in 1995, doubts about the precise accuracy of the recorded length of this related meeting notwithstanding. Bearing in mind that Villamorey is a Panamanian company and no expert evidence was adduced as to Panamanian law, I decline to hold that that resolution had no legal effect under Panamanian law. Applying Bermudian/English conflict of law rules, whether or not a company has validly passed a resolution is an internal corporate management question which falls to be governed by the law of the place of incorporation of the relevant company: Lawrence Collins (ed.), Dicey & Morris, '*The Conflict of Laws*', Rule 156[6]. No basis for departing from this principle was advanced in argument. I am bound to assume that Panamanian law is the same as Bermudian law and Bermuda law would not nullify the Villamorey resolution in question because of notarial irregularities under Guatemala law. The fact that, as Ms. Permuth's evidence strongly suggests, the notarization of the

[6] 12th edition (Sweet & Maxwell: London, 1993), Volume 2 page 1111.

Villamorey meeting may well be invalid under Guatemala law is not determinative in this regard. The same applies to her opinion that under Guatemala law foreign currency transactions were prohibited, especially since the Minutes only purport to approve the sale of shares in a Bermuda company, not to effectuate the sale itself.

35. Not only did I believe Mr. Lopez as a factual witness. Juan Guillermo's admission during the August 1998 Toronto Meeting that he may have seen Villamorey Minutes when the February 1995 sale occurred makes it impossible to believe that the Villamorey meeting did not take place at all. However, it is far from clear that the sale did take place for the nominal consideration of US$1 stated in the Minutes. Other share sales notarized by Mr. Lopez on the same day were either "*at the price and under the agreed conditions with the buyer*" (Inversiones Nuevas SA, Hornbill Investment Limited), or were supported by sale agreements dated February 15, 1995 for substantial sums (US$12 million, Lomax Investment Corporation, and US$13 million Crystal del Pacifico). The nominal consideration referred to in the Villamorey Minutes is not plausibly explained (in terms consistent with the sale having been consummated), although the letter of intent which contemplated the sale of various entities by Lisa provided for a total consideration of $23 million. It is true that Juan Guillermo swore an affidavit on February 15, 1999 admitting that Lisa had sold various companies including its interest in Leamington, and that Lisa has seemingly commenced no proceedings to set aside this sale[7].

36. The proper law of a contract for the sale of shares in Leamington, a Bermuda company, seems obviously to be the place of incorporation of the company: *Banco Atlantico SA-v- The British Bank of the Middle East* [1990] 2 Lloyd's Rep 504. In my judgment the public policy importance to Bermuda's international insurance regulatory regime of clarity as to who ultimately owns Bermuda insurance and reinsurance companies impacts on the way this issue ought to be

[7] First Defendant's Skeleton Argument, paragraph 59.

addressed. Where, as is clearly the case here, Leamington has represented in its audited financial statements and its insurance returns that Lisa post-1995 was one of its ultimate beneficial owners, clear evidence is required to establish that these representations are incorrect. It also seems curious that lawyers in civil law jurisdictions such as Guatemala and Panama would be content to consummate a sale of shares without executing a written sale agreement. The suggestion that the failure to report the change in ultimate beneficial ownership of Leamington which purportedly occurred in 1995 cannot be explained by reference to extreme confidentiality concerns. The purported change merely involved Lisa's principals dropping out of the picture, with the "new" ultimate beneficial owners being otherwise the same as the "old" owners.

37. Bearing in mind how sensitive Lisa was about getting fair (or, according to the Defendants, unfair) value for all of its interests, it seems extraordinary to suggest that Lisa with full knowledge and consent agreed to finally dispose of its interest in Leamington for only nominal consideration. Bills of sale exist for the sale of other interests which total the $23 million referred to in the earlier letter of intent, which leaves no consideration for the sale of Leamington at all. No obvious or straightforward explanation has been proffered as to why this should have happened. More significantly still, the recorded August 1998 Toronto meeting reveals discussions about Leamington which make no sense whatsoever if Lisa's indirect Leamington interest had already been sold three years previously. Rossell is recorded in the Transcript as saying at this juncture:

> *"You are going to start to receive all the profits... because we had left Levington [phonetic] a little over time... in order to strengthen the company and we hadn't distributed dividends..."*[8]

38. In my judgment there is no sufficient evidence before this Court to displace the statutory presumption which arises under section 68 of the Companies Act that

[8] Volume J1, page 154.

the registered shareholder, Villamorey, is the shareholder of Leamington. I find that Juan Guillermo was simply mistaken when he swore in 1999 that Lisa's Leamington interest had been sold by Villamorey. Such a mistake is consistent with the propensity Juan Guillermo has demonstrated in these proceedings for being wrong when he has testified on matters of detail outside of his own direct knowledge. And the evidence of Mr. Lopez, Leamington's own witness, supports the view that Juan Guillermo's father was the one who conducted the 1995 negotiations rather than Juan Guillermo himself:

> *"17 Q. Yes. And was Mr. Juan Arturo Gutierrez*
> *18 present at these meetings?*
> ***19 A. Look, he was in the negotiations, he was***
> ***20 present for most of the negotiations. He was there, 10:17***
> ***21 he did participate in the negotiations. We would all***
> ***22 see him come in with his bodyguard. All of the***
> ***23 employees were aware of the fact that he was arriving***
> ***24 and that he would be negotiating with his nephews."***[9]

39. On balance it appears that the sale of Lisa's indirect interest in Leamington was contemplated by way of an agreement in principle but was never consummated as Lisa contends. This view is further, and most cogently, supported by a December 7, 1995 letter from Asensio to Mr. Baker of the Managers indicating that "*Mr. Juan Arturo Gutierrez has decided to sell his equal part of Leamington's shares*" and indicating that La Brana has been formed to hold all of the shares on behalf of the other two family members. While the English words used by a Spanish speaker might carry less weight than the same words used by someone for whom English is their native tongue, the terms of the December 7, 1995 letter as a whole give the distinct impression of an incomplete transaction. The suggestion that Mr. Baker proceed to the BMA was seemingly never pursued[10]. Briz, the President of

[9] Day 9, page 1445.
[10] Volume K8, page 410.

Leamington from incorporation in 1987 until 2000, long after the purported 1995 sale, in his Witness Statement signed on October 24, 2007 and filed on behalf of Leamington, concludes by stating:

> *"11.During the time that I was president of Leamington....Leamington paid dividends exclusively to Villamorey as the sole shareholder of Leamington."*

40. I find (to the extent that this may be relevant for the purposes of the present proceedings and Lisa's claims for loss attributable to its shareholding in the Avicola companies) that Lisa's indirect shareholding in Leamington was not sold in 1995.

Legal and factual findings: is AVSA the de facto parent of the Avicola Group (Lisa's claim against Leamington)?

41. Another discrete issue which it is convenient to dispose of at the outset is whether AVSA has been proven to be the *de facto* parent of the Avicola Group. It is necessary to distinguish two questions in this regard. Firstly there is the pleading issue of whether Lisa's pleaded case embraces a claim for loss suffered by Lisa solely as a shareholder of AVSA, which must be proven to be either an actual or de facto parent of the Group, on the one hand. Or, alternatively, does Lisa's claim embrace loss suffered by the Plaintiff in respect of the Avicola Group as a whole irrespective of whether or not AVSA is shown to be the de facto Group parent. Secondly, there is the separate issue as to whether or not AVSA is jointly liable with the non-party Avicola operating companies who were in fact the primary insureds on the grounds that AVSA was at all material times the controlling *de facto* parent company. This narrower issue will be addressed separately below.

42. As far as the scope of loss claimed is concerned, the issue was argued on the basis that Lisa's claim pivotally depended on proof of the averments set out in the FBPs served to avoid a strike-out application once it was appreciated that AVSA was

not in fact the parent company of the Avicola Group. By the end of the trial it seemed to me that this was ultimately a very technical argument as far as the quantum of loss was concerned, because Lisa's case from the outset was and remained that it was defrauded of its share of the profits of the Avicola Group being monies which were unlawfully paid to Leamington under bogus reinsurance policies in relation to which AVSA itself was not a primary insured. As between Lisa and Leamington, it seemed to me by the end of the trial, the status of AVSA in relation to the primary insureds was largely irrelevant it being common ground that Lisa's shareholding in the primary insured operating Avicola companies was the same percentage as its shareholding in AVSA (25%). The quantum and recoverability of Lisa's loss from Leamington did not appear to be affected by the *de facto* parent issue at all.

43. My Ruling at the pre-trial review to the effect that Lisa's claim was limited to loss suffered by it as a shareholder of AVSA was in substance merely confirming that Lisa's claim as pleaded had always been based on the premise that it had suffered losses attributable to profits generated by the Avicola Group, not profits generated by Leamington/Villamorey, claims which Lisa explicitly abandoned years ago. The position with respect to the status of AVSA within the Avicola Group is primarily of concern to Lisa's claim against AVSA even though both Leamington and AVSA averred (paragraph 6 of the RAD and AD, respectively) that AVSA was not the parent company of the Avicola Group. Lisa's Reply to the RAD of the First Defendant (and AD of the Second Defendant) was as follows:

> "2. *...Lisa accepts that the operating companies are not strictly speaking subsidiaries of Avicola Villabos S.A. under Guatemalan law. However, for purposes of reporting and the payment of distribution to shareholders of Avicola, the income of all the operating companies is consolidated and is treated and distributed as group income. Furthermore, at the videotaped meeting on 20 August 1998 the controllers represented to Juan Guillermo that they would be*

providing to him all the relevant financial information of all the operating companies."

44. The Reply was dated February 22, 2007. By Summons dated May 16, 2007, Leamington applied for Further and Better Particulars but not in relation to paragraph 2 of Lisa's Reply. On June14, 2007, however, AVSA issued its partial and total strike-out applications. It sought to strike-out the entirety of Lisa's claim on the grounds that the above-quoted plea could not be understood. When the *de facto* parent argument was set out in the FBPs, the particulars were for all practical purposes provided to explain Lisa's case against AVSA, not Leamington at all[11]. It is true that in formal terms the original plea as well as the particulars were advanced against both Defendants, but prior to the trial it was not obvious that any or any serious issues were joined between Lisa and Leamington on the *de facto* parent argument at all. The FBPs themselves contain three main paragraphs, all three of which explicitly refer to AVSA alone and not Leamington. Paragraph 1 opens by stating: "*Avicola Villabos S.A ('Avicola') is the de facto parent company of and/or the de facto principal of and/or the de facto controller of a group of numerous operating companies.*" These matters are in reality all advanced to explain the nature of the case against AVSA, not the loss recoverable from Leamington.

45. Mr. Riihiluoma was unable to advance a coherent case in closing as to why this issue was relevant to Leamington's case. Leamington's only proper concern was to know what quantum of loss formed the basis of Lisa's claim. The profits generated by the relevant insured members of the Avicola Group remain the same irrespective of the corporate hierarchy of Group members. I find that Lisa's pleaded case against Leamington, sensibly read, embraces the profits of the Avicola Group as a whole, and no need in this context to determine whether or not AVSA was the *de facto* parent arises.

[11] See paragraphs 22-25 of this Court's Reasons for Decision dated July 3, 2007.

Legal and factual findings: is AVSA the de facto parent of the Avicola Group (Lisa's claim against AVSA)?

46. Mr. Woloniecki opened AVSA's closing submissions by asking the following rhetorical question: "*Why are we here?*" Lisa's Closing Submissions relied upon the following portions in Juan Guillermo's Witness Statement:

> "*20. Even though these companies are legally distinct entities, in practice they form separate divisions of a larger consolidated chicken production operation. Some of the operating companies run fattening farms, some slaughter houses and one provides the IT services to the entire Group...*
>
> *21. The operating companies are certainly not separate and distinct entities as a matter of fact. I believe that as a matter of fact and as a matter of practice, Avicola is the company that, by itself and Multi Inversiones SA, directs and controls the actions of all 19 companies, which are all treated as one single Avicola Group. All the financial reporting and accounting for the entire Group is consolidated. The information provided to shareholders has always been consolidated for the entire Group* (emphasis added).
>
> ...
>
> *24(b) All 19 companies are managed by the same Group executives. This appears to be confirmed by the fact that Jose Fernando Ramon Rojas Camacho himself admits, at ¶3 of his own Affidavit of 18 June 2007, that he was, until 2002, 'the CFO of 19 Guatemalan companies... which, together, are known as the Avicola companies'.*

24(g) I do not believe that the fraud could have operated without the companies in the Avicola Group operating as one enterprise. As I understand it, the fraud required records to be falsified throughout the production chain (emphasis added)."

47. This is some evidence supportive of the Plaintiff's case. I accept that, as a matter of Bermuda and/or Guatemala law, it is legally possible for a controlling corporate entity to be vicariously liable for the torts of the companies it controls[12]. But this testimony as to AVSA's control is based in large part on Juan Guillermo's recollection of how AVSA operated prior to 1982. There is no cogent support for this proposition in the voluminous documentary record relating to the Leamington insurance programme. These assertions support Lisa's case in a largely abstract way, without any tangible support for them when one closely analyzes the relevant transactions. It is not enough for AVSA and the relevant Avicola operating companies to have common officers and/or accounting practices. It must be demonstrated that the relevant officers were acting on behalf of AVSA when they were directing the operating companies in making the allegedly fraudulent insurance and reinsurance arrangements. The estoppel case (i.e. the submission that AVSA is estopped by its conduct from denying that it is a de facto parent) is also not sufficiently proved.

48. Bearing in mind the high standard of proof required for allegations of fraud, I am not satisfied that AVSA was either the *de facto* parent or controller of the operating Avicola companies so as to render AVSA liable for any frauds which such companies and/or Leamington may have committed. Even if AVSA alone could declare dividends and the operating companies were just cost centres, it does not follow that AVSA was the controlling corporate entity. It seems more plausible that a company wholly owned by the other two branches of the Gutierrez family such as Multi Inversiones was in reality the controlling corporate

[12] The submissions set out at paragraphs 108-112 of Lisa's Closing Submissions are accepted.

entity, if there was one. For example, in notes recording negotiations between the parties in Toronto on February 21, 1998, Juan Guillermo himself described the two sides as "*Lisa's side*" and "*Multi-Inversiones' side*". And paragraph 3 of these notes record Rossell indicating that "*Multi-Inversiones provides strategic planning, legal advise* [sic], *fiscal strategy and high level administration services to the Avicola Companies.*"[13] This is admittedly far from conclusive in terms of ascertaining which corporate entity played a controlling role before Lisa sold its interest in Multi-Inversiones, however. This is because Juan Guillermo suggests that this sale happened as late as 1997.

49. The del Aguila Affidavit suggests that AVSA had some prominence in the Poultry Group, and he left AVSA in 1996 before Lisa's interests in various companies (including Multi-Inversiones) were sold. He worked for AVSA for many years and was ideally placed to explain precisely what role AVSA played in relation to the Avicola Group of companies between 1978 and 1996 as Chief Internal Auditor of AVSA "*and its affiliates and subsidiaries*"[14]. Although he defined AVSA as "*a conglomerate of horizontally and vertically integrated corporations*", del Aguila did not explicitly aver that AVSA itself was the dominant corporation. I accept that this may be inferred. His February 3, 1999 Affidavit is mainly concerned with how off-the-books sales occurred. In the penultimate paragraph of his Affidavit, del Aguila describes false invoices being presented to AVSA to divert money to the Panamanian Ancona Finance, SA as part of a general scheme of diverting AVSA monies to offshore entities. Del Aguila deposed: "*These invoices would be prepared by Multi-Inversiones, the holding company of the Bosch-Gutierrez and Gutierrez-Mayorga interests...*" This supports, in a very general way, the assertion made by Rossell to Juan Guillermo in 1998, that Multi-Inversiones played a high level consultative role in relation to the Avicola Group as a whole, including AVSA itself.

[13] Vol. D1, page 136A.
[14] Vol. D1, page 172.

50. I therefore find that AVSA may only properly be held to be liable for breach of any legal duties to Lisa to the extent that it is proved to have directly participated in the conduct complained of. Lisa's case based on the vicarious liability of AVSA for the acts of its officers and/or its corporate agents is dismissed. It follows that since AVSA was not itself an insured and there is no or no sufficient evidence tying AVSA to the Leamington programme, claims against AVSA and Leamington (conspiracy, simulation) in relation to the Leamington programme must be dismissed as against AVSA. These claims are clearly based on the unsubstantiated premise that AVSA is jointly liable with the operating poultry companies and/or vicariously liable for the acts of their common principals or for the acts of the poultry companies themselves.

51. A claim under Article 176 of the Guatemalan Commercial Code was asserted against AVSA alone. This was what Mr. Hargun's own Closing Submissions stated in this regard:

> *"Article 176 is not an independent cause of action but allows other causes of actions to be asserted, for example, claim for simulation and for intentional wrongdoing (conspiracy). Given that claims for simulation and conspiracy to defraud are otherwise asserted, Article 176, in the context of these proceedings, adds little to causes of action already pleaded."*

52. It follows that this claim against AVSA stands or falls with substantive claims asserted against both Leamington and AVSA, namely the tort of conspiracy (Bermuda law) and simulation (Guatemala law). For the reasons set out above, these claims have not been proved as against AVSA and must accordingly be dismissed.

The "background" or "feeder" frauds

53. I indicated in my June 9, 2008 Ruling following the pre-trial review that I considered it improbable that any positive findings as to breaches of Guatemalan tax law would be made at trial. It remains to consider whether this Court should accept Lisa's submission that the Leamington reinsurance fraud was motivated by a desire to launder monies which were the fruits of a large-scale tax fraud.

54. In the absence of expert evidence as to Guatemalan tax law it is not possible to properly make any findings that specific tax offences were committed by AVSA and/or the Avicola operating companies. It is possible, however, to determine whether Lisa has established by way of background a plausible motive for Leamington being used as an instrument of fraud. The most cogent evidence that those controlling Avicola and Leamington had a motive to funnel false premiums through an offshore reinsurance programme may be summarised as follows.

55. It seems clear beyond serious argument that the Avicola companies conducted business on a regular basis using official accounting records which recorded only a portion of the Group's true income. Lisa's Opening Submissions cite the following extracts from the Transcript in which Rojas made the following admissions:

> *"And live chickens was something that didn't get too... too much attention before Juan Guillermo [phonetic], but you can see that starting in '94-'95 and, in particular, this last '96-'97, you can see that it went...well it... it went up rather significantly."*[15]

> *"Then, it started to... to... to... gain importance and there... we... we also ran into a problem, which... which also partially gave rise to what happened with... uhm... with Campero [phonetic] during the last two years, and it's that nobody works with... with... with... with invoices!*

[15] Vol. E, pages 70-71.

With invoices. That's why... that's something I was going to mention to you. That's why the black area you see [here] is sixty-three million quetzales in '97-'98 generated through the sales of live chickens is black. There's no way to invoice that. Those to whom you sell the live chickens don't give you any type of receipt or anything and...that's why, in fact, part of this... and that was part of the confusion we had the last time... we had to pass it on to Avicola [phonetic] as white money, in order to maintain the sales history and tax payments plan... because if you fail to pay taxes at any time...at the level you are in... the Treasury gets on your case and, we... we'd have found ourselves in trouble. We're going to address that later on."[16]

56. The term "*black money*" has been defined to mean as follows: "*Income, as from illegal activities, which is not reported to the government for tax purposes.*"[17] It seems obvious that the terms "black" and "white" used extensively in their context in the Transcript in relation to money, accounts and/or transactions, were intended to refer to off-books and on-books money respectively. There was clearly a less than enthusiastic attitude towards paying taxes, as Rojas went on to explain: "*We already had a ...a scare once....This thing with fiscal terrorism is ever present, right?*"[18]. There was also a willingness to take extensive steps to minimize the tax exposure. As Rossell went on to explain:

"The idea for all this within our tax planning, which is something that we handle with Multi [phonetic], is to increase sales, turn this around, try to catch it right here instead of sales dropping here to...return this in order for sales to hold their trend and also for the tax level to stay on the same trend. Thus, avoiding having any unusual problems in the eyes of the

[16] Idem.
[17] http://www.thefreedictionary.com/black+money.
[18] Vol. E, page 85.

Treasury which would subject us to an audit. That's why this whole thing is so complex."[19]

57. Rojas and Rossell clearly admitted in a meeting which was secretly recorded that a substantial portion of the income generated by the Avicola Group, in particular cash generated from the sale of live chickens, chicken manure and oranges was kept off the books and used to fund distributions to shareholders. It was effectively admitted at trial that after Lisa revealed the existence of the Transcript, revised tax filings were submitted and further taxes paid by the Avicola companies[20]. They did not expressly admit defrauding Lisa of its share of these distributions however; and alleged admission of the Ancona fraud is far less clear. Lisa also relies on the following admission made in paragraph 9 of the Lozada expert accounting report filed on behalf of the Defendants in respect of the first two feeder frauds:

> *"The Xela Operation consisted of an "off-book accounting system to account for the cash flows from the sale of live chickens (Pollos Vivos), oranges and chicken manure (Los Cedros) and a subsequent net distribution of profits (Utilidades) to all shareholders including Lisa."*

58. The reliance placed on the feeder frauds is explained in paragraph 24 of Lisa's Closing Submissions as follows:

> *"The existence of the Pollos Vivos fraud and the Los Cedros fraud is relevant and probative because when considered with the Leamington fraud, it renders it more likely that the Leamington fraud took place. If it assists in this regard, the evidence is admissible on the ground of similar fact evidence. See JP Morgan Chase Bank and others v Springwell Navigation Corporation [2005] EWCA Civ. 1602:-*

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[19] *Ibid*, page 94.
[20] Volume D 2, pages 194-196.

'71. That puts the test for the relevance of any evidence, and conspicuously for the relevance of similar fact evidence, far too high. Cross & Tapper, Evidence (9th edition), p55, suggest that as a definition of relevance is it not possible to improve on article 1 of Stephen's Digest:

"any two facts to which [the term] is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other [emphasis supplied]"

72. A fact may therefore be probative either on its own or because it renders a conclusion more likely when taken in conjunction with other facts. The latter is essentially the role of similar fact evidence. The relationship of Chase with the other Greek families, taken on its own, clearly cannot prove anything about the relationship between Springwell and Chase. But it might explain, illuminate or put in context evidence about that latter relationship that would otherwise be ambiguous or difficult to understand.'"

59. I accept the evidence of Juan Guillermo and Mr. Rosen that the disclosures about the off-books profits were made by the Controllers in the context of attempts being made by Lisa to value the Avicola Group for the purpose of sale of Lisa's interest in it. I find that they were genuinely surprised by the disclosures initially made at the April Toronto meeting even if they had previously received copies of statements which in fact represented the so-called "Special Results". This prompted Juan Guillermo to arrange for a secret filmed recording of the meeting at which further disclosures about the off-books business were made. The extensive explanations which were made by Rojas and Rossell as to how Avicola operated are inconsistent with any rational suggestion that Juan Guillermo was fully aware of the "black money" all along. The Transcript suggests that the Controllers were explaining what the "real world" was like in the "old country" to

a naïve émigré who was living in a far more comfortable developed world. It seems highly improbable that Juan Guillermo wrote the following letter to them in December, 1998 referring to his father in disingenuous terms:

> *"I'm not even going to start listing the series of activities and facts I've come to know about recently here, which have had a significant impact on me and dishonour my Dad's memory. I can't conceive that the companies that you presently manage can be involved in activities of this nature. The interests and net worth of Lisa, SA have been damaged by your inadequate conduct, as was admitted by your representatives."*[21]

60. Rossell in his first Witness Statement does not explicitly refute the admissions relied on in relation to the off-the books business. In his Second Witness Statement, he avers that Lisa was well aware of the live chicken business and that he personally travelled to Toronto in 1994 to discuss the various operations. At this stage Lisa expressed no objections to the operations. In essence, it is implied that Lisa was aware of the off-books aspects of the Avicola business. This is not made explicit by Rossell who (a) does not expressly admit that off-business occurred at all, though he admits a tax rectification was made in 1999, and (b) does not even explicitly assert that Lisa's principals were aware that the live chicken business was off-books at all (as opposed to simply being aware of the existence of the income stream). Rojas in his first Witness Statement does not deal with the "feeder frauds" at all. In his Second Witness Statement, Rojas does not deny the off-the books business at all, and essentially refutes any suggestion that Lisa had been defrauded and denies that he admitted Lisa was defrauded.

61. Luis Arturo Gutierrez Strauss's November 14, 2007 Witness Statement exhibits his June 2, 2000 Affidavit. He admits that he is estranged from his siblings as a result of a disagreement in particular with Juan Guillermo. He strongly supports the honesty and efficacy of the dealings of the Controllers as far as the

[21] Volume J3, page 164.

commercial interests of all shareholders and profitability are concerned and denies that Lisa has been defrauded. He worked within the Group until 1994 and was Lisa's representative. He does not admit being aware of the off-the books nature of any part of the Group's business; nor does he contend that Juan Guillermo was aware of this either.

62. In my judgment there is no or no sufficient evidence that any admissions were made by either Defendant to the effect that the "feeder frauds" constituted a fraud on Lisa as opposed to being designed to conceal from the revenue authorities in Guatemala what the Poultry Group's true earnings were. The Transcript supports the untested evidence of the Defendants in this regard. I am not satisfied having regard to all of the evidence in any event that Lisa was defrauded as alleged in relation to the Pollos Vivos and Los Cedros frauds.

63. I reject Lisa's submission that these background "frauds" are admissible as similar fact evidence on the grounds that they make it more probable that the Leamington fraud occurred. They are, however, admissible as potentially making it more probable that the Transport Policies issued by Leamington were not genuine reinsurance, but for this limited purpose alone.

Factual and legal findings: were the Leamington reinsurance policies genuine reinsurance?

64. A commercial court sitting in the world's leading captive domicile is bound to approach a claim that a local captive insurer has issued non-existent policies with a degree of caution that might not be required elsewhere. Bermuda public policy clearly requires a delicate balance to be struck between avoiding unwarranted attacks on an important segment of the national economy and granting appropriate relief where captive arrangements are proven to have been used as an instrument of fraud. While Leamington is not entitled to any "home court" advantage, Lisa cannot expect a Bermudian Court to lightly conclude that captive insurance or

reinsurance contracts are of no legal effect based on generic criteria which could apply to countless existing contracts issued by other Bermudian captives.

65. While it is legally permissible for this Court to determine the validity of the Transport Policies based on expert opinion evidence, it is in my view preferable to use the expert opinions as a lens through which the factual evidence is viewed. In that way any formal conclusions reached will be fact specific and should not undermine the stability of contractual relationships beyond the scope of the present case. Moreover, the unique fact pattern of the present case is such that the crucial judgments turn not just on the formal structure of the reinsurance arrangements, but on the underlying intent of the Controllers and Leamington. As far as the evidence of Mr. Gardemal, whose expert financial evidence goes primarily to support Lisa's compensatory claim, is concerned, I have placed no reliance on his generic "*indicia of fraud*". He fairly conceded that he is not an insurance expert, and I found this aspect of his evidence too general to be of assistance in the specialist area of captive insurance arrangements.

66. The general weight of Lisa's expert's insurance evidence is obviously diminished by the fact that Mr. Spragg's captive insurance experience is substantially US-based. Most of the analysis in his main report was based on criteria used for US tax purposes for the purposes of determining whether premiums ceded to a captive may be deducted for tax purposes. Under cross-examination, Mr. Spragg creditably admitted that he had no real familiarity with the Latin American view of such matters generally, let alone Guatemala in particular. It is unclear whether Lisa was unable to retain a local captive manager expert because none was willing to proffer the desired opinions or because none was willing to break ranks with local professional colleagues. I draw no inferences one way or another in this regard and assess Mr. Spragg's evidence on its merits.

67. Mr. Bailie's extensive experience of Bermuda captive insurance for over 20 years made his evidence generally particularly cogent. But I accept Mr. Spragg's

observation that Bailie too had no reliable basis for expressing opinions as to Guatemalan premium rates for transport polices. And it seems obvious that greater weight should be attached to his opinions as to captive management practice generally than to his opinions as to the underlying facts. Of course in many cases the primary findings made by a court may be based substantially on expert opinion evidence. Where issues of fraud and deliberate breach of duty are alleged, the crucial findings will typically relate to the state of mind of the primary actors at the material time. I accept the following opinions expressed by Mr. Bailie: (a) the level of involvement of captive managers in their clients' underwriting programmes was lower in the 1980's and 1990's than it is today, (b) outside of US tax requirements, there is no general insurance requirement for captive/parent relations to be at arms length, (c) numerous factors influence premium levels for captives, making the process quite distinct from ordinary commercial insurance where the insurer determines the premium level, (c) it is normal for captives to maximise premium income and the tax benefit for their shareholders who may also be policyholders, (d) loss reserves are often kept by insurers instead of retained earnings because in some jurisdictions (but not Bermuda), the latter are taxable but the former are not. In the Bermudian context the tax-driven incentives for keeping loss reserves do not exist, (e) retroactive approval of dividends which have been previously paid is not good practice but nor is it an indication of fraud, (f) the absence of underwriting files is not unprecedented for the period of time in issue, (g) the direct payment of premiums to Leamington is not necessarily an indicator of fraud as Gardemal suggests as there is no evidence that the fronting companies did not receive their commissions, (h) lending to related parties is not uncommon for captives, (i) the use of fronting companies is a normal practice and not an indicator of fraud as Gardemal seems to suggest, (j) the fact that no claims were made on the Transport Policies over several years is unusual but not unprecedented, and, finally, I note (k) that Bailie's view that the reinsurance was genuine was necessarily based on a

detached review of the relevant transactions rather than based on direct knowledge of the underlying facts[22].

68. Under cross-examination by Mr. Riihiluoma, Mr. Spragg fairly conceded that there was no specific basis for believing that the primary policies issued by El Roble did not transfer any risk in the sense that if claims had been submitted they would not have been paid. Juan Guillermo also agreed that if a valid claim had been submitted to El Roble it probably would have been paid. Nor is there any dispute as to whether or not the purportedly insured risks might potentially exist and warrant insurance cover. But this questioning was extremely hypothetical as it was common ground at trial that over a 13-year period, no claims were actually made or paid under the primary transportation policies. It is open to this Court to conclude, looking at the insurance and reinsurance arrangements as a whole in light of all the evidence, that the risks at both levels (although the reinsurance level is most directly relevant) were non-existent in the sense that the Avicola companies had a fixed intention from the outset which they never diverted from not to make any claims even if losses occurred. Mr. Spragg further opined that "*Leamington was a sham captive that happened to write some legitimate policies later in life*"[23]. And under re-examination by Mr. Hargun he opined that no risk transfer occurred under the reinsurance Transport Policies[24].

69. I agree with Mr. Spragg's view that the Transport Policies were not genuine reinsurance but that the later Property Policies were genuine. I find that the reinsurance policies did not involve the transfer of any genuine risk. In reaching this finding, I do not rely on all of Mr. Spragg's supportive technical reasoning and instead concur with his conclusion primarily based on my own assessment of the underlying facts. And these findings are reached in circumstances where (a) the crucial question turns on the view the Court takes of the genuineness of contracts the formal validity of which has not been in question and (b)

[22] Day 10, pages 1627-1628.
[23] Day 5, pages 751-754.
[24] Day 5, page 854.

Leamington, a Bermuda company, called no live factual witness to support the proposition that there was a transfer of risk under the Transport Policies.

70. In his closing oral argument, Mr. Riihiluoma forcefully argued that Lisa's pleaded case of "non-existent" risks was not proved because it was clear that genuine risks of chicken losses did factually "exist". The no transfer of risk argument was a wholly distinct and un-pleaded new allegation. In my judgment the term "non-existent risks" read in a commonsense manner in the light of the RASC as a whole encompasses both (a) risks which do not really exist because they are wholly fictitious, and (b) risks which do not really exist because no real or genuine risk was transferred under the impugned insurance and/or reinsurance contracts.

71. In the context of a secretly recorded meeting at which extensive admissions were made about elaborate attempts to conceal off-books income from the Guatemalan tax authorities (including moving documents to avoid detection in an anticipated audit), the following statements[25] cannot easily be explained away as describing legitimate reinsurance in colourful terms:

"

"MV2 (Rojas)	*Rather, then, let's go on to what we expect to, uhm... what's it called? ... to distribute this year...*
MV1 (Juan Guillermo ("JGG"))	*Uh-huh*
MV2 (Rojas)	*Profits, dividends, Levington [phonetic], Ancona [phonetic]... Ancona [phonetic], Multi [phonetic] and Abejemol [phonetic], right?*
MV1 (JGG)	*Okay. So, what you mean is that here's where... then, let's see... that is, what says 'profits'... comes from live chickens.*

[25] Lisa's Outline Submissions, pages 13-14; Volume E page [ ].

MV2 (Rojas) — *Uh-huh.*

MV3 (Rossell) — *Exactly. The dividends come from the fiscal portion.*

MV1 (JGG) — *This is fiscal.*

MV3 (Rossell) — *Levington [phonetic] comes from a... a... figure that perhaps we hadn't told you... they're insurance [policies] that... don't exist... see? They're just false premiums that are paid and then Levington returns them and they're distributed...*

(Interrupts. Voices overlap.)

MV1 (JGG) — *Okay.*

MV3 (Rossell) — *That is... let's say...*

MV1 (JGG) — *Let's say Levington [phonetic] distributes...*

MV3 (Rossell) — *We insure everything nobody else in the world insures... but it's not an actual policy, right?*

MV1 (JGG) — *Oh, okay.*

MV3 (Rossell) — *Then, uhm... we charge a premium to Avicola [phonetic], it passes it on to us and we distribute it.*

MV2 (Rojas) — *And Levington [phonetic] is that company that... uhm...*

MV3 (Rossell) — *Yeah... That's where it's going to start to you... because we have started its liquidation... it's going... we're going to be sending you about... three hundred thousand dollars, perhaps... a little more.*

MV2 (Rojas) — *It... It... has a small cost... There are some... there are some shelters that involve costs... other don't involve costs. This one has a cost on the part of the insurance company because you have to contract a fronting, as... as that's called. And a commission that Levington also charges, right?*

MV1 (JGG) *Okay.*

MV3 (Rossell) *What's important is that from these ninety-... this is what will... reach the stockholders' hands."*

72. It is difficult to comprehend why Rossell would have referred to policies that "*don't exist*" and "*false premiums that are paid and then Levington returns them and they're distributed...*" [emphasis added] if risks were genuinely transferred under the Transportation Policies as well as under the later Property Policies. It is true that Mr. Bailie supported Rossell in his attempt (via his written evidence) to sanitise these words as simply trying to explain complex concepts in simple terms by indicating that such explanations are not unheard of in the captive world outside of professional captive management circles. It is also true that the admissions relied upon by Lisa can only be construed as such in relation to one portion of the reinsurance programme, and that, to that extent at least, Rossell's explanation as to why he used this language carries some weight. Such words coming from the mouth of a captive owner or officer in the context of a corporate group the activities of which were otherwise beyond reproach would be one thing. But when the officer has admitted to institutionalised practices designed to deceive his local tax authorities on the part of the primary insureds, the relevant policies ran for some 13 years with not a single claim, the officer is unwilling to have his exculpatory account tested by cross-examination, and an executive incentive plan rewards the managers of the primary insureds by giving them a share of the captive's profits based on the amount of premiums ceded, one is dealing with an entirely different scenario. It is also significant that the financial record indicates that Leamington, after an initial period during which no dividends were paid, was effectively used as a "cash cow" with premiums frequently flowing in and distributions flowing out in rapid succession. In addition, even though transport risks were supposedly known to be low, it seems a curious coincidence that Leamington itself sought no reinsurance protection of its own.

73. Asensio and Briz (in their written evidence) give stock explanations for the creation of the Leamington programme while the broker Tercero gives a more detailed account of how the programme worked. Briz significantly notes, however, that no income tax was payable on dividends distributed by Leamington under Guatemalan law. Briz's assertion that some claims were made on the Transport Policies was not substantiated at trial. Donald Baker's Witness Statement in relation to Jardine Pinehurst Management Company Limited and its management of Leamington from 1994 until he left Jardine in 1996 adds little of substance. Rojas, CFO of AVSA, dealt with the executive incentive programme and it is unclear what basis he had for his understanding that genuine risks were transferred by the primary insureds. None of these witnesses were available for cross-examination. Briz and Asensio, nearly 20 years earlier, had visited Bermuda and in their trip report recorded the following approach to the reinsurance programme:

> *"It was decided to submit claims to Leamington sporadically in order to maintain an appropriate image for the authorities. With such claims, the equity of some of the members of the Poultry Farming division can be redeemed."*[26]

74. At this stage, December 4-7 1989, only the Transport Policies existed and no claims were ever submitted. But the report does suggest that these policies were not genuine risk-transferring instruments where either (a) claims would or (b) would not arise, and the "authorities" would assess the programme on its merits. It is consistent with the concerns expressed in the 1989 trip report that genuine Property Policies were issued in the mid-1990's under which claims were "sporadically" submitted. At the primary insurance level it is possibly theoretically correct to say that El Roble was on risk even if the primary insureds unilaterally decided not to submit claims. At the reinsurance level where those

[26] Volume G 4, page 136.

paying the premiums (the Avicola companies notionally on behalf of El Roble) and Leamington receiving them had an implicit understanding that no claims would be made, the position at first blush seems markedly different in practical terms. But on closer analysis, there is in the context of a 100% reinsurance of a fronting company's risk no practical distinction at all between the liability of the reinsured and the liability of the reinsurer. Because if a claim was improbably made at the primary level, one would reasonably expect that the claim would be passed on to the captive reinsurer.

75. No claims were in fact submitted by the time the programme was terminated after the commencement of the present litigation, even though the trip report suggests that submitting claims was considered in 1989. It would be highly artificial in the unique circumstances of the present case to hold that genuine risks were transferred merely because it was theoretically possible at one time for the Avicola insureds to make claims which would have triggered claims on Leamington by El Roble under the Transport Policies. What is unique about the present case is that the decision on whether or not to make claims does not appear, in light of the Transcript, to have been made on *bona fide* commercial grounds for reasons which I will come to. Mr. Bailie, when cross-examined about the trip note compiled only two years after Leamington's incorporation, made the following pertinent observations:

> *"Q. Isn't this an indication that they are suggesting that they would be making false claims in order to give the right appearance?*
>
> ***A. Well, I don't know, he hasn't said they were deciding to submit false claims, he was deciding [to] submit claims. They may have. They may have been having claims all this time. I expect they probably were, give the nature of the risks.***

Q. So you think they had claims but simply hadn't bothered to submit them and this is an indication that it's about time we submitted some?

A. That's a theory, it's possible. You know there might be claims and that they may not be submitted because it's more tax efficient not to."[27]

76. These answers I find to be very insightful. I accept the judgment of Mr. Bailie that the trip note is probably not evidence of consideration being given to filing false claims. People planning to submit false claims do not ordinarily discuss doing so with their captive managers and keep a written record of their fraudulent intent. Rather, I infer the following from Mr. Bailie's judgment that the nature of the risks were such that he would have expected claims and his educated guess that claims were perhaps not made for tax purposes. It is more likely than not a feature of captive insurance practice for the claims submission process to be affected by judgments as to tax efficiencies. How far one manipulates the claims submission process is a matter of judgment raising potential questions of adverse tax treatment in the parent's domicile and adverse regulatory comment in the captive's domicile. A simple form of such claims submission 'manipulation' occurs daily in the motor insurance market when drivers decide whether or not to file a claim based on a judgment as to the comparative commercial disadvantages of (a) claiming and losing their no-claims bonus, and (b) bearing the cost of the relevant loss. Mr. Bailie conceded that various attributes of the Leamington programme during the period in question represented the use of such companies in an "*aggressive*" manner for tax purposes. It is therefore not implausible that a corporate group that regarded tax collectors as "terrorists" would set up reinsurance policies that in practical terms involved no risk transfer, because a decision was made at the outset, and adhered to subsequently, not to submit any claims whatsoever.

[27] Day 9, page 1568.

77. Alternatively, even if the decision not to submit claims was not fixed and irrevocable so there was some hypothetical or minimal risk transfer, and notwithstanding the fact that Lisa has not proved in commercial terms that the premiums received bore no relationship to the risks assumed, I would find that this alternative limb of its attack on the Transportation Policies was made out. Accepting that captive insurance has unique characteristics and cannot be expected to mirror precisely ordinary insurance and reinsurance contractual relations, under section 1(1) of the Insurance Act 1978 *"insurer" means a person carrying on insurance business"*. The same section also provides:

> *""insurance business" means the business of effecting and carrying out contracts —*
>
> *(a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed; or*
>
> *(b) to pay a sum of money or render money's worth upon the happening of an event, and includes re-insurance business.."*

78. As a licensed Bermuda insurer, the legitimacy of Leamington contracts which purport to be insurance contracts fall to be tested against that statutory standard. Where the predominant function of what purports to be a reinsurance contract entails neither (a) protecting (in the captive context at least) the underlying insureds against potential losses, nor (b) paying a sum to the actual insured on the occurrence of a contingency, it must be open to this Court to find that the relevant contractual arrangements are not genuine reinsurance.

79. In concluding that the Transport Policies were not genuine reinsurance policies as contended by Lisa, I also have regard to the "*working hypothesis*" of the elements

of reinsurance set out by the learned authors of O'Neill and Woloniecki. '*The Law of Reinsurance in England and Bermuda*', 2nd edition, at pages 34-35[28]:

> "(1) *A reinsurance contract is a transaction involving the transfer of risk acquired through providing insurance to another or others which is governed by the legal principle of uberrima fides.*
>
> *(2)The transferor (the reinsured) transfers risk to one or more transferees (the reinsurer/s) in consideration for the payment of money (the reinsurance premium).*
>
> *(3)The risk which the reinsured transfers may arise either (a) under a contract or contracts of insurance, or a contract or contracts of reinsurance, which contracts the reinsured has entered into before the making of the reinsurance contract; or (b) following the making of the reinsurance contract, under future contracts of insurance or reinsurance, which are in the contemplation of the parties at the time the reinsurance contract is made.*
>
> *(4)The reinsurance contract under which the risk is transferred is separate and distinct from the insurance or reinsurance contract or contracts under which the reinsured has assumed the risk.*
>
> *(5)The reinsurer may assume 100 per cent of the risk which the reinsured has assumed, or will in the future assume, under a contract or contracts of insurance or reinsurance.*
>
> *(6)The nature and extent of the obligation of the reinsurer to pay money to the reinsured is defined solely by the terms of the particular insurance contract.*
>
> *(7)There will frequently be elements of reinsurance which do not constitute an acceptance of the reinsured's "insurable interest" in the underlying subject-matter.*

[28] (Sweet & Maxwell: London, 2004). The highlighted portion of the quoted passage was put to Mr. Bailie in cross-examination.

We submit that it is preferable to avoid inquiries into what is the 'subject matter' of the original insurance, and to focus on the commercial purpose of reinsurance. The search for a comprehensive definition of reinsurance is not merely elusive, but may also prove illusory. It is unnecessary to postulate whether reinsurance is a form of insurance, or a particular form of liability insurance. ***The essential elements, common to insurance and reinsurance, are the transfer of risk and the principle of uberrima fides or utmost good faith.*** "[emphasis added]

80. If the reinsurance contracts are legally separate and distinct from the underlying contracts with El Roble, the validity of the Transport Policies between El Roble and Leamington does not stand or fall with the underlying contracts. The mere fact that genuine risks were transferred at the primary level does not automatically mean that genuine risks were transferred at the reinsurance level, even in the case of a 100% reinsurer such as Leamington. Such an analysis would be highly technical and factually inappropriate in the present case. In the present case the most realistic view of the entire insurance and reinsurance arrangements in relation to the transportation policies is that risks were non-existent at both primary and reinsurance levels because the individuals controlling the primary insureds never intended to submit any claims, even though it seems probable that the fronting El Roble had no knowledge of this fact.

81. And if there were some very ethereal risk which was transferred, as the trip note relied upon by Lisa in fact suggests (i.e. the making of claims was contemplated but never pursued), the premiums paid clearly bore no relationship to the *de minimis* risk transferred. Mr. Spragg's conclusion as to the premium levels being wholly unrelated to the risks transferred, properly analysed in light of the unusual

circumstances of the present case,[29] does not require reference to the usual commercial rates.

Factual findings: did Leamington and /or AVSA intend to and in fact injure Lisa?

82. In my judgment the overwhelming weight of the evidence suggests that the Controllers were primarily concerned with avoiding and/or evading tax obligations when Leamington was established and the transportation insurance and reinsurance programme was set up. Lisa has failed to prove the highest level of its pleaded case, namely that the predominant purpose of the scheme was to launder the proceeds of the off-books live chicken sales and to deprive Lisa of its share of all of this unreported income. However it seems more likely than not that some of the "black money" was "whitened" by being used to pay the premiums which were then distributed as purportedly legitimate corporate profits, and that the Controllers intended to deprive Lisa of its rightful share of the profits generated by Avicola.

83. Lisa's position on injury is set out in Mr. Hargun's closing Submissions in salient part as follows:

> *"72.Lisa refutes the contention that there was no intention to injure or that Lisa was in fact not injured in relation to the Avicola's reinsurance program with Leamington. Lisa refers to the following facts:-*
>
> > *72.1At the Toronto Meeting, Rossell advised Juan Guillermo that Leamington had not declared any dividends since Leamington was building up its reserves. The fact that Rossell made this statement at the Toronto Meeting has not been challenged. That statement was untrue on both counts. First, during the*

[29] In particular, the fact of no claims being submitted at all over 13 years for policies in relation to which Mr. Bailie felt losses would have occurred after only two years.

period 1996 – 1998, Leamington declared US$10 million by way of dividends to its registered shareholder Villamorey. This is admitted in ¶22 of the Re-Amended Defence of Leamington. Secondly, Leamington was not building up its reserves at all. Leamington was declaring dividends as fast as its premium income permitted and, as stated above, had declared $10 million in dividends in the previous two years. Again, this evidence is unchallenged (see ¶s 34 - 37 above).

72.2Until recently, Lisa believed that Villamorey had not distributed the $10 million received from Leamington by way of dividends during 1996 - 1998 because of the dramatic increase in Villamorey's expenses. Those expenses included the payment of "black salaries" to the executives. However, according to the witness statement of Villaverde, filed on behalf of Leamington, the dividends declared by Leamington during 1996 – 1998 and paid to Villamorey, were in fact transferred by Villamorey to La Brana for distribution for the benefit of the Gutierrez Mayorga and Bosch Gutierrez families. Accordingly, the end result is that all the dividends declared between 1996 and 1998 by Leamington were paid to the other two branches of the family to the exclusion of Lisa. This is the clearest evidence of injury to Lisa and the underlying facts are unchallenged.

72.3In their witness statements, Villaverde and Rossell maintain that all the dividends declared by Leamington were paid to Villamorey, as the registered shareholder, and thereafter to the three branches of the family, including Lisa. They maintain that the only reason why Lisa did not receive any dividends from Villamorey, in respect of the dividends

declared by Leamington, after 1995 was because Lisa had sold its shareholding in Leamington to La Brana. This assertion is wrong on two counts. First, even in respect of the pre-1995 period, it is now accepted by the Defendants that Lisa did not receive its proportionate share of the dividends declared by Leamington. It is accepted by Maria Yip, the expert on behalf of the Defendants, that Lisa did not receive its share of the dividends declared prior to 1995. Indeed, in anticipation of this trial, La Brana has tendered, by letter dated 30 April 2008 payment of US$229,301.61 (representing US$105,607 plus interest) in respect of dividends declared by Leamington pre-1995. Secondly, the contention by the Defendants that Lisa had sold its indirect shareholding in Leamington in 1995 is, it is respectfully submitted, false. The Defendants admit that but for the contention that Lisa sold its indirect shareholding in Leamington in 1995, Lisa would have received, with interest, $5,947,164. Lisa's contention that the suggestion of the alleged sale is false is further analysed in ¶s 65 - 70 below.

72.4Even if the true position is that Lisa had sold its shareholding in Leamington in 1995, Lisa would still be entitled to its share of the "premiums" paid in respect of the transportation policies to Leamington as a result of its direct shareholding in Avicola and indirect shareholding through Villamorey. At the Toronto Meeting, Rossell advised Juan Guillermo that Lisa would start to receive dividends from Leamington. Subsequent to the Toronto Meeting, Lisa did indeed receive three payments after the Toronto Meeting. Rossell now contends that two of those payments were not made to Lisa in its capacity as a indirect shareholder of Leamington, but they

were ex gratia payments on par with the "incentive" payments made to the executives of the Avicola companies. Rossell says "In as much as the Poultry Companies paid premiums for Transport Policies reinsured by Leamington, Multi-Inversiones directors agreed to make ex gratia payments related thereto in favour of the other stakeholders in the poultry companies, including Lisa". What is clear is that Lisa did not receive these payments after the alleged sale in 1995 and despite the subsequent promise in August 1998, has only received a small portion of it. The Defendants appear to admit that had Lisa received the entirety of the "ex gratia payments", Lisa would have received an additional $1,900,085 exclusive of interest. This is confirmed by Rossell when he says that Avicola commenced making these payments in 1998 but had not finished doing so when these proceedings were commenced in Bermuda. Lisa has not received any payment from any entity associated with the Avicola Group since 1998, despite maintaining one third economic interest in Avicola. Again, none of these facts are challenged by the Defendants.

72.5Rojas confirms that the executives of the Avicola operating companies were paid "ex gratia payments" or "bonuses" by reference to the net amount of the premiums ceded to the Leamington transportation policies and their percentage share in the underlying Avicola companies. Villaverde confirms that these payments in relation to the Leamington programme to the executives were in fact made by Villamorey. Villaverde has confirmed that all the premiums received by Villamorey from Leamington after 1995 were transferred to La Brana for the benefit of the Gutierrez

Mayorga and Bosch Gutierrez families. The only other source of funds available to Villamorey was its shareholding in the Avicola companies. It appears, therefore, that the "distributions" made by Avicola (whether on the books or off the books) to Villamorey were used, in part, to make the incentive payments to the executives of the Avicola operating companies. Lisa, being a one third shareholder of Villamorey, was necessarily injured as a result of those payments."

84. Leamington submitted in paragraphs 15 to 18 of its Skeleton Argument as follows:

15. The essence of Lisa's claim is that the first defendant Leamington, a Bermudian Class I reinsurance captive, was a fraudulent vehicle used to distribute AVSA's funds to AVSA's other shareholders to the exclusion of Lisa. Lisa claims that Leamington perpetrated this alleged fraud by means of issuing policies covering non-existent risks at grossly inflated premiums. Lisa appears to be suggesting that Leamington was used as a vehicle for laundering "off-book" cash generated in Guatemala through the alleged background frauds. However, Lisa offers no explanation as to why a perpetrator of such a fraud would want to remit "cash" proceeds to a closely regulated corporate vehicle operating in a heavily scrutinized jurisdiction, a vehicle in which Lisa moreover, prior to 1995, had an equivalent interest. This suggestion accordingly makes no sense.

16. It is important to emphasise that fraud is the essence of Lisa's claim. Unless it can establish that the whole purpose of the Leamington reinsurance programme was to deprive it of sums which it would otherwise have received in its capacity as a

shareholder in AVSA, its pleaded claim will fail. If, for example, the most that Lisa could establish was that companies in the Poultry Group paid inflated re-insurance premiums to Leamington with a view to say, minimising tax paid in Guatemala and/or building up reserves in a tax friendly environment such as Bermuda, that would get Lisa nowhere: it had after all the same shareholding in Leamington as it had in the poultry companies, at any rate until 1995 when it disposed of its indirect interest in Leamington. Lisa has accordingly to go further and show that the whole purpose of the Leamington reinsurance programme was to deprive it of sums it would otherwise have received as distributions in its capacity as a shareholder in AVSA.

17. In this regard, Lisa's case faces a number of insuperable difficulties:

(i) It is common ground between the parties that Leamington only wrote two kinds of re-insurance business: transport policies and all-risks property policies. Lisa's Re-Amended Statement of Claim acknowledged (paragraph 15 – Trial Bundle ref) that Leamington wrote some genuine re-insurance business, but without any indication of which business was genuine and which was alleged to be fraudulent. Although Lisa was pressed to give particulars of which policies it was challenging, it was apparently unable to do so before service of its experts' reports. Accordingly, and for this reason, Kawaley J ordered sequential service (rather than simultaneous exchange) of experts' reports on24 August 2007. From the relevant reports (see in particular), it is apparent that Lisa is not challenging the bona fides of the all-risks property polices, as opposed to the transport policies. However, the only reinsurance that AVSA itself ever purchased was property all-risks reinsurance. Accordingly, unless

it can make good its new case on the "de-facto" group, its claim will fail even if it is able to establish that the premiums paid by the other Poultry Companies in respect of transport re-insurance were grossly inflated.

(ii) Prior to its sale of its indirect interest in Leamington in 1995, Lisa in fact received dividends from Villamorey totalling some $816,660, which reflected Lisa's share of the dividends declared by Leamington. Even after that sale, Lisa received ex gratia payments by reference to the profits that had been generated by Leamington on business with companies in which Lisa still had a shareholding interest. The result of such dividends and ex gratia payments is wholly inconsistent with the thrust of Lisa's case; namely, that Leamington was used as a vehicle to defraud it of sums that it would otherwise have received by way of dividends qua shareholder in AVSA.

18. Further, Lisa's case as regards the alleged Leamington fraud is riddled with inconsistencies:

(i) Lisa's principal witness of fact, Juan Guillermo Gutierrez, goes to great lengths to stress that Leamington's operations cannot be justified simply on the basis that tax advantages arose from its use. Yet Lisa's expert on insurance matters, Mr Spragg, appears to base many of his manifold criticisms of Leamington on the very fact that it appears, in his view, to have been used primarily as a mechanism for reducing tax payable in Guatemala.

(ii) AVSA would not have enjoyed any tax advantage from the Leamington programme if it had been used to launder "off book" cash from the sale of live chickens. On Lisa's case such cash sales were, in fact, being effected in order to avoid paying tax in

Guatemala. Conversely, there might well be tax advantages to be gained from the Leamington re-insurance programme to the extent that "on the books" legitimate profits that would have been subject to tax in Guatemala were reduced though the payment of premiums to Leamington.

85. In Leamington's Headline Points for Closing, it is submitted that Lisa cannot maintain a claim for any loss it suffered otherwise than as a shareholder of AVSA, a broad contention which has already been rejected above. This is a point which can validly be advanced by AVSA itself, but has no or no material bearing on Leamington's liability for any damage it has caused since Lisa has from the outset explicitly sought to recover losses referable to Avicola as a whole. Leamington's Headline Points for Closing do not directly address the following issues at all: (a) whether Leamington intended to injure Lisa, (b) whether Lisa in fact was injured as an Avicola Group shareholder. Leamington's case, based on its Skeleton Argument, may be summarised as follows. There was no intention to damage Lisa because (a) Lisa has failed to show that "*the whole purpose of the Leamington reinsurance programme was to deprive it of sums it would otherwise have received as distributions in its capacity as a shareholder in AVSA*"; (b) prior to the sale of its Leamington interest in 1995, Lisa received its share of dividends (and an accidental shortfall was later tendered) and after the sale it received an *ex gratia* payment equivalent to that received by the Avicola executives. This is inconsistent with a fraud on Lisa; and (c) Lisa's expert evidence suggests Leamington was used for tax purposes, which is inconsistent with Juan Guillermo's assertion that it was a money laundering vehicle.

86. Subject to considering the legal elements of the conspiracy and other claims, which are dealt with separately below, I reject the broad submission that Lisa can only complain of loss if it proves that the entire purpose of the Leamington programme was to defraud Lisa. However, I accept the narrower argument advanced by Mr. Riihiluoma that the averments that Leamington was primarily a money laundering vehicle have not been proved. In my judgment Leamington was

established primarily for tax purposes and Lisa itself was forced to concede that the Property All Risks programme was legitimate reinsurance.

87. The crucial evidential question is whether or not Leamington may be said to have injured Lisa as a shareholder of the Avicola Group. This may helpfully be considered in relation to three main scenarios: (1) post-1995 assuming Lisa's Leamington interest was not sold by Villamorey to La Brana; (2) post-1995 assuming Lisa's Leamington interest was sold by Villamorey to La Brana. I consider the latter scenario in case my primary finding that Lisa did not sell its indirect interest in Leamington is held to be wrong; and (3) whether Lisa suffered actionable injury under Guatemalan law?

Injury to Lisa: the post-1995 period assuming Lisa's Leamington interest was not sold by Villamorey to La Brana

88. The principal evidence which supports an intention to deliberately injure comes from two facts which cannot be disputed. Firstly, in the August 20, 1998 meeting, Rossell, an officer of Leamington, represented that substantial dividends had not yet been distributed by Leamington:

> *"You are going to start to receive all the profits... because we have left Levington [phonetic] a little over time...in order to strengthen the company and we hadn't distributed dividends...So, from today forward the money will start to come in to you...today I believe that, umh...ninety-five was cleared, I think it was? But throughout the rest of the year, we're going to send you all the pending amounts to get up-to-date on...on Levington..."*[30]

89. Secondly, it is clear that Lisa had received some of its dividend entitlement for the period 1990 to 1994 so that Rossell must have been speaking about the period 1995 onwards. Moreover, the phrase *"You are going to start to receive all the*

[30] Volume E, pages 192-193.

profits" in the present continuous tense is clearly prospective and cannot sensibly be read as a statement limited to what overdue amounts from the pre-1995 era. This rebuts the notion that Lisa's interest in Leamington had been sold in 1995, in which case no commitment to pay Lisa a dividend for 1995 (already "approved") and other "pending" dividends would have arisen for discussion. But more importantly, it is admitted that approximately $10 million was in fact declared and distributed by Leamington through Villamorey between 1996 and 1998 so this excuse for non-payment of Lisa was plainly false. Ms. Yip does not dispute Mr. Gardemal's assertions in his November 29, 2007 Report where he outlines the following sample dividend payments:

(i) February 2, 1996, Leamington distributed a $1.2 million dividend to Villamorey, less than a month after a similar amount was paid into Leamington by Ancona by way of premium;

(ii) April 28, 1997, Leamington distributed $3 million to Villamorey by way of dividend;

(iii) February 23, 1998, Leamington declared a dividend for $3 million which was paid on February 1, 20 and March 12, 1998 in equal instalments.

90. Rossell by his own account has been General Manager and a director of Multi-Inversiones "*in charge of coordinating risk management for Multi-Inversiones and its affiliated or related companies*" (Witness Statement, paragraph 3). He has also been Leamington's Secretary and Treasurer since 1993 who "*held periodic meetings with Lionel Asensio and representatives of the Poultry Companies as to risks to be insured and the best use of Leamington*" (Witness Statement, paragraph 4). He must have known at the August 20, 1998 Toronto meeting that these and other substantial distributions had been made by Leamington.

Leamington's discovery documents show that requests for these distributions were typically made during this time period by Alameda with which Briz (Leamington's President) was associated. For example Briz spoke to Don Baker of Leamington's Insurance Managers about the availability of cash for dividends on November 10, 1995. Briz was then informed that on November 15, 1995 a $1.1 million dividend had been paid to Villamorey. In each case Briz was faxed at Alameda[31]. Alameda consistently gave the dividend instructions during this period although Asensio often signed the relevant correspondence[32]. Briz himself on January 22, 1996 requested "*a Declaration of Dividends to be paid as soon as possible to VILLAMOREY, S.A.*", writing on Alameda letterhead and using the title "General Manager"[33]. The link between Leamington's President, Briz, and Alameda, may explain why instructions from Asensio in relation to matters unrelated to the reinsurance programme (e.g. dividend and capital structure matters) appear to have been routinely accepted by Leamington's Bermuda-based agents. According to Gardemal's Report, Briz himself in a June 23, 1994 letter characterised Alameda as the "*functional division and office in charge of insurance and reinsurance*" for Multi-Inversiones[34].

91. Briz as the Multi-Inversiones treasurer would likely have worked under the general supervision of the General Manager Rossell. Briz was also at all material times President of Leamington and General Manager of Multi-Inversiones controlled Alameda. This constellation of facts not only illustrates why the best available evidence strongly points to Multi-Inversiones (and not AVSA) being viewed as the corporate entity which controlled Leamington. It also demonstrates that Rossell was in real terms a key agent and directing mind of Leamington, whose admissions and knowledge may properly be attributed to the First Defendant.

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[31] Volume K8, pages 434, 443.
[32] Volume K [ ], pages [ ].
[33] Volume K8, page 383.
[34] Volume G 1, page 20, paragraph 2.

92. So Rossell was deliberately misleading Juan Guillermo on August 20, 1998 when he represented that Leamington had made no distributions since 1994, a 1995 dividend had merely been approved and further dividends were pending, while acknowledging that Lisa was entitled to participate in distributions which in fact had been made. His knowledge that Lisa had not received its share of these distributions and collusion in concealing the true position from Lisa is attributable to Leamington, which I find intended to injure Lisa and did injure Lisa to this extent. Leamington was allowing itself to be used as a vehicle to defraud Lisa by making distributions to Villamorey which were not being distributed (or promptly distributed) to Lisa but which had been, as Mr. Gardemal found without contradiction, actually distributed to the other two Villamorey shareholders at the date of the August 20, 1998 Toronto meeting . Of course, there is no suggestion whatsoever that any of these facts could possibly have come to the attention of Leamington's Bermuda-based insurance and/or legal representatives.

93. It is perhaps somewhat unclear whether Lisa would have received some or all of its entitlement had the present proceedings not been commenced and the secret recording not been revealed, as Rossell promised in Toronto in August 1998. On any view at that juncture, Lisa in fact had not received what is now admitted to be its full entitlement in respect of pre-1995 dividends, and was prejudiced by the delay in receiving the post-1995 dividends which had been distributed to Avicola's other shareholders. Dividing a Villamorey dividend into three is far from high science, yet Lisa was only offered its full pre-1995 dividend share in April 1998, ten years after it began investigating the financial position. Assuming Villamorey is indeed still the sole shareholder of Leamington, there is no doubt that Lisa has been injured by being deprived of its rightful third share of the post-1995 dividends described above. The position in economic terms is essentially the same as Lisa would any event have been entitled to one-third of the profits of the Avicola Group and Villamorey even if the Leamington interest had been sold.

94. Lisa cannot complain of being deprived of its share of the Villamorey dividends directly in the present proceedings because it abandoned any such claim years ago. But Lisa can complain that if the premiums which generated those profits, essentially through bogus reinsurance arrangements (the Transportation Policies) were not funnelled out to Leamington in that way, Lisa would as a shareholder of Avicola have participated in those monies in any event. The Plaintiff's primary case is that those profits ought to have been distributed by the Avicola companies themselves, and not channelled through Leamington at all.

Injury to Lisa: the post-1995 period (assuming Lisa's Leamington interest was sold by Villamorey to La Brana)

95. I now consider the position on the hypothesis that Lisa's indirect Leamington interest was indeed sold in 1995 as Leamington contends, in circumstances where the Transportation Policies were not genuine reinsurance and were a vehicle to gain illicit tax advantages for the two branches of the Gutierrez family to the exclusion of Lisa.

96. On this hypothesis, which clearly was not advanced by Lisa at all, the case for construing the transportation aspects of the Leamington programme as calculated to injure Lisa is, it seems to me, even stronger[35]. The financial record shows that the overwhelming majority of dividend payments were made after the purported sale. This would suggest even more strongly that once Lisa sold its interest in Leamington, the Controllers decided to exclude Lisa altogether from the Avicola-generated profits by distributing them through a corporate vehicle (Leamington) in which Lisa had no interest at all. It would also suggest that Lisa was misled into selling its interest in the highly profitable Leamington for nominal consideration, because Rossell's 1998 explanation of how Leamington worked strongly suggests that Rossell had reason to believe that Lisa at that late stage did not fully understand the role played by Leamington.

[35] It is possible that the loss calculation is more complicated and it seems obvious that accepting that the sale of a valuable interest for nominal consideration in fact took place in 1995 is contrary to Lisa's commercial interests.

97. If Lisa's interest was sold for nominal consideration shortly before Leamington started to distribute the bulk of its dividends generated by Avicola "premium" income, I would have found that from this point (if not from the outset) a substantial purpose of Leamington was to defraud Lisa of its share of the Avicola Group profits.

98. But for the reasons I have already stated, my primary finding is that a proposed sale of Lisa's interest in Leamington was never consummated, and that defrauding or injuring Lisa was only a subsidiary function of the purported Transportation Policies which were predominantly used for tax evasion/avoidance purposes.

Legal and factual findings: did Lisa suffer actionable injury under Guatemalan law?

99. Professor Gordon very robustly asserted that Lisa could sue a third party such as Leamington for damage suffered by it in relation to its AVSA shareholding. Such injury would be direct injury and not merely reflective of Avicola's loss (Reply Report, paragraph 21). Mr. Ibarguen very firmly asserted that Lisa could not assert a claim against AVSA or Lisa under the Commercial or Civil Codes of Guatemala because it could only complain of suffering direct or personal loss in respect of AVSA dividends which had been declared but not paid.

100. I have already found that Lisa's case against AVSA based on the theory that it was the *de facto* parent of those Avicola companies which were reinsured by Leamington under the Transportation Policies has not been proved. No need to consider the position as regards AVSA arises. Had I been required to decide the liability of AVSA under Guatemalan law, I would have accepted the opinions expressed by Mr. Ibarguen in his oral evidence and, in particular, paragraphs 22 - 23 of his Third Affidavit and held that the claims against AVSA failed under Guatemalan law because no direct injury was suffered.

101. What is relevant is whether as regards the double actionability rule Lisa has proved that the tort of conspiracy claim is maintainable against Leamington under both Bermuda law and Guatemalan law on the assumption that the tort was substantially committed in Guatemala. This was decided as a preliminary issue by me (and subsequently affirmed by the Court of Appeal) as follows:

> *"46. The Defendants correctly assert that to justify an action in Bermuda for a tort committed abroad, the claim must be both actionable in Bermuda and the place where the tort was committed: Chaplin –v-Boys [1971] A.C. 356. The Plaintiff answers that the claims under paragraphs 15 and 16 are for equitable fraud, not tort at all. And the tortious conspiracy cause of action is based on acts committed by Leamington in Bermuda, not on torts committed abroad. Further and in any event, all claims would be actionable in Guatemala as causing intentional or negligent harm under Article 1645.*
>
> *47. I accept Mr. Hargun's submission that Lisa's claims under paragraphs 15 and 16 do not engage the double actionability rule at all, because they are not foreign tort claims. As far as the conspiracy claim is concerned, the crucial test advanced by the Plaintiff's Counsel is the following dictum of Slade LJ in Metal & Rohstoff-v- Donaldson Inc. [1990] 1 Q.B 391 at 446:*
>
> *"In our judgment, in double locality cases our courts should first consider whether, by reference exclusively to English law, it can properly be said that a tort has been committed within the jurisdiction of our courts. In answering this question, they should apply the now familiar 'substance' test...If on the application of this test, they find that the tort was in substance committed in this country, they can wholly disregard the rule in Boys v. Chaplin ...; the fact that some of the relevant acts occurred abroad will thenceforth have no bearing on the defendant's liability in tort. On the other hand, if they find that the tort was in substance committed in some*

foreign country, they should apply the rule and impose liability in tort under English law, only if both (a) the relevant events would have given rise to liability in tort in English law if they had all taken place in England, and (b) the alleged tort would be actionable in the country where it was committed. We appreciate that the application of the substance test may give rise to difficult problems on the facts of some cases..."

48. It is far from clear, having regard to the Plaintiff's pleaded case alone, where the tort was in substance committed. The conspiracy case is particularized in reliance on paragraphs 1-15 of the ASC, which embraces three frauds admittedly committed abroad. On balance, it seems to me that the alleged tort was in substance committed abroad, thus engaging the double actionability requirement.

49.I am satisfied that although the double actionability rule is engaged as regards paragraph 17 of the ASC, the acts complained of would be actionable in Bermuda and under Guatemalan law, in particular, under article 1645 of the Civil Code. To the extent that the pleading suggests that relevant acts may have occurred in El Salvador and Honduras[36], in the absence of expert evidence, this Court is entitled to rely on the presumption that foreign law is the same as Bermudian law. So I would reject the objection to Lisa's standing based on the application of the double actionability rule."[37]

102. Having regard to the evidence adduced at trial, I find that the conspiracy complained of was partly committed in Bermuda (where the dividends were formally declared), but substantially committed in Guatemala where the controlling minds of Leamington were primarily based. How was the conspiracy

[36] The domicile of two of the fronting companies according to paragraph 14 of the ASC.
[37] Volume B2 TAB 27; [2006] Bda LR 9.

actionable under Guatemalan law? I accept the evidence of Mr. Ibarguen that simulation requires both parties to the transaction to intend it to be a sham[38]. Mr. Ibarguen agreed that in general terms Lisa's case would give rise to an action against the Administrators[39]; but this would be a shareholder claim, not a claim against a third party such as Leamington. Mr. Ibarguen was bound to admit in general terms that where a legal person causes direct injury to another, they would be liable under Article 1645 of the Civil Code[40]. Professor Gordon was therefore in my judgment right to assert quite confidently that the conspiracy to defraud claim against Leamington (and AVSA) if proved would be actionable under Guatemalan law:

> "*...Article 1645. Any person who has caused damage or injury to another, intentionally or negligently, is obligated to repair it, except where it is established that the damage or injury was produced by the fault or negligence of the victim...This provision is common to every civil law tradition nation law dealing with negligent or intentional injury...The possible examples are endless. The common thread is that (1) a person...(including artificial persons) has (2) caused (3) injury (4) intentionally or negligently (5) to another...It is my opinion that Lisa has a separate cause of action under Guatemalan Civil Code Article 1645 against Avicola or Leamington...Guatemala has no provisions which directly create conspiracy as a civil action. However, Article 1645 applies to collective actions by more than one person, and conspiración is recognised in the civil law as two persons joining together for an unlawful purpose.*"[41]

Legal and factual findings: conspiracy to defraud claim

103. In terms of identifying the legal elements of the tort of conspiracy to defraud, it is necessary to distinguish two main scenarios. Firstly, where the conspiracy

[38] Day 8, pages 1316-1317, 1364-1367.
[39] Day 8, page 1346.
[40] Ibid, pages 1380-1382.
[41] Report, paragraphs 20-21.

involves unlawful means, an intention to injure the claimant is all that need be proved: '*Clerk & Lindsell on Torts*', 14th edition (Sweet & Maxwell: London, 2006), paragraph 25-123. Ancillary to this point is the requirement that where the illegality relied upon involves the contravention of a statutory provision, as opposed to fraudulent means alone, the relevant statute must be construed to determine whether civil action is permissible for the contravention in question: *Clerk & Lindsell*, paragraphs 25-130-25-136. Where the conspiracy is effected by lawful means, the predominant purpose of the conspiracy must be shown to have been to injure the claimant: *Clerk & Lindsell*, paragraphs 25-130-25-136. In determining whether or not Leamington participated in the conspiracy, this Court must ascertain whether the Plaintiff has proved that its participation took place with the requisite knowledge of the unlawfulness of the conspiracy [42].

104. The conspiracy to defraud claim is, as previously set out above, pleaded as follows:

> *"17. Further, and in the alternative, the matters complained of in paragraph 15 and 16 hereof were committed by Leamington pursuant to a conspiracy between the Controllers (and in particular Rosell) and Leamington ~~and (by reason of the matters set out in paragraph 17C and 17F below) Avicola~~ to defraud Lisa of its true entitlement ~~as a shareholder of Avicola~~ of the distributions made by Avicola. The parties to the conspiracy included Losen, Rojas, Bonifasi, Rossell, ~~Avicola~~ and Leamington. Leamington joined the conspiracy after its incorporation on 23 July 19*[8]*7."*

105. The primary plea was a conspiracy to defraud. However, the particulars relied upon under paragraph 15(i) cross-refer to the Pollos Vivos, Los Cedros and

[42] See *Walsh and Taal –v- Horizon Bank International* [2008] Bda LR 16; [2008] SC (Bda) 20 Com, paragraphs 114-120, 130

Ancona Frauds. It is true that these "background frauds" make reference to breaches of Guatemalan tax law and laundering which have not been adequately proven, but the main thrust of the allegations is a fraudulent exclusion of Lisa from its share of the Avicola profits. It follows that the main thrust of the pleaded case on the Leamington fraud is that the reinsurance programme (limited at trial to the Transportation Policies programme) was fraudulently used as a means to exclude Lisa from its rightful share of the Avicola profits. The central allegation is that the policies were not genuine. The conspiracy alleged was neither a lawful means conspiracy nor was it an unlawful conspiracy requiring construction of the statutes allegedly contravened.

106. Although I am not satisfied that the predominant purpose of the conspiracy was to injure Lisa, the Plaintiff has proved that there was an intention to injure Lisa in relation to a conspiracy involving the use of (fraudulently) unlawful means. Lisa has also proved that the conspiracy involved the Controllers and was joined by Leamington after its incorporation in 1987. It is clear that Rossell, in particular, had actual knowledge of all of the facts which made the conspiracy unlawful. The most cogent evidence of this is his frontline role at the August 20, 1998 meeting in misleading Lisa's principal about the distributions made by Leamington from which Lisa had been indirectly excluded. His knowledge may be imputed to Leamington because "*an officer of a company must surely be under a duty, if he is aware that a transaction into which his company or a wholly owned subsidiary is about to enter is illegal or tainted with illegality, to inform the board of that company of the fact. Where an officer is under a duty to make such a disclosure to his company, his knowledge is imputed to the company*": *Belmont Finance Corporation–v- Williams Furniture Ltd.* (No.2) [1980] 1 All ER 393 at 404 (per Buckley LJ). Rossell was admittedly (a) both secretary and treasurer of Leamington from 1993, (b) in charge of coordinating risk management for Avicola, (c) in charge of Lionel Asensio, who ran Agencia de Seguros Empresariales, S.A., an insurance brokerage company, under his supervision and (d) at all material times also an officer of Multi-Inversiones. As such Rossell (and

Leamington's President Briz) knew that no genuine transfer of risk took place under the Transport Policies and that the profits generated were not being distributed to Lisa.

107. The Plaintiff has proved its tortious conspiracy to defraud claim.

Legal and factual findings: Lisa's equitable fraud claim

108. In its Closing Submissions, Lisa submitted as follows:

> *"130. The factual allegations in relation to Lisa's case on equitable fraud are set out in ¶s 8 & 15 of the Amended Statement of Claim. Lisa contends that Leamington was a participant in this fraudulent scheme to launder monies (whether on or off the books), to reduce the profits of Avicola and to reduce the dividends which would otherwise be payable to the Plaintiff. Lisa also asserts that knowledge of Rossell, as president, director and secretary of Leamington, is to be attributable to Leamington and that Rossell has been at all material times the controlling mind of Leamington (¶18). Lisa puts this case under equitable fraud in two ways.*
>
> *131. First, on the basis of the plea that the transportation reinsurance contracts in substance were a sham and a fraud, Bermuda law will in those circumstances impose a constructive trust on Leamington as the fraudulent recipient of the premium. Equity will recognise the proprietary interest of the party defrauded.*
>
> *132. Second, Lisa puts its case on the basis of dishonest assistance/knowing receipt – see further below.*
>
> *133. In terms of remedies for equitable fraud, Lisa claims constructive trust (¶1 of the relief), return of the monies held upon trust, (¶2), accounting (¶5) and payments of monies due upon the taking of account (¶6)."*

109. This claim, which relies on the same facts as the conspiracy to defraud claim in respect of a more straight forward cause of action, has also been proved. I find that the Transportation Policies were in substance a sham and a fraud because (a) they were not genuine reinsurance, and (b) were used in part to defraud Lisa of its rightful share of the Avicola profits. It bears repeating that the policies were valid on their face and that this finding is not based on a technical analysis of the reinsurance arrangements which Leamington's Bermuda-based insurance managers or lawyers ought to have carried out. Rather it is based substantially on an analysis of the surrounding evidence as to (a) the motivations of the controlling minds of Leamington, as partially evidenced by their own admissions, and (b) the fact that after Leamington's dividends were declared in Bermuda, Lisa was excluded from participating in the distributions made by Leamington's Panamanian shareholder, Villamorey.

110. I further find that Lisa's 1/3rd share of the premiums received by Leamington in respect of the Transportation Policies were received by Leamington with knowledge of that fraud constituting the First Defendant a constructive trustee in the Plaintiff's favour of the sums received. For the reasons already set out above, the relevant knowledge of Rossell and Briz as controlling minds of Leamington is attributable to Leamington.

Legal and factual findings: Lisa's claim for dishonest assistance/knowing receipt

111. This claim which relies on the same facts as applicable to the two aforementioned claims is also proved as against Leamington. Lisa's closing Submissions stated as follows:

> "135. *As set out above in ¶s 130 - 134, there was a constructive trust on Leamington as the fraudulent recipient of the false reinsurance premiums.*

136. In addition, Leamington (by Rossell at the very least) well knew that the "premiums" received by it ultimately from Avicola were not bona fide insurance premiums but were fraudulent in nature. Leamington (by Rossell at the very least) was party to the scheme to launder the monies of Avicola (whether on or off the books) through Leamington by false insurance premiums. In those circumstances, the party defrauded (Lisa) is entitled to enforce a constructive trust over the proceeds of the fraud on the basis of dishonest assistance and/or knowing receipt (see El Ajou v Dollar Land Holdings PLC [1994] 2 All ER 685).

137.The elements giving rise to the cause of action for dishonest assistance are:

137.1A trust or other fiduciary relationship;

137.2A breach of trust or other fiduciary duty on the part of the trustee or other fiduciary;

137.3A causal link between the breach and the loss to the beneficiaries,

137.4Assistance by the defendant in the breach;

137.5A dishonest state of mind on the part of the assistant.

See Underhill & Hayton, The Law of Trusts & Trustees, 17th ed, at para 100.18.

138. The elements giving rise to the cause of action for knowing receipt are:

138.1Property held on trust or subject to some other fiduciary duty;

138.2Misapplication the property by the trustees or fiduciary in breach of trust or fiduciary duty;

138.3Receipt of the property or its traceable proceeds by the defendant;

138.4A causal link between the defendant's receipt and the breach of trust or fiduciary duty;

138.5A dealing with the property by the defendant for its own benefit, and not in his character as agent for another party;

138.6Knowledge by the defendant that the property has been transferred in breach of trust or fiduciary duty, either at the time of receipt or at any other time prior to his dealing with the property for his own benefit.

See Underhill & Hayton, The Law of Trusts & Trustees, 17th ed, at para 100.52.

139.These elements are all made out on the present facts. In particular, claims under these causes of action are not limited to situations where an express trustee has misappropriated trust property. They can also lie against defendants who have assisted in or received property misappropriated by other

fiduciaries who have voluntarily assumed responsibility for managing the property or where a defendant has received or helped a constructive or resulting trustee to misapply the trust property: see Bank Tejerat v Hong Kong & Shanghai Banking Corporation (CI) Ltd [1995] 1 Lloyds' Rep 239 and Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd's Rep Bank 511. Avicola and the Controllers are here liable as constructive trustees for the misappropriation of Avicola's assets. Leamington is liable for its role in receiving those assets by way of fraudulent reinsurance premiums and/or assistance in laundering those assets.

140. The pleas of equitable fraud and relief of constructive trust seek to obtain restitution from Leamington. As a matter of Bermuda conflict rules, the obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation. The proper law of the obligation is (if the obligation arises otherwise than in connection with a contract or land) the law of the country where the enrichment occurs (see Rule 200 of Dicey & Morris: The Conflict of Laws, 13th Edition. Furthermore, only Bermuda law is relevant on the basis that the acts complained of took place in Bermuda."

112. I find that Leamington knowingly assisted a misapplication of the Transportation Policies by its receipt and distribution of the premiums paid in respect of the Transportation Policies and that the elements of the claim as delineated in the above submissions have been made out. Two points require further analysis as regards both constructive trust claims, and which arise from the above submissions.

113. In relation to the tortious conspiracy claim, I have found that the tort was substantially committed in Guatemala where it seems to me the tortious acts substantially occurred. It was there that the relevant instructions were given, implemented in Bermuda, which caused Lisa loss. Is it possible to find in the context of these alternative constructive trust claims that Bermuda law governs the obligation to make restitution because this is where the enrichment occurred? The discussion in *Dicey and Morris* on Rule 200 suggests: (a) where a restitutionary obligation is created following the commission of a tort, the law which governs the tort should also govern the equitable obligation to make restitution; (b) although the law where the enrichment occurs generally determines a constructive trust claim, this principle is not overwhelmingly supported by clear judicial authority, and factual variations may justify a different approach. The need to consider the constructive trust claims only arises in the present case on the hypothesis that no tort has in fact been committed at all (either because I am wrong in holding that the elements of the tort have been proved under Bermuda law or wrong in holding that the conduct complained of is actionable in Guatemala). In any event, I have found that Bermuda law governs the tort claim because the tort was partially committed abroad and the double actionability rule is met. In terms of looking at where the unjust enrichment occurs in relation of the constructive trust claims, however, the unjust enrichment complained of (as opposed to the acts causing it) substantially occurred in Bermuda to the extent that the premiums were (a) received by a Bermuda company, and (b) distributed with the approval of Board resolutions passed at meetings held in Bermuda.

114. The second issue which is not self-evident is the requirement that the constructive trustee knew of the breach of trust either (a) when the monies were received, or (b) before they were distributed in breach of trust. It is clear that the knowledge of Rossell can be attributed to Leamington from 1993 when he became an officer of Leamington and became deeply involved with the Avicola risk management programme. It is unclear precisely when in 1993 Rossell became involved, and

$200,000 was declared that year. The vast majority of dividends were declared after 1993, and although $2.5 million was paid before 1993, it is common ground that Lisa was partially paid its share of all pre-1995 monies and the entitlement of Lisa to the shortfall is not in dispute. It therefore is not necessary to consider the pre-1993 position in terms of what knowledge can properly be attributed to Leamington.

115. Although the preponderance of the evidence does suggest that Briz, admittedly Treasurer of Multi-Inversiones from 1984 to 2003, had actual knowledge of any breach of trust before the Leamington dividends were distributed, it accordingly matters not that the position prior to 1993 is ambiguous. Not only was Briz President of Leamington at all material times. Although he omits mention of this in his Affidavit, he was intimately involved with the dividend process. Firstly, as already mentioned when discussing the broad question of a fraud on Lisa above, he held himself out to be General Manager of Alameda. This was a company of which Lionel Asensio was Operations Manager, and Asensio was involved in both forwarding premiums and requesting the payment of dividends. Alameda, it seems obvious, was acting on behalf of the other two branches of the Gutierrez family, who owned Multi-Inversiones. Thus Briz on June 30, 1992 wrote to Leamington's insurance managers on Alameda letterhead stating: "*We hereby request a declaration of dividends to be paid to VILLAMOREY S.A. in the amount of U.S. $1,300,000.*"[43] On that date $1.3 million was paid to Villamorey, and $200,000 was lent to Alameda. The dividend was retroactively approved in November 1992 when Lisa received 1/3rd of the total "distribution", even though only $1.3 million was formally approved as a dividend. It is unclear that the comparatively small pre-1995 deficit is attributable to the pre-1993 era before Rossell entered the stage. But Briz' involvement as President of Leamington and agent for Villamorey, through Alameda, in 1992 strongly supports the inference that he knew that Leamington was acting in breach of trust in declaring dividends which were not paid to Lisa in the post-1993 period. On January 22, 1996, writing

[43] Volume K8, page 97.

as General Manager of Alameda, he requested that a dividend of $750,000 should be paid by Leamington to Villamorey[44]. A similar request had previously been made by him on November 13, 1995 for a $1.1 million dividend[45]. It seems more likely than not than Briz made these requests both with knowledge that Villamorey would exclude Lisa from its share of these monies and well-knowing that Lisa was a shareholder of Villamorey. Such knowledge on the part of Leamington's President is attributable to Leamington itself. It is in the face of these distribution requests that Briz himself admits that at all material times Villamorey was the sole shareholder of Leamington, and does not support the proposition that Villamorey sold its shareholding in Leamington in early 1995.

116. The general pattern appears to have been that before Leamington declared the dividend or made a distribution, a request came from Alameda. On a balance of probabilities it seems to me to be clear that when the request was made for a distribution, it was known how the funds were going to be disbursed. There can be no suggestion (in the absence of positive evidence to this effect) that it was only after Villamorey received the funds that a decision was made to exclude Lisa from the ultimate distribution. Briz' knowledge supports the knowing receipt claim alone, while Rossell's knowledge supports both the dishonest assistance and knowing receipt claims. In assessing the cogency of the evidence as to their knowledge generally, it is noteworthy that neither of these officers was willing to give oral evidence on oath to deny or refute the prejudicial inferences which clearly arise from the documentary and other evidence before this Court.

Legal and factual findings: Leamington's defence to the fraud and constructive trust claims

117. Leamington defended its position on three broad fronts: (a) the assertion that the Transportation Policies were not fraudulent, and (b) the following submissions set out in paragraph 5(i) of its Headline Points for Closing:

[44] Volume K8, page 383.
[45] Volume K8, page 438.

"Lisa's case that Leamington was used as a vehicle to launder moneys generated by purported off-book sales of live chickens, oranges and manure is entirely irrelevant to the relief sought against Leamington. But, on any view, that case was shot to pieces at trial. Leaving aside the inherent improbability of AVSA or the other poultry companies using alleged off-book, untaxed monies to pay premiums on policies re-insured by Leamington (thereby gaining no tax advantage), rather than reducing their taxable profits by using on-book funds to pay the premiums (thereby throwing up profits in a low tax environment), Lisa's accounting expert freely stated that he could not determine whether on-book or off-book funds were used to pay the premiums on policies reinsured by Leamington. ***[7/1146, line 7- 7/1148. line 10]****. It is for Lisa, as claimant, to prove its case. If it cannot do so now, after ten years of litigation, its case cannot succeed."*

118. And (c), in its Supplemental Headline points for Closing, Leamington made the following additional points:

"1.In essence, Leamington submits the point is this: vicarious liability can be used to make defendants other than the primary wrongdoer liable for matters that have been pleaded. It cannot be used to make a defendant liable for matters that have not been pleaded.

2. A few simple propositions may help to explain Leamington's position. Assume that Lisa has suffered a loss of $X as a shareholder in AVSA and $Y as a shareholder in the other 18 companies. Assume also that all 19 companies are found to be co-conspirators against Lisa.

i. *There is no reason in principle why, if all 19 companies are joined as defendants each one of the 19 should not be jointly and severally liable for $X plus $Y.*

ii. *Equally, if only one of them is joined as a defendant (say, AVSA), Lisa can still hold that one defendant liable for the damage it has suffered as a shareholder in all of them – i.e. for $X plus $Y, if its claim is appropriately made. It would have to bring the claim in its capacity as a shareholder in all 19 companies, not just as a shareholder in AVSA; and it would have to plead the loss it had suffered as a shareholder in each.*

iii. *However, if the only loss claimed is the loss suffered as a shareholder in AVSA, the claim being brought as a shareholder in that company but not the other 18 companies, Lisa can only ever recover $X (unless, relying on the de facto parent allegations, Lisa can show that the $Y loss sustained in respect of the other 19 companies would in fact have impacted on the amount of dividends it would have received from AVSA, because the profits of the other 18 companies were paid through AVSA). In this situation, vicarious liability cannot assist Lisa – it cannot be used to make AVSA liable for unpleaded losses suffered by Lisa, suffered in a different capacity to that in which it brought the claim.*

Leamington submits that the point may seem technical, but it is not an empty pleading point. A claim for the loss suffered in any one of the other 18 companies would, in fact, be a different cause of action. It would have required Lisa to prove different facts – most obviously, its position as a shareholder in that company – than those required to be proved in the action as presently constituted.

If Lisa had made an appropriate amendment whilst it was still open to it to do so, expanding the claim to cover loss suffered in its capacity as a shareholder in the other 18 companies, the position may have been different. But Lisa has left it too late to do that, the relevant limitation period having expired; this is undoubtedly why Lisa has chosen to advance its claim via de facto parent allegations."

119. The last point will be dealt with first. I have already set out above why I reject Leamington's pleading point that Lisa is not entitled to seek relief in respect of loss suffered in respect of its shareholding in the Avicola companies generally as opposed to simply AVSA. From Leamington's perspective, the quantum of loss is unaffected because Lisa's original claim against Leamington was for the loss of its rightful share of the profits of the Avicola Group. Of course the scope of loss is favourably affected from Leamington's perspective in that it is limited only to the premiums paid by those Group members who were in fact insured under the Transport Policies. The fact that AVSA is not in fact the parent company of the Group has substantive impact on the case against AVSA, but not on the loss sought from Leamington. The suggestion that the other Avicola companies should have been joined by Lisa because it was necessary for Lisa to prove a wholly different case as regards its status of a shareholder of those companies, advanced by Leamington, is wholly unmeritorious. There is no dispute that Lisa is a shareholder of the other poultry companies which were reinsured under the Transportation Policies.

120. If Leamington would have wished to seek a contribution from a joint tortfeasor as this submission appeared to imply, it has always been open to it to serve a third party notice (a) from the outset on AVSA, and (b) from the date of the Plaintiff's voluntary Further and Better Particulars, on the other Avicola companies concerned. It is not for a Plaintiff to join every potential tortfeasor so as to minimize the exposure of any one of joint tortfeasors. This point is highly

artificial since Leamington and the non-party companies are affiliates, and Leamington and AVSA had common representation for several years. In any event, the alternative constructive trust claims can properly be maintained against Leamington alone.

121. It is true that Lisa has failed to strictly prove that Leamington was a money laundering vehicle, and that this was not an essential element of its case. But this submission is not a substantive answer to the claim that Leamington was used to defraud Lisa. The main substantive defence advanced in respect of the Leamington Fraud was to contend, based primarily on expert evidence, that the Transportation Policies were genuine reinsurance polices. This argument has been rejected above primarily on the basis of an analysis of the factual evidence of fraud which Leamington elected not to call a single witness to controvert through oral testimony. The First Defendant has, on the facts and in the face of admissions by one of its significant operational officers that the reinsurance policies were a sham, essentially put the Plaintiff to strict proof of its core allegations.

Legal and factual findings: Lisa's loss

122. Leamington did not address factual issues of quantum in its Skeleton Argument or its Headline Points for Closing, its case being clearly set out in its expert evidence. I reject as a matter of Bermuda law the broad traverse that the loss claimed is irrecoverable because it is merely reflective of loss suffered by the Avicola reinsureds. On the facts of the present case the loss complained of by Lisa has always been (since the derivative claim was abandoned) alleged to be loss it has suffered separate and apart from the shareholders of the companies as a whole. Having regard to the fact that the Avicola companies are demonstrably under the control of those who are causing the damage complained of, Lisa must be entitled to seek direct relief even if it is theoretically open to it to compel the companies to take the requisite legal action on their behalf: *Johnson-v-Gore-Wood* [2002] 2 AC 1; *Giles-v-Rhind* [2002] EWCA Civ 142.

123. As far as Guatemalan law is concerned, for the reasons previously stated, I am satisfied that the tortious conduct complained of would be actionable against Leamington at the instance of Lisa under Article 1654 of the Civil Code. The position would likely be otherwise as regards AVSA where I found Mr. Ibarguen's evidence that shareholder claims are narrowly prescribed more persuasive.

124. It remains to consider the damages Lisa is entitled to recover for its tortious conspiracy claim and/or the compensation Lisa is entitled to recover for its constructive trust claims. It was agreed that Lisa's interest in the Avicola companies was one-third, taking its Villamorey interest into account. I summarily reject the submission that Lisa should be able to recover 50% of what the other two shareholding interests have received. I also reject the submission, if it was advanced as regards Leamington at all, that Lisa should be able to recover compensation for the executive incentive payments made. This claim would only not be double recovery if it relates to premiums paid in respect of the genuine Property Policies. I am not satisfied, having regard to all the evidence, that such payments (while admittedly unusual, according to Mr. Bailie) fall within the ambit of the Plaintiff's pleaded claims and were made in whole or in part either fraudulently or in breach of trust.

125. The loss has been analysed in two segments; firstly, the pre-1995 loss and secondly the post-1995 loss. Ms. Yip initially agreed that it appeared that Lisa was entitled to $1,900,085 in respect of the post-1995 period. Mr. Gardemal contended that this was understated by 43%, and Ms. Yip agreed that this figure was understated by 41%. Mr. Gardemal's figure was based on an estimate as he was unhappy to rely on Leamington's documentation alone, and some of the underlying premium documentation could not be found. His percentage was based on an entirely logical estimation process. I find that there is no reason to doubt the accuracy of the premium income reflected in Leamington's audited financial statements on which Ms. Yip relied, and accordingly the post-1995 loss of Lisa is

$1,900,085 plus $54,019.14 as Ms. Yip agreed in her oral evidence in respect of arrears owing for the pre-1995 period (including a cheque recently tendered by La Brana in this regard). Mr. Gardemal in his Scenario Y calculated Lisa's one-third share of the premiums paid under the Transportation Policies as $4,934, 515. But this covered premiums paid by both Poultry Companies and Mills. Scenario X was Poultry Companies only, and this was $2, 388,039, using a 43% figure which I have rejected in favour of Ms. Yip's 41%.

126. Leamington objected to the production of the June 17, 2008 Update Gardemal Report. I reject that objection as it is always possible for experts to update their evidence in the course of the trial, and the Update was designed to give notice of supplementary calculations. Schedule A to Lisa's FBPs, however, lists nineteen companies which form part of the Avicola Group for the purposes of Lisa's claim. It is Leamington's case that none of these companies are Mills companies. Apart from attempting to broaden the financial scope of a claim which has clearly been substantially reduced by Leamington's success in forcing Lisa to concede the Property Policies were valid reinsurance, it is difficult to comprehend this aspect of Lisa's compensation claim. None of the Mills companies appear in Schedule A to the FBPs, and accordingly they fall outside of the scope of Lisa's pleaded case on loss, generously and purposively read. I am unwilling in these circumstances to infer as against Leamington that Avicola premiums were used to fund the policies of these companies on the grounds that AVSA has failed to make full disclosure.

127. Lisa is entitled to recover these sums plus interest at the statutory rate of 7%. Mr. Hargun invited the Court to leave the parties to calculate the interest, and no submissions were made as to the precise date from which interest should or should not run. In principle, interest should run from the date the relevant premiums were received by Leamington until payment (or possibly until tender of payment.) I will hear argument on the question of interest if necessary.

Summary

128. All claims against AVSA are dismissed on the grounds that there was no sufficient evidence that it was a participant in the Leamington Fraud.

129. Lisa's claims in tort for conspiracy to defraud and the alternative constructive trust claims succeed as against Leamington. Lisa is entitled to recover the total sum of $1,954,104.14 plus pre- and post-judgment interest at the rate of seven per cent.

130. I will hear counsel as to costs and the computation of interest if required.

Dated this 5th day of September, 2008

KAWALEY J

This is Exhibit "B" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

Villamorey, S.A.
Informe del Auditor Independiente
Al 31 de diciembre de 2010 y 2009

HLB Guatemala
Bámaca Morales & Asociados
Contadores Públicos y Auditores

Dictamen del Auditor Independiente

Al Consejo de Administración
y a los Accionistas de
Villamorey, S.A.

He auditado los estados financieros que se adjuntan de Villamorey, S. A., entidad domiciliada en Panamá, que incluyen los balances generales al 31 de diciembre de 2010 y 2009, los estados de resultados, de cambios en el patrimonio de los accionistas y de flujo de efectivo por los años que terminaron en esas fecha, así como un resumen de las políticas contables importantes y otras notas aclaratorias.

Responsabilidad de la administración por los estados financieros

La administración es responsable por la preparación y presentación razonable de estos estados financieros de conformidad con principios de contabilidad generalmente aceptados. Esta responsabilidad incluye: el diseño, la implementación y el mantenimiento de control interno para la preparación de una presentación razonable de los estados financieros, que estén libres de errores importantes, ya sea como resultado de fraude o error; la selección y aplicación de las políticas contables adecuadas y la elaboración de estimaciones contables que sean razonables de acuerdo a las circunstancias.

Responsabilidad del auditor

Mi responsabilidad es expresar una opinión independiente sobre los estados financieros basada en mi auditoría. Excepto por lo que se indica en los párrafos siguientes, realicé mi auditoría de acuerdo con Normas Internacionales de Auditoría. Esas normas requieren que cumpla con los requerimientos éticos y que planee y lleve a cabo la auditoría para obtener una certeza razonable de si los estados financieros están libres de errores importantes. Una auditoría también comprende aplicar procedimientos para obtener evidencia de auditoría sobre los montos y revelaciones en los estados financieros. Los procedimientos seleccionados dependen de mi criterio profesional, incluyendo la evaluación de los riesgos de errores importantes de los estados financieros, derivados de fraude o error. Al conducir las evaluaciones de los riesgos tengo en cuenta el control interno para la elaboración y presentación razonable de los estados financieros de la compañía, para diseñar procedimientos de auditoría que sean convenientes de acuerdo a las circunstancias, pero no con el propósito de expresar una opinión sobre el control interno.

Una auditoria también incluye evaluar la conveniencia de las políticas contables utilizadas, lo razonable de las estimaciones contables emitidas por la administración y la presentación general de los estados financieros.

Considero que la evidencia de auditoría que he obtenido es suficiente y apropiada para basar mi opinión de la auditoría.

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Contadores Públicos y Auditores

Al 31 de diciembre de 2010 y 2009 existen las siguientes situaciones especiales:

1) La compañía no cuenta, en sus registros contables, con la integración de la inversión inicial en acciones en otras compañías por Q18,178,219. A partir de cierta fecha hasta el 31 de diciembre de 2,010 y 2,009 las transacciones ocurridas están debidamente integradas. Sin embargo, por no tener aquella integración y porque los registros contables no permiten la aplicación de procedimientos alternos de auditoría para determinar la composición de tales inversiones, no fue posible satisfacerme de la razonabilidad de tal monto inicial.

2) Fui informado por la administración de la Compañía y, en lo aplicable, confirmado por los abogados de la empresa acerca de las siguientes situaciones de índole legal:

   a) Lisa, S.A. quien posee el 33% de las acciones comunes del capital pagado de Villamorey, S. A. y en esa calidad, en el año 2000 presentó dos demandas en Panamá: a) la primera, en el Juzgado Undécimo de Circuito del Primer Circuito Judicial de Panamá en contra de Villamorey, S.A. y otras dos entidades, reclamando el pago de daños y perjuicios, y b) la segunda, en el Juzgado Duodécimo del Circuito de lo Civil del Primer Circuito Judicial de Panamá, en contra de Villamorey, S.A. solicitando la nulidad de los acuerdos tomados en la Reunión Ordinaria de Accionistas de la Sociedad, celebrada en la ciudad de Guatemala, el diecisiete de noviembre de 2000.

   b) En la primera demanda, el 11 de julio de 2008 el tribunal dictó sentencia en la cual declaró: a) desestimada la demanda porque Lisa, S.A. no probó su pretensión de daños, b) se le condenó al pago en costas por la suma de US$ 1,200,000, c) se le fijó la suma de US$200,000 por daños causados a Villamorey, S.A., y d) se le condenó al pago de US$ 40,000 por costas de la reconvención.

   c) En la segunda demanda, el 21 de octubre de 2008 el tribunal dictó sentencia en la cual declaró: a) desestimada la demanda, y b) se le condenó al pago en costas por la suma de US$ 1,250 a favor de Villamorey, S.A. Lisa, S.A. por no estar de acuerdo apeló las dos sentencias, por lo que están pendientes las resoluciones de segunda instancia.

   d) Villamorey, S.A. para garantizar el pago de las sumas de dinero, solicitó el embargo de las acciones y dividendos que Lisa, S.A. tiene en la sociedad y en otras siete sociedades guatemaltecas en las que ambas son accionistas.

   e) El 21 de Junio de 2002, Lisa, S.A. presentó una nueva demanda en el Tribunal de Distrito de Estados Unidos de América, Distrito del Sur de Florida, identificado como Caso Número 02-21931 CIV-MOORE, en contra de sesenta personas individuales y jurídicas, incluyendo a Villamorey, S.A. Esta demanda fue desestimada por el tribunal de la Florida, resolviendo que son los tribunales guatemaltecos los competentes para conocer el caso, actualmente esa demanda no ha sido presentada, y para lo cual no se le fijó plazo.

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f) El 6 de abril de 2,011, Lisa, S. A. presentó una demanda en los tribunales de la ciudad de Toronto, Canadá, por US$400,000,000; esta demanda fue notificada el 27 de abril de 2,011 y actualmente se prepara la defensa del caso.

g) Las sentencias en los dos primeros procesos fueron favorables a Villamorey, S.A. por lo que se harán todas las gestiones hasta la finalización de los casos. Por ser todos los procesos de conocimiento, no es posible determinar el tiempo de su finalización ni cuantificar el monto de honorarios y gastos. En consecuencia, no se ha registrado ninguna reserva para pérdidas. Sin embargo, ha efectuado una provisión para probables gastos legales derivados de estos juicios por la suma de Q14,876,920.

3) La Compañía tiene la política de reconocer sus ingresos por concepto de dividendos sobre la base de lo percibido, lo cual difiere de lo estipulado por los principios de contabilidad generalmente aceptados donde se indica que deben reconocerse por el método de lo devengado. Debido a esta forma de contabilización, pudiera haber dividendos decretados por las compañías poseídas, que pudieran no haber sido reconocidos como ingresos.

4) En nuestro dictamen de fecha 12 de abril de 2,010 sobre los estados financieros de Villamorey, S. A. al 31 de diciembre de 2,009 y 2,008, incluimos un párrafo de énfasis relacionado con recuperabilidad del saldo de cuentas por cobrar por Q21,856,916 al 31 de diciembre de 2,009, tal como se indica en la nota 5 a los estados financieros. Este saldo fue cobrado en su totalidad en el año 2,010.

Opinión

En mi opinión, excepto por los ajustes que pudieran ser necesarios, derivados de los asuntos que se indican en los numerales del 1) al 3), anteriores, los estados financieros que se adjuntan ofrecen una presentación razonable en todos los aspectos importantes de la posición financiera de Villamorey, S. A. al 31 de diciembre de 2010 y 2009 y de su desempeño financiero y flujos de efectivo para los años que terminaron en esas fechas, de conformidad con principios de contabilidad generalmente aceptados.

David Roberto Bámaca Morales
Contador Público y Auditor
Colegiado N° 879

Guatemala, 24 de mayo de 2011

VILLAMOREY, S. A.

Balances Generales
Al 31 de diciembre de 2,010 y 2,009
(Cifras expresadas en Quetzales)

	Nota		2,010		2,009
ACTIVO					
Activo Corriente					
Caja y Bancos	4	Q	76,686,611	Q	80,013,973
Cuentas por Cobrar	5 y 7		-		21,856,916
Inversiones en Acciones	6 y 7		119,912,333		120,008,193
TOTAL ACTIVO		**Q**	**196,598,944**	**Q**	**221,879,082**
PASIVO					
Pasivo Corriente					
Cuentas por Pagar a Accionistas	7	Q	2,265,928	Q	2,265,928
Dividendos por Pagar	7		33,872,478		-
Provisión para contingencias legales	8 y 9		14,876,920		14,876,920
Otras Cuentas por Pagar			66,967		121,640
TOTAL PASIVO		**Q**	**51,082,293**	**Q**	**17,264,488**
PATRIMONIO DE LOS ACCIONISTAS					
Capital Pagado	10		1,000,000		1,000,000
Utilidades Retenidas			103,614,015		152,917,128
Utilidad del período			40,902,637		50,697,466
TOTAL PATRIMONIO DE LOS ACCIONISTAS		Q	**145,516,651**	Q	**204,614,594**
TOTAL PASIVO Y PATRIMONIO DE LOS ACCIONISTAS		**Q**	**196,598,944**	**Q**	**221,879,082**

Las notas adjuntas son parte integral de los estados financieros.

VILLAMOREY, S. A.

Estados de Resultados
Años terminados el 31 de diciembre de 2,010 y 2,009
(Cifras expresadas en Quetzales)

	Nota		2,010		2,009
Ingresos					
Dividendos	7	Q	39,618,148	Q	46,078,922
Gastos de Operación					
Gastos de Administración			201,141		564,780
Gastos financieros			188		1,359
Total de Gastos de Operación			201,329		566,138
Otros Ingresos y Gastos - Neto-	7		1,485,818		5,184,682
Utilidad Neta		Q	**40,902,637**	Q	**50,697,466**

La notas adjuntas son parte integral de los estados financieros.

VILLAMOREY, S. A.

Estados de Movimiento de Patrimonio de los Accionistas
Al 31 de diciembre de 2,010 y 2,009
(Cifras expresadas en Quetzales)

	CAPITAL PAGADO	UTILIDADES RETENIDAS	TOTAL
Saldo al 31 de diciembre de 2,008	Q 1,000,000	Q 152,917,128	Q 153,917,128
Utilidad del año 2,009		50,697,466	50,697,466
Saldo al 31 de diciembre de 2,009	**1,000,000**	**203,614,594**	**204,614,594**
Utilidad del año 2,010		40,902,637	40,902,637
Ajuste a resultados de años anteriores		4,796	4,796
Pago de Dividendos		100,005,375	100,005,375
Saldo al 31 de diciembre de 2,010	**Q 1,000,000**	**Q 144,516,651**	**Q 145,516,651**

Las notas adjuntas son parte integral de los estados financieros.

VILLAMOREY, S. A.

Estados de Flujos de Efectivo
Años terminados el 31 de diciembre de 2,010 y 2,009
(Cifras expresadas en Quetzales)

	2,010	2,009
Flujos de Efectivo de las actividades de operación		
Resultados de las actividades de operación	Q 40,902,637	Q 50,697,466
Menos partidas que no requirieron flujos de efectivo		
Baja en inversiones	100,000	-
Ajuste a los resultados de ejercicios anteriores	4,796	-
Cambios netos en los activos y pasivos		
(Aumento) Disminución en cuentas por cobrar	21,856,916	-1,664,387
Aumento (Disminución) en dividendos por pagar	33,872,478	-
Aumento (Disminución) en cuentas por pagar	-54,673	121,640
Efectivo neto obtenido por las actividades de operación	**96,682,153**	**49,154,719**
Flujos de efectivo por las actividades de inversión		
Aumento en Inversiones	4,140	-
Efectivo neto usado en las actividades de inversión	4,140	-
Flujos de efectivo por las actividades de financiamiento		
Pago de dividendos	100,005,375	
Efectivo neto usado en las actividades de inversión	100,005,375	-
Cambio neto en el efectivo	-3,327,362	49,154,719
Efectivo al inicio del año	80,013,973	30,859,254
Efectivo al final del año	Q 76,686,611	Q 80,013,973

Las notas adjuntas son parte integral de los estados financieros.

VILLAMOREY, S.A.

Notas a los Estados Financieros
Al 31 de diciembre de 2010 y 2009

(1) Operaciones de la Compañía

Villamorey, S. A., fue constituida en junio de 1,971, bajo las leyes de la República de Panamá, por tiempo indefinido, para que pueda operar fuera de dicho país. Se dedica principalmente a efectuar inversiones en el capital social de compañías guatemaltecas. Desde el inicio de sus operaciones sus registros contables los mantiene y prepara sus estados financieros en Quetzales, moneda oficial de la República de Guatemala; la base contable utilizada se explica más adelante.

(2) Resumen de las Políticas Contables más significativas

Los estados financieros han sido preparados en todos sus aspectos importantes de acuerdo con principios de contabilidad generalmente aceptados. Las principales políticas contables adoptadas en la contabilización de sus operaciones y en la preparación de su información financiera se resumen a continuación:

a) Inversiones Temporales

Las inversiones temporales se presentan al costo más los intereses acumulados, el cual se aproxima al valor de mercado. Estas inversiones se encuentran colocadas con vencimiento a la vista.

b) Inversiones Permanentes

Las inversiones efectuadas en acciones representativas del capital pagado de compañías guatemaltecas están registradas al costo de adquisición.

c) Transacciones en moneda extranjera

Las transacciones en moneda extranjera se registran en moneda nacional (Quetzales), al tipo de cambio vigente al momento de la operación. Los saldos de activos y pasivos en moneda extranjera son reexpresados en moneda nacional al final de cada año, utilizando el tipo de cambio prevaleciente en el sistema bancario y el efecto correspondiente es incluido como parte de los resultados del período.

d) Reconocimiento de ingresos y gastos

Los ingresos provenientes de los dividendos son reconocidos por el método de lo percibido; los que provienen de inversiones en pagarés y otros títulos valores así como los que provienen de saldos de cuentas bancarias se reconocen por el método de lo devengado.

Los gastos se reconocen en el momento en que se incurren.

e) Instrumentos financieros

El valor razonable de un instrumento financiero representa la cantidad por la cual puede ser negociado en una transacción actual libre de presiones entre partes interesadas. Los siguientes métodos y suposiciones fueron utilizados al estimar el valor razonable de cada clase de instrumento financiero.

- Efectivo: Su valor en libros se aproxima al valor razonable debido a que son valores expresados en Quetzales que es la moneda de reporte y los saldos en moneda extranjera están convertidos al tipo de cambio vigente a la fecha de cierre.

- Cuentas por cobrar: Su valor en libros se aproxima al valor razonable debido a su corto vencimiento y fueron recuperadas en su totalidad.

- Cuentas por pagar: Su valor en libros se aproxima al valor razonable debido a su corto vencimiento.

(3) Unidad monetaria y tipo de cambio

Los estados financieros se expresan en Quetzales, moneda oficial de la República de Guatemala. El valor del Quetzal con respecto al Dólar de los Estados Unidos de América (US$), se fija en el mercado bancario nacional a través de la oferta y demanda de divisas. A partir del 2 de diciembre de 2006 el tipo de cambio de compra y venta fue unificado, quedando vigente el tipo de cambio de referencia. Al 31 de diciembre de 2010 y 2,009 los tipos de cambio de referencia en el mercado bancario eran de Q8.01 y Q8.35 por US $ 1.00, respectivamente.

No hay restricciones cambiarias en Guatemala para la repatriación de capitales, pago de acreedurías o cualquier otro fin. La divisa extranjera puede comprarse y venderse en cualquier monto en bancos del sistema o en casas de cambio autorizadas.

(4) Efectivo

Al 31 de diciembre, el saldo de efectivo se integra de la siguiente forma:

		2,010		2,009
Saldos en Quetzales	Q	41,563,968	Q	55,684,081
Saldos en Dólares de los Estados Unidos		35,122,643		24,329,892
	Q	76,686,611	Q	80,013,973

Dentro de los saldos en US$ del 2,009, se incluyen US$ 2,041,491, que devengaban una tasa de interés anual variable y se encontraban depositados en una entidad relacionada.

De manera voluntaria, se ha creado un fondo de Q33, 872,478, equivalente al monto de los dividendos por pagar, para garantizar su pago.

(5) Cuentas por cobrar

Este saldo proviene de una deuda más los intereses acumulados. Al 31 de diciembre, el saldo de estas cuentas por cobrar se integra de la siguiente forma:

		2,010		2,009
Rioneri Investors Inc.				
Elba Capital Inc.	Q	-	Q	10,928,458
		-		10,928,458
	Q	-	Q	21,856,916

Estas deudas devengaban una tasa de interés anual variable determinada, equivalente al promedio de la tasa bancaria pasiva que publique el Banco de Guatemala para la moneda local. Se estimó que la recuperación de estos saldos no tiene ningún riesgo importante.

VILLAMOREY, S.A.

Notas a los Estados Financieros
Al 31 de diciembre de 2010 y 2009

(6) Inversiones en Acciones

Al 31 de diciembre, el saldo de las inversiones en acciones se integra de la siguiente forma:

		2,010		2,009
ADMINISTRADORA DE RESTAURANTES, S.A.	Q	34,629	Q	34,629
ADMINISTRADORA DE RESTAURANTES, S.A.		20		-
AGROPROCESOS AVICOLAS, S.A.		30,473,154		30,473,154
ALIMENTOS PARA ANIMALES, S.A.		12,466,290		12,466,290
AVICOLA DEL PACIFICO, S.A.		140,000		140,000
AVICOLA LAS MARGARITAS, S.A.		10,388,575		10,388,575
AVICOLA VILLALOBOS, S.A.		1,662,172		1,662,172
CERRO COLORADO, S.A.		5,886,859		5,886,859
COMPAÑIA ALIMENTICIA DE CENTROAMERICA, S.A.		34,629		34,629
COMPAÑIA ALIMENTICIA DE CENTROAMERICA, S.A.		20		-
COMPAÑÍA IMPORTADORA LA PERLA, S. A.		1,020		-
COMPRAVENTA DE PRODUCTOS ALIMENTICIOS, S.A.		34,629		34,629
COMPRAVENTA DE PRODUCTOS ALIMENTICIOS, S.A.		20		-
CRECIMIENTO, S.A.		50,000		50,000
DISTRIBUIDORA AVICOLA DEL NORTE , S. A.		1,000		-
EL LLANO, S.A.		8,310,860		8,310,860
ESCOBIO, S.A.		6,233,145		6,233,145
IMPORTADORA DE ALIMENTOS DE GUATEMALA, S. A.		38,091		38,091
IMPORTADORA DE ALIMENTOS DE GUATEMALA, S. A.		20		-
INCUBACION, S.A.		54,800		54,800
INDUSTRIA AVICOLA DE PALIN, S.A.		1,000		1,000
INDUSTRIA AVICOLA DEL SUR, S.A.		6,925,717		6,925,717
INDUSTRIA FORRAJERA DE MAZATENANGO, S.A.		34,629		34,629
INVERSIONES EMPRESARIALES, S.A.		34,629		34,629
INVERSIONES TORRE NOVA, S. A.		1,020		-
LOS ABETOS, S.A.		5,194,288		5,194,288
MULTIPLICACION, S.A.		51,800		51,800
POLLO REY, S. A.		1,020		-
REPRODUCTORES AVICOLAS, S.A.		20,777,150		20,777,150
SAN JOSE EL RECUERDO, S.A.		4,848,002		4,848,002
SAN JUAN, S.A.		5,540,573		5,540,573
SISTEMAS Y EQUIPOS, S.A.		692,572		692,572
BASIC RESOURCES INTERNATIONAL, S. A.		-		100,000
	Q	**119,912,333**	**Q**	**120,008,193**

VILLAMOREY, S.A.

Notas a los Estados Financieros
Al 31 de diciembre de 2010 y 2009

(7) Saldos y Transacciones con Partes Relacionadas

Villamorey, S. A. forma parte de un grupo de compañías que cuenta con una administración común; un volumen significativo de transacciones con efectos económicos es efectuado con las compañías de este grupo, bajo ciertas condiciones que son determinadas entre ellas.

Las transacciones con partes relacionadas durante los años terminados el 31 de diciembre fueron las siguientes:

Dividendos recibidos:

		2,010		2,009
ADMINISTRADORA DE RESTAURANTES, S.A.	Q	58,600	Q	34,920
AGROPROCESOS AVICOLAS, S.A.		2,848,502		4,102,453
ALIMENTOS PARA ANIMALES, S.A.		6,458,260		6,313,019
AVICOLA LAS MARGARITAS, S.A.		2,359,400		3,302,139
AVICOLA VILLALOBOS, S.A.		6,216,226		11,171,296
CERRO COLORADO, S.A.		2,800,584		1,812,736
COMPAÑIA ALIMENTICIA DE CENTROAMERICA, S.A.		264,200		1,746,776
COMPRAVENTA DE PRODUCTOS ALIMENTICIOS, S.A.		310,000		1,656,501
EL LLANO, S.A.		1,660,252		2,440,779
ESCOBIO, S.A.		2,254,280		3,066,752
IMPORTADORA DE ALIMENTOS DE GUATEMALA, S. A.		338,200		463,467
INDUSTRIA AVICOLA DEL SUR, S.A.		819,068		1,677,971
INDUSTRIA FORRAJERA DE MAZATENANGO, S.A.		62,000		58,717
INVERSIONES EMPRESARIALES, S.A.		2,206,800		770,933
LOS ABETOS, S.A.		1,738,628		2,413,360
REPRODUCTORES AVICOLAS, S.A.		1,428,034		1,861,365
SAN JOSE EL RECUERDO, S.A.		1,804,976		2,331,104
SAN JUAN, S.A.		2,412,196		717,283
SISTEMAS Y EQUIPOS, S.A.		3,577,942		137,352
TOTAL DE DIVIDENDOS RECIBIDOS	**Q**	**39,618,148**	**Q**	**46,078,922**

Intereses devengados:

		2,010		2,009
Ancona Finance, S. A.	Q	250,316	Q	1,169,627
Rioneri Investors Inc.		277,696		1,776,721
Elba Capital Inc.		277,696		1,776,721
	Q	805,708	Q	4,723,069

Derivado de esas transacciones y de otras habidas en años anteriores al 31 de diciembre, los saldos por cobrar y pagar son los siguientes:

Saldos por cobrar:

		2,010		2,009
Rioneri Investors Inc.	Q	-	Q	10,928,458
Elba Capital Inc.		-		10,928,458
	Q	-	Q	21,856,916

Saldos por pagar a accionistas:

		2,010		2,009
Accionistas con acciones nominativas	Q	643,555	Q	643,555
Accionistas con acciones al portador		1,622,373		1,622,373
	Q	2,265,928	Q	2,265,928

Saldos de dividendos por pagar a accionistas:

		2,010		2,009
Dividendos por pagar de accionista con acciones nominativas	Q	33,331,791	Q	-
Intereses acumulados sobre dividendos por pagar		540,686		-
	Q	33,872,478	Q	-

(8) Cuentas por Pagar - Provisión para Contingencias Legales

La provisión para contingencias legales ha sido creada para que, de manera conservadora, se tenga un monto destinado a cubrir parcialmente las eventualidades que pudieran derivarse de los procesos judiciales que se mencionan en la nota (9), siguiente.

9) Procesos Judiciales

Lisa, S.A. es accionista de la Compañía y en esa calidad, en el año 2000 presentó dos demandas en Panamá: a) la primera, en el Juzgado Undécimo de Circuito del Primer Circuito Judicial de Panamá en contra de Villamorey, S.A. y otras dos entidades, reclamando el pago de daños y perjuicios, y b) la segunda, en el Juzgado Duodécimo del Circuito de lo Civil del Primer Circuito Judicial de Panamá, en contra de Villamorey, S.A. solicitando la nulidad de los acuerdos tomados en la Reunión Ordinaria de Accionistas de la Sociedad, celebrada en la ciudad de Guatemala, el diecisiete de noviembre de 2000.

En la primera demanda, el 11 de julio de 2008 el tribunal dictó sentencia en la cual declaró: a) desestimada la demanda porque Lisa, S.A. no probó su pretensión de daños; b) se le condenó al pago en costas por la suma de US$ 1,200,000; c) se le fijó la suma de US$200,000 por daños causados a Villamorey, S.A., y d) se le condenó al pago de US$ 40,000 por costas de la reconvención.

En la segunda demanda, el 21 de octubre de 2008 el tribunal dictó sentencia en la cual declaró: a) desestimada la demanda, y b) se le condenó al pago en costas por la suma de US$ 1,250 a favor de Villamorey, S.A. Lisa, S.A. por no estar de acuerdo apeló las dos sentencias, por lo que están pendientes las resoluciones de segunda instancia.

Villamorey, S.A. para garantizar el pago de las sumas de dinero, solicitó el embargo de las acciones y dividendos que Lisa, S.A. tiene en la sociedad y en otras siete sociedades guatemaltecas en las que ambas son accionistas.

El 21 de Junio de 2002, Lisa, S.A. presentó una nueva demanda en el Tribunal de Distrito de Estados Unidos de América, Distrito del Sur de Florida, identificado como Caso Número 02-21931 CIV-MOORE, en contra de sesenta personas individuales y jurídicas, incluyendo a Villamorey, S.A. Esta demanda fue desestimada por el tribunal de la Florida, resolviendo que son los tribunales guatemaltecos los competentes para conocer el caso, actualmente está pendiente que presente tal demanda, y para lo cual no se le fijó plazo.

El 6 de abril de 2,011, Lisa, S. A. presentó una demanda en los tribunales de la ciudad de Toronto, Canadá, por US$400,000,000; esta demanda fue notificada el 27 de abril de 2,011 y actualmente se prepara la defensa del caso.

Derivado de esas actuaciones judiciales, la Compañía se ha visto en la necesidad de realizar desembolsos importantes para las defensas legales correspondientes, dentro y fuera de Guatemala.

Las sentencias en los dos primeros procesos fueron favorables a Villamorey, S.A. por lo que se harán todas las gestiones hasta la finalización de los casos. Por ser todos procesos de conocimiento, no es posible determinar el tiempo de su finalización ni cuantificar el monto de honorarios y gastos. En consecuencia, no se ha registrado ninguna reserva para pérdidas. Sin embargo, ha efectuado una provisión para probables gastos legales derivados de estos juicios por la suma de Q14,876,920.

(10) Capital

El capital autorizado, suscrito y pagado de la sociedad es de US$1,000,000 y está dividido y representado en 10,000 acciones comunes, pudiendo ser nominativas o al portador, con un valor nominal de US$100.00 cada una.

Como se explica en la Nota N°1, desde el inicio de sus operaciones, los registros contables se llevan en Quetzales, derivado de ello este capital pagado esta registrado en esta moneda; adicionalmente en la fecha que se colocaron las acciones, el tipo de cambio del Quetzal era Q1.00 igual a US$1.00.

This is Exhibit "C" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

853

El Contador General de GTC BANK INC. CERTIFICA: que las presentes fotocopias de los estados de cuenta en hojas enumeradas del 001 al 028 de la cuenta 900-05126-4 a nombre de la empresa VillaMorey, S.A., correspondientes al periodo de Mayo 2010 a Agosto 2012 son copia fiel de sus originales por haberlos impreso del sistema de control de depósitos del banco.

Y para los usos legales que al interesado convenga firmo y sello la presente en la ciudad de Guatemala a los veintiún días del mes de Agosto del año dos mil doce.

Eswin Lopez Tercero
Contador General
GTC BANK INC.

85

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 08:58:15
Pág. : 1

ESTADO DE CUENTA -- MAY/2010

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			00.00
06/05/2010	Traslado de 900004999	00.00	4,166,250.00	4,166,250.00
25/05/2010	Traslado Apertura cd 010152676	4,166,250.00	00.00	00.00
31/05/2010	PAGO DE INTERESES	00.00	2,710.92	2,710.92

Saldo Inicial	(-) Débitos 001	(+) Créditos 002	Saldo Final
00.00	4,166,250.00	4,168,960.92	2,710.92

000001

855

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:26:51
Pág. : 1

ESTADO DE CUENTA -- JUN/2010

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,710.92
30/06/2010	PAGO DE INTERESES	00.00	00.60	2,711.52

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,710.92	00.00	00.60	2,711.52

000002

856

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:24:56
Pág. : 1

ESTADO DE CUENTA -- JUL/2010

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,711.52
31/07/2010	PAGO DE INTERESES	00.00	00.62	2,712.14

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,711.52	00.00	00.62	2,712.14

000003

857

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:26:58
Pág. : 1

ESTADO DE CUENTA -- AUG/2010

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,712.14
31/08/2010	PAGO DE INTERESES	00.00	00.62	2,712.76

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,712.14	00.00	00.62	2,712.76

000004

858

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:25:05
Pág. : 1

ESTADO DE CUENTA -- SEP/2010

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,712.76
30/09/2010	PAGO DE INTERESES	00.00	00.30	2,713.06

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,712.76	00.00	00.30	2,713.06

000005

951

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:25:08
Pág. : 1

ESTADO DE CUENTA -- OCT/2010

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
				2,713.06
	Saldo Anterior.....:			2,713.37
31/10/2010	PAGO DE INTERESES	00.00	00.31	

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,713.06	00.00	00.31	2,713.37

000006

860

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:36:42
Pág. : 1

ESTADO DE CUENTA -- NOV/2010

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,713.37
30/11/2010	PAGO DE INTERESES	00.00	00.30	2,713.67

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,713.37	00.00	00.30	2,713.67

000007

861

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:27:13
Pág. : 1

ESTADO DE CUENTA -- DEC/2010

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,713.67
31/12/2010	PAGO DE INTERESES	00.00	00.31	2,713.98

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,713.67	00.00	00.31	2,713.98

000008

862

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:34:17
Pág. : 1

ESTADO DE CUENTA -- JAN/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,713.98
31/01/2011	PAGO DE INTERESES	00.00	00.31	2,714.29

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,713.98	00.00	00.31	2,714.29

000009

863

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 08:58:37
Pág. : 1

ESTADO DE CUENTA -- FEB/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,714.29
28/02/2011	PAGO DE INTERESES	00.00	00.28	2,714.57

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,714.29	00.00	00.28	2,714.57

000010

869

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:34:24
Pág. : 1

ESTADO DE CUENTA -- MAR/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,714.57
31/03/2011	PAGO DE INTERESES	00.00	00.31	2,714.88

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,714.57	00.00	00.31	2,714.88

000011

865

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:00:44
Pág. : 1

ESTADO DE CUENTA -- APR/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,714.88
30/04/2011	PAGO DE INTERESES	00.00	00.30	2,715.18

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,714.88	00.00	00.30	2,715.18

000012

866

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:32:32
Pág. : 1

ESTADO DE CUENTA -- MAY/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,715.18
31/05/2011	PAGO DE INTERESES	00.00	00.31	2,715.49

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,715.18	00.00	00.31	2,715.49

000013

867

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 17/08/12 10:34:34
Pág. : 1

ESTADO DE CUENTA -- JUN/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
				2,715.49
	Saldo Anterior.....:			
30/06/2011	PAGO DE INTERESES	00.00	00.30	2,715.79

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,715.49	00.00	00.30	2,715.79

000014

868

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:05:07
Pág. : 1

ESTADO DE CUENTA -- JUL/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,715.79
31/07/2011	PAGO DE INTERESES	00.00	00.31	2,716.10

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,715.79	00.00	00.31	2,716.10

000015

869

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:03:08
Pág. : 1

ESTADO DE CUENTA -- AUG/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,716.10
31/08/2011	PAGO DE INTERESES	00.00	00.31	2,716.41

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,716.10	00.00	00.31	2,716.41

000016

870

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:03:11
Pág. : 1

ESTADO DE CUENTA -- SEP/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,716.41
30/09/2011	PAGO DE INTERESES	00.00	00.30	2,716.71

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,716.41	00.00	00.30	2,716.71

000017

871

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:05:17
Pág. : 1

ESTADO DE CUENTA -- OCT/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,716.71
31/10/2011	PAGO DE INTERESES	00.00	00.31	2,717.02

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,716.71	00.00	00.31	2,717.02

000018

872

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:03:18
Pág. : 1

ESTADO DE CUENTA -- NOV/2011

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
				2,717.02
	Saldo Anterior.....:			2,717.02
30/11/2011	PAGO DE INTERESES	00.00	00.30	2,717.32

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,717.02	00.00	00.30	2,717.32

000019

873

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:12:51
Pág. : 1

ESTADO DE CUENTA -- DEC/2011

Nombre del contrato:
VILLAHOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
				2,717.32
	Saldo Anterior.....:			2,717.63
31/12/2011	PAGO DE INTERESES	00.00	00.31	

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,717.32	00.00	00.31	2,717.63

000020

874

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:13:43
Pág. : 1

ESTADO DE CUENTA -- JAN/2012

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
				2,717.63
	Saldo Anterior.....:			2,717.94
31/01/2012	PAGO DE INTERESES	00.00	00.31	

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,717.63	00.00	00.31	2,717.94

000021

875

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:15:49
Pág. : 1

ESTADO DE CUENTA -- FEB/2012

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,717.94
29/02/2012	PAGO DE INTERESES	00.00	00.29	2,718.23

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,717.94	00.00	00.29	2,718.23

000022

876

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:13:50
Pág. : 1

ESTADO DE CUENTA -- MAR/2012

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
				2,718.23
	Saldo Anterior.....:	00.00	00.31	2,718.54
31/03/2012	PAGO DE INTERESES			

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,718.23	00.00	00.31	2,718.54

000023

87

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:13:53
Pág. : 1

ESTADO DE CUENTA -- APR/2012

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,718.54
30/04/2012	PAGO DE INTERESES	00.00	00.30	2,718.84

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,718.54	00.00	00.30	2,718.84

000024

878

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:15:58
Pág. : 1

ESTADO DE CUENTA -- MAY/2012

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,718.84
31/05/2012	PAGO DE INTERESES	00.00	00.31	2,719.15

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,718.84	00.00	00.31	2,719.15

000025

87

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:23:23
Pág. : 1

ESTADO DE CUENTA -- JUN/2012

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
	Saldo Anterior.....:			2,719.15
30/06/2012	PAGO DE INTERESES	00.00	00.30	2,719.45

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,719.15	00.00	00.30	2,719.45

000026

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:21:24
Pág. : 1

ESTADO DE CUENTA -- JUL/2012

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS $.

Fecha	Descripción	Débitos	Créditos	Saldo
				2,719.45
	Saldo Anterior.....:	00.00	00.31	2,719.76
31/07/2012	PAGO DE INTERESES			

Saldo Inicial	(-) Débitos 000	(+) Créditos 001	Saldo Final
2,719.45	00.00	00.31	2,719.76

000027

881

CORPORACION G Y T CONTINENTAL
GTC BANK

Fecha/hora : 21/08/12 09:21:27
Pág. : 1

ESTADO DE CUENTA -- AUG/2012

Nombre del contrato:
VILLAMOREY, S.A.
Dirección de correspondencia:
GUATEMALA

Asesor : A24
Núm. Cuenta : 900051264
Producto : CUENTA ESPECIAL COFINSA 2
Moneda : DÓLARES AMERICANOS S.

Fecha	Descripción	Débitos	Créditos	Saldo
				2,719.76
	Saldo Anterior.....:			

Saldo Inicial	(-) Débitos 000	(+) Créditos 000	Saldo Final
2,719.76	00.00	00.00	2,719.76

000028

This is Exhibit "D" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

436

[redacted] SAV.

INVERSION A PLAZO FIJO CORPORATIVA

Intereses al vencimiento: ☐ Intereses mensuales: ☐

Nombre de la cuenta: Villamorey, S.A. Cuenta Especial

Razón social de la empresa: Villamorey, S.A. Cuenta Especial

Dirección de la Empresa: Scotia Plaza, ave. Federico Boyd, No. 48 y calle 51 pisos, 9,10,11 e. Panamá Teléfono: (507) 263-5633

Número de cuenta: 900051264 Fecha de apertura: 06/05/2010

Monto inicial: 4,166,250.00 Plazo de la inversión:

Fecha inicio de la inversión: Fecha vencimiento de la inversión:

Tasa a devengar: 0.10 Manejo de firmas: individual

Dirección entrega correspondencia: Sav. 15-45 zona 10 Centro Empresarial torre I nivel 8

Forma de renovación:

Automática ☐ no renovación automática ☐ incluir intereses ☐ no incluir intereses ☐

Por el mismo plazo ☐ otras instrucciones:

Intereses a ser acreditados a otra cuenta del Banco:

Nombre del Representante Legal:

El Representante Legal acepta que todos los datos anteriores son correctos

Firma

Información de Representante Legal

Nombre completo: Juan Luis Bosch Gutierrez

Dirección domicilio: Lotificación los Encinos, casa 2 Km 6.7 Carr. el Salvador

No. teléfono domicilio: (502) 2333-5602 e-mail: lish@quale.net.

País de residencia: Guatemala No. de Cédula o Pasaporte: A-1 424075.

País donde fue emitido: Guatemala Ocupación: Ejecutivo.

Empresa para la que trabaja: Multi-Inversiones

Posición que ocupa: CO-presidente

Dirección de la empresa: Sav. 15-45 zona 10 Torre I Pent house.

Número de teléfono: 2333-7106

Para uso exclusivo del Banco

Código del oficial: A 11

Firma

Nombre: Alejandra Aviles

Descripción del documento: Traslado 900004999.

900004999

This is Exhibit "E" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

Court File No. CV11906200CL

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 JUAN ARTURO GUTIERREZ

Respondents

This is the CrossExamination of MARGARITA CASTILLO, the Applicant herein, on affidavits sworn the 17th day of January 2011 and the 9th day of September 2011, taken at the offices of Network Reporting & Mediation, One First Canadian Place, Suite 3600, 100 King Street West, Toronto, Ontario, M5X 1E3, on the 17th day of April, 2012.

A P P E A R A N C E S:

Jeffrey S. Leon Jason W.J. Woycheshyn	For the Plaintiff
Peter Manderville Mark Crane	for the Respondents
Also Present:	Juan J. Rodriguez, Esq. Juan Guillermo Gutierrez

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Refusals are found on the following pages:

27, 86, 87, 119, 157, 162 163, 169, 170

*** The list of refusals is provided as a service to counsel and does not purport to be complete or binding upon the parties.

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Upon commencing at 10:04 a.m.

MARGARITA CASTILLO; Sworn.

CROSSEXAMINATION BY MR. MANDERVILLE:

1 Q. Will you state your name for the record, please, ma'am?

A. Margarita Castillo.

2 Q. Ms. Castillo, you're an applicant in a legal proceeding in Ontario Superior Court, court file number CV11906200CL?

A. Yes.

3 Q. And you're the applicant in that proceeding?

A. Yes, I am.

4 Q. In connection with that proceeding, you have sworn three separate affidavits?

A. Yes.

5 Q. Just so you know, it's not really a memory test.

A. No.

6 Q. If you're not sure, I'll refer you to something and... Before we began, your counsel Mr. Leon and I agreed that we would mark the various application records and responding records as exhibits and just refer to the contents by

individual tab number.

Correct, Mr. Leon?

MR. LEON: Yes, subject to I don't think there are any documents here that are in dispute in terms of the authenticity, but why don't we just mark it, and if there are, I'll let you know.

MR. MANDERVILLE: We can raise it at the time.

MR. LEON: I don't mind if we mark your clients' application record, but there are some documents that may be disputed documents, so I just want to make it since this is a crossexamination rather than a discovery, I don't want the suggestion by marking it somehow we've accepted that they're admissible in the proceeding.

MR. MANDERVILLE: I'm content with that. I suspect I'll raise a similar caution when the time comes.

BY MR. MANDERVILLE:

7 Q. Ms. Castillo, I'm showing you Volumes 1 and 2 of your application record.

A. Yes.

8 Q. Mr. Leon, I'd like to make this Exhibit 1, both of them, or one will be Exhibit 1, Volume 2, tab such and such and so on.

MR. LEON: Okay. What are you marking,

Exhibit 11 and 12?

MR. MANDERVILLE: Sure.

MR. LEON: Maybe what makes most sense is to mark her or, sorry, the applicant's motion material or application material with numbers and yours with letters and that way there's no

MR. MANDERVILLE: For the purpose of this examination.

MR. LEON: For the purpose of this examination, yes.

EXHIBIT NO. 11: Application Record, Applicant.

EXHIBIT NO. 12: Application Record Applicant.

BY MR. MANDERVILLE:

Q. Ms. Castillo, I'm showing you a document entitled "Reply Application Record."

A. Yes.

Q. This will be Exhibit 2.

EXHIBIT NO. 2: Reply Application Record.

MR. LEON: Yes.

BY MR. MANDERVILLE:

Q. Ms. Castillo, I'm showing you a document entitled "Second Reply Application Record."

25 A. Yes, I see.

Q. Mr. Leon, this will be Exhibit 3.

MR. LEON: Yes.

EXHIBIT NO. 3: Second Reply Application Record.

BY MR. MANDERVILLE:

Q. Ms. Castillo, I'm showing you a document entitled "Responding Application Record, Volume 1."

A. Okay.

Q. I'm also showing you a document entitled "Responding Application Record, Volume 2."

A. Okay.

Q. We have agreed that these will be marked A1 and A2.

EXHIBIT A1: Responding Application Record, Volume 1.

EXHIBIT A2: Responding Application Record, Volume 2.

MR. LEON: Yes.

BY MR. MANDERVILLE:

Q. Ms. Castillo, I'm showing you a document entitled "Supplemental Application Record."

A. Yes.

Q. Mr. Leon, this will be Exhibit B.

MR. LEON: Yes.

EXHIBIT B: Supplemental Application Record.

MR. LEON: Although technically it should be Supplemental Respondent to Reply Affidavit.

MR. MANDERVILLE: I appreciate you overlooking that.

BY MR. MANDERVILLE:

18 Q. Lastly, Ms. Castillo I'm showing you a document entitled "Affidavit of Juan Guillermo Gutierrez, sworn September 27th, 2011?

A. Yes.

19 Q. Mr. Leon, this will be Exhibit C.

MR. LEON: Yes.

EXHIBIT C: Affidavit Juan Guillermo Gutierrez, Sworn September 27, 2911.

BY MR. MANDERVILLE:

20 Q. Ms. Castillo, you've been sworn today?

A. Yes, I have.

21 Q. What is your date of birth?

A. May 30, 1958.

22 Q. Have you completed your high school education?

A. No, I didn't finish high school.

Q. What is your highest level of education

you completed?

A. I went to the equivalent of Grade 8 and then I went into I did three years of secretarial school.

Q. Okay.

A. Bilingual secretarial school.

Q. Spanish and English?

A. Yes.

Q. Where was the secretarial school? Was that like a community college?

A. No, it was a specific school for secretarial.

Q. This is in Guatemala City?

A. That's correct.

Q. Did you graduate from that program?

A. I did.

Q. And you have three daughters?

A. I do have three daughters.

Q. What are their ages, please?

A. The oldest is 30, the middle one is 27 and the youngest is 22.

Q. I understand that after you completed the secretarial school program you went to work for your father?

25 A. Yes. That wasn't my original plan, but

that's how I did, yes.

32 Q. And according to an affidavit of your father you went to work for him in or about 1977, and I take it at the time you would have been age 18 or 19?

A. Yes, that's correct.

33 Q. And you met your husband, Ricardo, at your father's offices?

A. Yes.

34 Q. And he was a typewriter salesperson for IBM at the time?

A. He was office products salesman for IBM.

35 Q. To your knowledge, what is Ricardo's level, highest level of education?

A. He finished high school and then he went into university in Idaho, Moscow, Idaho. And then

36 Q. Sorry, where?

A. Moscow, Idaho. And then he started law school in Guatemala.

37 Q. Did he obtain a degree in Idaho?

A. I'm not I believe he did.

38 Q. Did he complete law school?

25 A. He was missing out a few classes but

that was about the time that we moved here, so he never went back and finished.

39 Q. And you and Ricardo married in October 1980?

A. Yes, that's correct.

40 Q. And your first daughter, the 30year old was born in November of '81?

A. Yes.

41 Q. And at that point you ceased working outside the home?

A. I still after maternity leave, I still came back to work but I was asking for time to go, and so that's why my father told me that it would probably be better that I go do a very important job that was take care of my daughter.

42 Q. So would it be accurate for me to say that you left the workforce in or about 1982?

A. Yes, that's accurate.

43 Q. At the time of your wedding your father bought you and Ricardo a home in Guatemala City?

A. Yes.

44 Q. We've seen that your father decided to leave Guatemala in 1982; correct?

A. That's correct.

Q. At the time, if my arithmetic is

correct, you were 24 years old?

A. Yes.

46 Q. One child or two grandchildren now?

A. One.

47 Q. At the time your father decided to leave Guatemala, what was Ricardo's source of income at the time?

A. He was working for IBM.

48 Q. When your father elected to leave Guatemala, you decided that you wanted to move with your parents as well?

A. Yeah, he told me the idea and we agreed that it's was a good opportunity, so we decided to do it.

49 Q. I understand that ultimately your father settled in Toronto in 1984?

A. Yes.

50 Q. And you did as well?

A. Yes, I came two months later.

51 Q. From 1982 to 1984, your father at least resided primarily in Miami; is that correct?

A. Yes.

52 Q. Where did you live?

A. We were in Miami, too, but coming back

and forth to Guatemala.

53 Q. Did you have your own place in Miami or did you live with your parents?

A. No, at some point we rented our own apartment.

54 Q. Upon moving to Toronto, your father Arturo gave you and Ricardo a house?

A. Yes.

55 Q. He bought it for you?

A. Yes.

56 Q. He also gave you shares in his business?

A. Yes, he did.

57 Q. And he gave you an income stream from the business?

A. Yes, that's how it was.

58 Q. At some point he also gave you and Ricardo a cottage in the Muskoka area?

A. He helped us buyed it buy it

Reporter Appeals.

A. Yes, he did.

MR. LEON: No, repeat what you said.

THE DEPONENT: Oh, yes, he helped us to buy the cottage in Muskoka.

BY MR. MANDERVILLE:

Q. Did you and Ricardo put up some of the

price of the cottage?

A. Not at that time.

60 Q. And I take it upon moving to Toronto you elected to stay at home and raise your children?

A. Yes, I stayed at home and raised my children, to which I feel very lucky to have been able to do it.

61 Q. And Ricardo was hired by your father to work at your father's business?

A. Yes.

62 Q. Now, we know you became a director of Xela in 2007. I believe it was May. Is that correct?

A. I don't remember the exact date, but yes, that sounds correct.

63 Q. From 1984, when you first arrived in Toronto, until 2007, what involvement did you have in the family business?

A. Before 2007 I was already going sometimes to the board meetings just to listen because I expressed to my father that I would like to learn more about the business.

64 Q. How frequently would you do that?

25 A. I think every board meeting that there

was.

65 Q. So from 1984 to

A. Oh, no, it was more I was elected a director in 2007, so I think, if I remember correctly, maybe 2006 I started going.

66 Q. And prior to 2006 would you go?

A. No. I would go to the office occasionally but...

67 Q. Prior to 2007, how closely would you say you monitored the company's affairs?

A. I did not personally monitor them.

68 Q. How frequently would you ask Ricardo what's going on at the office?

A. Cannot pinpoint how frequent it was because I know that he wanted to whenever he came home from the office, it was family time in his mind, so we didn't talk about business.

69 Q. Would it be fair for me to suggest that from 1984 until 2006 at least, you generally did not concern yourself with what was going on in the business?

A. Oh, no, I was always curious to know how things were going.

70 Q. Who would you ask about it, if not

25 Ricardo?

A. My father.

71 Q. How frequently would that happen?

A. I don't know exactly how frequency. I cannot say exactly how many times or anything like that.

72 Q. And until and I want to divide between, say, before 2006 and afterwards. Until 2006 would you ever ask about the financial status of the business or the financial statements or anything like that?

A. Not that I remember. I know in '96 when there was the estate freeze, I know at that time I learned more.

73 Q. Yes.

A. Mmhmm.

74 Q. Yes, and we'll talk about that.

A. Okay.

75 Q. I want to take a look at your first affidavit which is in Volume 1 of the application record, so Exhibit 11. It's at tab 2.

If you turn to the back of it, page numbered 88, and that's your signature on the back of it?

A. Yes, that's my signature.

76 Q. It indicates that it was sworn on

January 17th, 2011?

A. That's correct, that's what it says.

77 Q. And at the time you swore to Mr. Woycheshyn that everything in the affidavit was true?

A. Yes, I did.

78 Q. The exhibits or the affidavits in the materials that we've marked as letter exhibits, have you read those affidavits?

A. Yes, I did.

79 Q. Affidavits of your father and your brother and Mr. Korol?

A. Yes, I did read them.

80 Q. And Mr. Shields as well?

A. Yes.

81 Q. Mr. Leon, I would like to you get Ms. Castillo Exhibit A2, please, the Responding Application Record, Volume 2.

In particular, Ms. Castillo, I would like you to turn behind tab 2 which is the first affidavit of Juan Arturo Gutierrez, sworn June 17, 2011.

A. Yes.

82 Q. And first off I should caution you some of the paragraphs are misnumbered in this affidavit. There appear to be two paragraphs 2 and

two paragraphs 3.

A. Yes, I see that.

83 Q. So to make sure we know what we're talking about, I'll sort of draw your attention to which I am referring to so you know.

A. Okay.

84 Q. The first paragraph 3 under the heading, "Family History of the Gutierrez Group in Guatemala"

A. That's page 2, yes.

85 Q. Correct. That be a good way to go about it. Have you read that paragraph of your father's affidavit?

A. Yes, I read it.

86 Q. Did you read Exhibit A with his lengthy letter that provides an account of the family history?

A. Yes, I read that letter.

87 Q. And that letter is written in the latter part of 1998 according to your father?

A. Yes. It says yeah, it says the letter, it's not dated, but that's what he says here in the application.

88 Q. Would it be fair for me to suggest that you were not aware of the family history at the

time you swore your initial affidavit?

A. No, I knew the family history.

89 Q. You would agree with me that your father, having written that letter of the family history in 1998, 13 years before your application started, obviously the letter was not prepared with the idea of responding to your application; correct?

A. That's correct.

90 Q. I'd like you to keep your father's affidavit handy because we'll refer back to it.

I'm going to turn to your first affidavit, please. Now, paragraph 6, you indicate:

"In 1989 Ricardo, one of his colleagues and I founded Tropic International Ltd., a separate company from the family business."

Do you see that?

A. Yes, I see that.

91 Q. At the time you swore this first affidavit, were you aware of the history of Tropic that your father recounts in his affidavit?

A. No, I wasn't aware.

92 Q. I take it then you weren't aware of the circumstances behind the startup and the failure of your husband's partnership with Charles Graham?

25 A. I knew that the business didn't go the

way they would wanted it to go.

93 Q. Did you understand at the time you swore your first affidavit, did you understand that your husband did not put up any financing for the Tropic venture?

A. Yes, I understood that.

94 Q. Did you understand at the time you swore your first affidavit that Xela or your father had financed the Tropic venture from the startup?

A. Yes, that's what I knew.

95 Q. Did you understand when the initial Tropic venture with Mr. Graham failed that Xela paid off all the losses arising from the startup?

A. Yes, that's what I was told.

96 Q. And is it your understanding that your husband Ricardo never put up any consideration for the shares he had in Tropic?

A. Yes, the same way I never put anything for anything else that my father gifted us.

97 Q. So, yes, you did understand that?

A. Yes.

98 Q. Mr. Leon, I apologize, but I want to take about four minutes, maybe even three.

MR. LEON: All right.

25 Recess at 10:42 a.m.

BY MR. MANDERVILLE:

99 Q. Ms. Castillo, before we broke, we had taken a look at your father's first affidavit and generally paragraph 3 on page 2 of it.

A. Yes.

MR. LEON: You've referred her to it. I'm not sure she read it.

BY MR. MANDERVILLE:

100 Q. If you want to read through it, by all means.

A. Okay, I'm ready to go.

101 Q. Before you became a director of Xela, I take it you were well aware of the longstanding dispute between your father and Xela, on the one hand, and your father's nephews, your cousins in Guatemala, on the other hand?

A. Yes, I was aware of that dispute.

102 Q. Before you became a director, you were aware that Xela and your father contend that they were owed a considerable amount of money, perhaps in the hundreds of millions of dollars, by your cousins?

A. Yes, that's what I understood from the information that I had.

25 103 Q. And you knew before you became a

director this was a significant dispute, a significant source of discontent with your father and with the company?

A. Yes, I knew that.

104 Q. Would you agree with me that if Xela is owed perhaps hundreds of millions of dollars by the nephews and their companies, it is in the best interests of the corporation to try and obtain it?

A. Yes, I believe it would be in the best interests of the company to resolve that matter.

105 Q. I'd ask you to take a look at paragraph 9 of your father's affidavit, first affidavit. It's at page it begins at page 10.

A. Okay. Could I read it?

106 Q. Oh, absolutely.

A. I have read it.

107 Q. At the time you swore your first affidavit, Ms. Castillo, were you aware of your father's and perhaps your brother's dissatisfaction with Ricardo's performance at the company?

A. Not to this point.

108 Q. Were you aware that it's contended that he would play computer games during board meetings?

A. I wasn't present at those board

meetings, so I would not be able to say if that's

the fact or not.

109 Q. You were not aware that that is the assertion?

A. No.

110 Q. And in the same volume, Exhibit A2, can you turn to tab 4, please. That is the affidavit of your brother Juan Guillermo Gutierrez, sworn June 20th, 2011?

A. Yes, I see that.

111 Q. Turn to paragraph 15 of that affidavit, please. It's at page 8.

A. Paragraph 15?

112 Q. Yes, that's right, and by all means take your time and read it.

A. I have read it.

113 Q. I take it at the time you swore your first affidavit, you were not aware of the facts set out by your brother in paragraph 15 that you've just read?

MR. LEON: Well, you're not asking her, are you, to acknowledge those are facts? You're just saying is she aware of those statements?

MR. MANDERVILLE: Fair enough.

BY MR. MANDERVILLE:

Q. With your counsel's qualification I'll

rephrase. At the time you swore your first affidavit, am I correct that you were not aware of the sorts of statements that your brother sets out in paragraph 15 of his affidavit?

MR. LEON: Well, sorry, I don't want to interrupt. There's a lot of statements there. Can you just maybe explain to the witness she doesn't have to answer "yes" or "no".

BY MR. MANDERVILLE:

115 Q. Sure, I'll okay. Your brother contends at paragraph 15 of his affidavit that Ricardo, your husband, used Xela's corporate credit card to fund a trip with your daughters to the World Cup in 2006, including plane tickets and many of the expenses during their stay in Germany, including restaurant bills.

At the time that you swore your first affidavit, were you aware of that assertion?

A. I'm aware that when he made that trip he would use the corporate card sometimes because of the bigger credit limit, but I am as far as I know, everything was accounted as it was a personal. He never tried to put it as a business expense or anything of the sort.

25 116 Q. To your knowledge, did he reimburse the

company for those expenses?

A. I don't know how he accounted for those expenses but...

117 Q. Fair to say that you don't know if he did or not?

A. No, I don't know.

118 Q. Your brother Juan Guillermo also contends in paragraph 15 of his affidavit that your husband Ricardo used company funds to pay for a New Year's trip to Australia and for his daughter Daniella's school in Australia.

At the time you swore your first affidavit, were you aware of that assertion concerning your husband?

A. I am aware that he used the credit card, the corporate credit card to pay for the initial semester of her schooling due to the fact that, like I said again, there was not enough time to send a wire transfer, so the easiest was to use a credit card in order to assure her placement in the program, and then due to the fact of the larger credit limit we used the card.

119 Q. Again, I take it, you're not aware as to whether or not those funds were reimbursed to

the company?

A. No. Like I said before, I'm not exactly sure how they accounted for those because he wasn't the only one using the corporate credit card for personal uses.

120 Q. Well, no, I understand your response. My question was I take it you're not aware as to whether or not he reimbursed the company for those personal expenses?

A. No, I'm not aware of that.

121 Q. Well, is there anything from preventing Ricardo from increasing the credit limit on his personal cards?

MR. LEON: You are asking her whether she knows whether there was?

THE DEPONENT: Well, I don't know.

BY MR. MANDERVILLE:

122 Q. To your knowledge?

A. No, I don't know why he wouldn't do it or why he didn't do it.

123 Q. Now, you subsequently became a director of the company, and upon becoming a director, if not before, you came to understand that as a director you had certain duties and obligations to the company?

25 A. Yes, that was my understanding.

124 Q. Well, you knew that as a director you were to prefer the company's interests to your own personal interests?

A. In company matters, yes.

125 Q. Correct?

A. Yes.

126 Q. Would you agree with me that if the company was not reimbursed for personal expenses like your daughter's tuition or trips to Australia or Germany, that would not be appropriate?

MR. LEON: Well, don't answer that. That's a question of law.

REFUSAL

BY MR. MANDERVILLE:

127 Q. Based on your experience as a director, Ms. Castillo, would you agree with me that using corporate funds for personal expenses is not something a director should be doing?

MR. LEON: Again, I don't think that's a proper question to the witness.

BY MR. MANDERVILLE:

128 Q. What's the nature of your objection to that question, Mr. Leon? I don't think it's a question of law. I just want to have you clarify.

MR. LEON: Well, either you're relating it

to specific facts or you're asking a theoretical question. Either way there's a problem.

BY MR. MANDERVILLE:

129 Q. During your time as a director of Xela, Ms. Castillo, was it your understanding that you could use corporate funds for personal expenses?

A. No, I did not use any corporate funds.

130 Q. Was it your understanding that that was permitted or not permitted?

A. The way that the company was run, I didn't see anything wrong about doing it. I did not do it personally because I did not have any access to credit cards or anything like that from the corporate.

131 Q. Was it your understanding and your counsel may want me to rephrase, but I'll give it a shot. Was it your understanding that, if corporate funds were used for personal expenses, they were to be reimbursed to the corporation?

A. I don't know how what arrangements were made regarding that, so I cannot answer that question.

132 Q. What was your understanding?

A. No, I told you, I don't know how they

went about it or how they accounted for it in the

company, so I don't know.

133 Q. Do you dispute your father's and brother's assertion in their affidavits that when your husband was confronted with these allegations, he elected to resign from the company?

A. I don't know exactly if he was confronted or when he was confronted, but I know that he was thinking about resigning way before it happened. So I don't see why that would be said that that was the matter.

134 Q. I'm not sure you have answered my question. I know you have given me your answer. My question was do you

MR. LEON: Sorry, go ahead.

BY MR. MANDERVILLE:

135 Q. Do you dispute the assertion by your father and by your brother in their affidavits that when your father confronted your husband over perhaps improper expenses, your husband elected to resign from the company?

MR. LEON: I think she did answer it, but she can answer it again.

THE DEPONENT: Well, like I said, I know from conversations with my husband that he was

25 thinking about resigning because he wasn't happy

there anymore. I don't I don't think he was in I don't know if or when he was confronted about that, if that was the case, which, to my knowledge, it wasn't the case.

BY MR. MANDERVILLE:

136 Q. And your husband has never advised you of this sort of thing?

A. No.

137 Q. Now, have you ever heard of a business called Digalta?

A. Yes, I am aware of that business.

138 Q. At the time you swore your first affidavit, were you aware of the transfer of Digalta to your husband by your father?

A. Yes, I'm aware of that.

139 Q. What is your understanding of why Digalta was transferred to Ricardo?

A. It was actually transferred to a company that we it's not in Ricardo's name. It's in a company in all our names, namely Ricardo, my daughters and me under a trust and it's we actually bought Digalta from Xela at that time.

MR. LEON: Xela is also sometimes pronounced Xela. It's the same word, Xela.

THE DEPONENT: I did the Spanish

pronunciation.

BY MR. MANDERVILLE:

140 Q. Anglophones mispronounce it as Xela.

A. I'll remember to say Xela.

So it was a transaction made like we got but that's our company actually bought Digalta from Xela.

141 Q. In return for what?

A. There is a promissory note that we are going to pay when the time comes.

142 Q. This is the promissory note that matures in 2013?

A. I believe that's the date, yes.

143 Q. When Arturo says he offered Ricardo Digalta in return for the transfer of the Tropic shares to you, do you dispute that?

A. That's what he offer at the time, but it was not exactly like that.

144 Q. What's your understanding of how it was executed?

A. Well, the transfer of Digalta was done previous to he transferred to the shares to my name. It wasn't an exchange one for the other. That's what I meant.

Q. When did the transfer of Digalta take

place?

A. I don't remember the exact date.

146 Q. Can I ask you to turn to paragraphs 10 and 11 of your father's first affidavit, please.

A. Which is page?

147 Q. Sorry, page 11.

A. Page 11.

MR. LEON: Here, let me help you find it.

THE DEPONENT: Yes. And you said paragraph number?

BY MR. MANDERVILLE:

148 Q. Paragraphs 10 through 12 actually. It's on page 11.

A. Can I read it?

149 Q. Yes, absolutely.

MR. WOYCHESHYN: You might want to clarify on the record, Mr. Manderville, that Exhibits A1 and A2, the actual records aren't numbered. So the page references that you are referring the witness to aren't the page numbers of the respective affidavits.

MR. MANDERVILLE: That's correct. Thank you.

THE DEPONENT: Is it 10 to 12?

BY MR. MANDERVILLE:

150 Q. Yes, it is.

A. I have read them.

151 Q. Do you accept the accuracy of what is set out in paragraphs 10 through 12 of your father's affidavit?

MR. LEON: Again, I don't think it's a fair question when there's that much set out there to just ask the broad question as you've asked, particularly since she's already told you her understanding. If you want to ask her specifics, you can.

MR. MANDERVILLE: Well, Mr. Leon, I think your client can answer "yes" or "no" or "I don't know" or "some but not all," can she not, and then we can move on from there?

MR. LEON: Okay. Go ahead and we'll see where we get to.

THE DEPONENT: What was your question?

BY MR. MANDERVILLE:

152 Q. Do you accept the accuracy of what your father has deposed to in paragraphs 10 through 12 of the affidavit we're looking at?

A. No, I don't agree with everything he says here.

Q. Now, two options, I suppose. Are there

things he says here you simply do not know about and then some things you say are inaccurate?

A. I said I didn't agree with the way he puts it here.

154 Q. Paragraph 10 states:

"Margarita asserts in her affidavit that she acquired these Tropic shares from Ricardo in 2008. This is untrue. Margarita did not 'acquire' anything from Ricardo, her husband, because she did not pay anything for the acquisition."

It's accurate that you did not pay for the acquisition; correct?

A. I remembered there being a nominal amount of $1, I guess, for the transfer between husband and wife.

155 Q. Okay.

A. That's probably why I came up with the word "acquire."

156 Q. Okay. He goes on:

"She" meaning you "was the transferee of Ricardo's shares in Tropic at my insistence in order to rectify the original oversight

because those shares in Tropic were

beneficially owned by Xela from the beginning."

Do you accept the accuracy of that?

A. I would put it more that I understood that he wanted them to be in my name, not necessarily that they were Xela owned in the beginning.

157 Q. He goes on to say:

"Noticeably missing from Margarita's affidavit" and this is the first affidavit you swore "is any mention of the Digalta transaction which is covered by the affidavit of Xela's CFO Mark Edward Korol, and which I mention here again."

Do you agree that you don't mention the Digalta transaction in your first affidavit?

A. No, I did not mention the Digalta transaction in my affidavit because I felt it wasn't what the affidavit was about.

158 Q. Paragraph 11 of your father's affidavit says:

"Shortly after Ricardo's departure from Xela, I asked Ricardo to transfer his

shares in Tropic to Xela. Ricardo

refused."

Do you accept the accuracy of that?

A. Yes.

159 Q. "As a compromise, I suggested to Ricardo that he transfer the Tropic shares to his wife Margarita for the benefit of Xela, and in exchange Xela would transfer to him Xela's interest in the Russian real estate venture called Digalta. Ricardo accepted."

Do you accept the accuracy of that statement?

A. Yes, that's what it happened, but I don't think it was exactly in exchange of.

160 Q. How would you put it?

A. Because like I told you, I he didn't get Digalta in exchange of Tropic because Digalta is a different transaction and he's going to repay.

161 Q. "Ricardo then transferred his shares in Tropic to Margarita and he executed general releases in favour of Xela and others for any and all claims relating to Tropic and Fresh Quest."

Do you accept the accuracy of that statement?

A. Yes, as far as I remember, that's what

happened.

162 Q. At paragraph 12, he goes on to say: "With respect to Digalta, it had assets of approximately $900,000, of which approximately $600,000 was held in cash." Do you accept the accuracy of that statement?

A. That I cannot comment because I don't know what the specifics were, the financial situation of Digalta at the time.

163 Q. "Digalta generated approximately $300,000 in yearly net income." Do you accept the accuracy of that statement?

A. It would be the same as my previous statement. I'm not aware of the financial situation of Digalta at the time.

164 Q. Since the transfer of Digalta to your husband Ricardo, is it fair for me to presume that he is obtaining an income stream from Digalta?

A. Yes.

165 Q. Your father goes on to state: "At my direction, Xela transferred its interest in Digalta in exchange for a promissory note of only $400,000 from Ricardo's Cyprus holding company which matures in 2013, and which I believe

will be uncollectible."

Do you accept the accuracy of what is set out there?

A. I don't accept the accuracy of saying that it will be uncollectible. I don't understand why he would make that statement.

166 Q. Take away the "I believe it will be uncollectible." Do you accept the accuracy of the remainder of that sentence?

A. Yes.

167 Q. Goes on to say:

"Digalta was worth much more than the promissory note, but I understood it would create a tax problem (taxable benefit for Ricardo) if we did not stipulate to a number for the transfer."

Do you accept the accuracy of that statement?

A. I am not aware of what were the price, the numbers or anything in that transaction. I'm not aware of what it was.

168 Q. Okay. "I did this because as I had always done in the past I wanted to know that my daughter and her family were well taken care of, and upon Ricardo's departure from Xela I wanted to give

him the opportunity to again make

something of himself and to be a selfsupporting man."

Do you accept the accuracy of that statement?

MR. LEON: How can she say what he thought?

MR. MANDERVILLE: Well, the answer may be, "I don't know."

THE DEPONENT: Yeah, I don't know what he was thinking.

BY MR. MANDERVILLE:

169 Q. Certainly it's true that in the past your father had taken steps to help you financially and to look after you as best he could?

A. Yes.

170 Q. Your father goes on to state:

"By giving him Digalta in Russia with substantial cash in hand, yearly net income of approximately $300,000, I was hoping to ensure his ability to support my daughter and my grandchildren."

Do you accept the accuracy of that statement?

A. I don't like the fact that he says "by giving" because it's a business transaction that will be concluded at the time when the promissory note is finished. So when it says "by giving" I

25 feel that it sounds like he is saying that he just

gave it to Ricardo.

171 Q. Okay.

A. And besides that, it was the company that while he was working in Xela, that's what he was taking care of and it was successful company because of his management.

172 Q. You've used the words "his" a lot?

A. I meant he was the one doing that part of the business.

173 Q. "He" being Ricardo or "he" being Arturo?

A. Ricardo. He was the one travelling. Ricardo was the one travelling to Russia and had the contacts over there.

174 Q. And Digalta is a real estate company in Russia?

A. Yes, I think you can say it's a real estate, yes. It has buildings and rents offices. Rents the buildings to rent the offices.

175 Q. So you take exception to his suggestion that he gave Ricardo Digalta?

A. Yes.

176 Q. Instead you would say the $400,000 that's been promised to be paid next year

25 A. Yes, because it's

MR. LEON: Let him finish his question.

THE DEPONENT: Sorry.

BY MR. MANDERVILLE:

177 Q. You would say that the $400,000 that's been promised to be paid next year would be the consideration for Digalta?

A. That's a transaction that was stipulated at the time, the money that was stipulated, and it's hurtful for me to read that he says that he believes it will be uncollectible.

178 Q. If you turn back to paragraph 9 of your father's affidavit at page 10, please. You see halfway down the page in that paragraph your father makes reference to:

"We also had a venture in Russia involving retail hardware and Ricardo was given that project to oversee. That ended in a dispute with a local partner and a lawsuit filed in Ontario which Xela had to pay to settle."

Is that referring to Digalta?

A. I'm not sure what refers to it, but I don't know if it was related to Digalta or not or it was a separate entity. I don't know that.

Q. During your time as director, did you

become aware of whether or not Xela had any more than a single business venture in Russia?

A. Not that I know of that I can remember.

180 Q. Were you aware of any of Xela's business ventures in Russia?

A. Yes, I was aware of them.

181 Q. Any other than Digalta?

A. Well, at the time of I heard about this other venture that is mentioned here.

182 Q. But you don't know what the name of that one was?

A. Don't remember the name.

183 Q. Now, you said to me earlier this morning that in 2006 you started to attend some directors meetings?

A. I think that's the accurate date, yes.

184 Q. This was while Ricardo was still a director?

A. Yes.

185 Q. And you would both go together?

A. Yes.

186 Q. What was your incentive to start attending directors meetings?

A. I wanted to learn more about the

25 business.

187 Q. Well, why in 2006? What prompted you?

A. I don't know exactly why the date is so significant in that. I cannot pinpoint why it was.

188 Q. No single event spurred you to start attending?

A. Not that I can think of.

189 Q. And I take it the other Xela board members never objected to your attending?

A. That I don't know.

190 Q. Well, did anyone ever say in your presence, "She is not a director. I don't want Margarita to be in attendance"?

A. Not that I can remember them saying that.

191 Q. Were you not, in fact, invited by Arturo to start attending?

A. Yes, that's probably true.

192 Q. You became a director in 2007 and you think it was in or about May; correct?

A. Yes.

193 Q. How frequently did the board meet?

A. Every three months, I believe, because it was about four times a year.

194 Q. And up until February 2010 did you

attend all the meetings?

A. As far as I can remember, yes.

195 Q. And you received $5,000 per month as a director's fee?

A. That's correct.

196 Q. And in addition you also received a monthly draw from the company?

A. Yes.

197 Q. How much would that be?

A. $26,800.

198 Q. Per month?

A. Yes.

199 Q. Typical directors meeting, how long did they last?

A. We go the whole day from 9:30 until 5:00, 5:30.

200 Q. You've stated in your second affidavit that you did not receive a salary in addition to the monthly draw and the director's fee because you did not act in a management capacity?

A. That's correct.

201 Q. In advance of each directors meeting you would receive a package of information?

A. Yes, I would. I would receive it the night before.

25 202 Q. And that information included minutes

of previous meetings?

A. That's correct.

203 Q. And financial details of the companies?

A. Yes.

204 Q. And I understand that you're not on the audit committee of the board?

A. That's correct.

205 Q. That's correct you were not?

A. Yes, I'm sorry, yes, I wasn't on that.

206 Q. It's not your fault. That was an awkwardly phrased question. But the audit committee would present a summary of their deliberations at each board meeting?

A. Yes, I believe some of them.

207 Q. Did you pay attention at the board meetings?

A. I did.

208 Q. Did you read all the materials provided to you?

A. I did.

209 Q. So if my arithmetic is correct, and the board met quarterly and each meeting would be about a full day in duration?

A. Yes, that's correct.

25 210 Q. So as a director about four days a

year

A. That's accurate.

211 Q. in attendance? And you understood that your brother Juan Guillermo was chief executive officer of the company during your time as director?

A. Yes, that's what I knew.

212 Q. Fair to say that he devoted most of his time to running the business?

A. Yes.

213 Q. Do you believe he should be compensated for the time he spends running the business?

A. Yes. Why not?

214 Q. Do you believe his compensation for running the business should be different than yours for being a director?

A. At the time that I was that that was mentioned to me I thought it was it should be like that. I'm never opposed to that or questioned it.

215 Q. So you accept that given that Juan is running the company, it's fair for him to receive a different measure of compensation than a director?

A. Yes. I never questioned that.

Q. Bear with me one second.

MR. LEON: Maybe this could we take the morning break? Is that

MR. MANDERVILLE: Sure, that's fine.

Recess at 11:18 a.m.

Resuming at 11:29 a.m.

BY MR. MANDERVILLE:

217 Q. Ms. Castillo, we were talking about your tenure as a director of Xela. During your time as a director who were the other directors?

A. There was Mr. Bill Dover. No, I'm sorry, no, he was an advisor. Carl Shields.

218 Q. Cal.

A. Oh, Cal. It's just Cal, sorry.

219 Q. Calvin.

A. And then my brother, my father and me.

220 Q. What about Patrick Wilson?

A. I believe he was an advisor, too.

221 Q. You felt he was not a director?

A. I'm not sure exactly, but I always felt that Patrick Wilson and Bill Dover were advisors.

222 Q. And when your father's affidavit material suggests that there was your father, your brother and you, and three others to make up six, do you dispute that?

25 A. Maybe I am mistaken. I don't know

exactly what there was, in what capacity the other two were there.

223 Q. And your brother Juan, he was not on the audit committee, was he?

A. That I don't know because I never I didn't go to any audit committee meetings.

224 Q. Do you know who was on the audit committee?

A. Yeah, I should rephrase that. I believe that on the audit committee was Bill Dover, Cal Shields and my father, but I don't know who else attended, if anybody else attended the meetings.

225 Q. And if I were to tell you that those three were on the audit committee and that Mark Korol, who you know to be the chief financial officer of the company

A. Yes.

226 Q. and your brother, who you know to be the CEO of the company, would attend on invitation the audit committee periodically would that sound correct to you?

A. That sounds about correct.

227 Q. So when you say at paragraph 83 of your

first affidavit that you were the only member of

the board not on the audit committee

A. Yes, I'm sorry, I don't need to look at it. Could you repeat it?

MR. LEON: You should look at it.

THE DEPONENT: I should look at it? 83. Oh.

BY MR. MANDERVILLE:

228 Q. You say, "Between 2007 and April 2010 I was the only Xela director not on the audit committee." Would you agree with me that's not accurate?

A. That's how I understood it at the time.

229 Q. Would you agree with me now that that was not accurate?

A. Well, you just told me that there were two more members, so probably I wasn't taking everybody's name as being a director.

230 Q. So to rephrase, you don't know whether or not Patrick Wilson was on the audit committee?

A. I think he was not.

231 Q. And you don't know whether or not your brother Juan was on the audit committee?

A. I don't know if he would attend the meetings, if you are asking me that. I don't know.

Q. I wasn't asking you that.

A. Well, I wasn't there.

233 Q. I was asking you if you know whether or not your brother Juan was on the audit committee?

A. To my understanding, it was the three gentlemen that I said before.

234 Q. Now, Ms. Castillo, in all three of your affidavits, I think, you take issue with some of Xela's money being used to fund political causes in Guatemala; correct?

A. That's correct.

235 Q. And Mr. Shields have you read Mr. Shields' affidavit?

A. I did read it.

236 Q. He has sworn that the issue of political expenses was discussed regularly at the board and was a "hotly debated topic" I believe was his turn of phrase. Did you read that?

A. Yes, I read that.

237 Q. So you agree with me that the political expenses by Xela was not a secret?

A. No, it was not a secret.

238 Q. It was openly discussed at the board?

A. I would put it more like it was openly talked, not discussed.

Q. Did you ever raise your objections to

any of the political expenses?

A. I did raise my objections to my father privately.

240 Q. But never at a board meeting?

A. No, not at the board level. I could add that sorry, I could add that because of the way I was raised, I was not going to question or oppose my father's views at the board level.

241 Q. Of the six board members, do you recall any others expressing objections to the issue of political expenses?

A. I don't recall that.

242 Q. Do you recall your understanding of what Xela's rationale was for making political expenses?

A. Yes, I could recall that.

243 Q. What is your recollection of why?

A. It was always said that he was for helping the cause of the dispute about Avicola.

244 Q. The dispute with your cousins?

A. That's correct.

245 Q. Would you agree with me that in the debates concerning political expenses the board decided it was in the best interests of the company

to make those expenses?

A. I don't know if I can answer that question exactly like that because I don't remember it being put to vote or a decision, and that really surprised me because my father always told me that politics was something that he would never get involved into, and the fact that we left Guatemala, we should forget about Guatemala.

So I could not understand, and I raised that to him why and at the time I said we, because I considered myself part of Xela, why we were getting involved in something that he mentioned to me several times that he considered not a good way to go.

246 Q. But you understood that the hope was that with the purchase of political influence, it might assist in recovering the monies owed by the cousins; correct?

A. That was how they how Juan put it at the time at the board. I don't know if I could say I agree or not agree because I didn't see the point of doing that.

247 Q. You had no reason to disbelieve what Juan said?

A. I did not agree with it but I didn't disbelieve at the moment. I don't think it was

25 necessary or accurate, that account.

248 Q. You were concerned it might be throwing good money after bad?

A. Could you rephrase that? I don't understand.

249 Q. You were concerned that it might be throwing good money, the political expenses, after bad in an effort to recover a debt you might not be able to recover?

A. That's probably not the way I would have put it. I just felt

250 Q. How would you have put it?

A. Sorry, you interrupted me.

251 Q. I apologize.

A. I probably thought that it's not exactly the way you said it. Like I was saying, it was more that it was an expense that I didn't see it being beneficial the way it was explained. Because, first of all, we were already a number of years out of Guatemala. So you know how things are, out of sight out of mind. So not everybody was concerned about what either my father or my brother were doing. That's how I saw it.

252 Q. Similarly, in your affidavits you voice concern of legal expenses Xela was incurring in

their pursuit of the nephews or cousins?

A. Yes.

253 Q. You understood that the company or its subsidiary Lisa obtained a judgment in Bermuda?

A. Yes.

254 Q. Against companies controlled by your cousins?

A. That's what it was explained to me when the case came.

255 Q. You understood that the court in Bermuda found that Lisa had been defrauded by companies controlled by your cousin?

A. In that particular case, yes, that's what I understand.

256 Q. You were pleased with the result from the Bermuda court?

A. Yes, I was pleased. It was a good thing for Xela.

257 Q. So at the time that Bermuda decision came out, and you've heard about it, you understood that your cousins had been defrauding your father's businesses?

A. That's what I was told and that's how it was explained to me.

258 Q. And you believed it?

25 A. In that respect, yes, I believed it.

259 Q. Do you have any reason to question your father's assertion that he believes he's owed many, many millions of dollars by your cousins?

A. I never said that I didn't believe what he thinks in that respect.

260 Q. In your view, is that the case, that your father is owed many, many millions of dollars by your cousins?

A. I don't know anything about the financial situation of the companies or the financial aspect of that transaction, so I don't I don't know. I'm not going to say how much it is but yes, I believe it's quite a significant amount.

261 Q. And I think you told me before that you believe it's in Xela's best interests to try and take steps to collect that?

A. Yes.

262 Q. Ms. Castillo, in your first affidavit you make assertions as to the state of your father's health. You suggest it's deteriorating. Do you have any evidence at all to substantiate that?

A. I went I took him to a hospital more than one time, so I know his health is not of a

young man.

263 Q. For what purpose?

A. A stent, a blockage in one of the arteries.

264 Q. All right. Is that it?

A. Well, that's the two times that I went with him to the hospital. More than I'm sorry, it's more than two times. I actually flew with him on an air ambulance to the Cleveland Clinic in Cleveland, Ohio once. I also flew down to Florida where they were during the winter for a specific test. Don't recall exactly what time. And the last time was when they called me to here in Toronto, they called me if I could drive them to Sunnybrook Hospital because he was having chest problem, chest pain.

265 Q. There was concern about your father's heart?

A. Well, I don't know his medical history, but I know he has got cholesterol problems and he gets blockage in his arteries.

266 Q. And he had heart surgery in the past?

A. He had a triple bypass in 1992, to which I also went and accompanied him at the hospital in Detroit.

25 267 Q. What was the purpose of the trip to

Cleveland?

A. He was the way I understood at the time, he's been to the Cleveland Clinic on other occasions and he wasn't feeling well. So instead of going here to the hospital, he decided to go back there where he already had a doctor.

268 Q. Do you understand the nature of his ailment?

A. I don't have any medical knowledge, so I don't understand exactly what it is.

269 Q. And you say, you swear that your father's mental health has deteriorated in recent years. Do you have any evidence at all to substantiate that?

A. I believe I meant by forgetfulness which that comes with age, and I didn't mean this as any insult or anything. It's just a fact of life.

270 Q. Anything other than forgetfulness?

A. I don't understand.

271 Q. I thought you were going to say you can't remember.

A. No, I don't understand exactly what you mean by that.

25 272 Q. Well, you say your father's health has

deteriorated in recent years and you've told me that you believe he is as he ages subject to forgetfulness on occasion; correct?

A. I'd say that he suffers with forgetting.

273 Q. Is there anything else?

A. I don't know exactly what's your question there because I have no medical knowledge, so I would not be able to tell you.

MR. LEON: Why don't you read the statement. He wants to know whether there is anything else behind why you said what's the paragraph?

BY MR. MANDERVILLE:

274 Q. Paragraph 3.

A. Sorry, what page was it?

275 Q. 49.

A. 49.

276 Q. At the top right.

A. At the top.

277 Q. There's paragraph 3.

A. Okay, I read the paragraph.

278 Q. And you've told me on the subject of the deterioration of his mental health that as he

25 ages, he is subject to forgetfulness on occasion?

A. Yes, that's what I said.

279 Q. Is there any other indication of how you say his mental health is deteriorating?

A. Well, I would say mental health was too broad. It's more like forgetfulness, like I said.

280 Q. When you say here, "My father's physical and mental health has deteriorated in recent years" and this is in January of 2011 when you swore his affidavit how do you say his physical health has deteriorated in recent years?

A. Well, by the fact that he has had those problems with arteries being blocked by cholesterol.

281 Q. The bypass, you mean?

A. After the bypass he had other problems. As far as I remember, when I went with him to Sunnybrook Hospital I was present when the doctor was there and by that time he already had about seven stents on different arteries.

282 Q. For cholesterol issues?

A. That's what I understand, yes.

283 Q. Is it fair for me to say that your father, to your knowledge, has not lost any of his intelligence over the years?

25 A. Not to my knowledge. That's fair to

say. I didn't question his intelligence in any way.

284 Q. One figure, one person who figures in these affidavits somewhat prominently is a fellow named Roberto Barillas. He is your nephew; correct?

A. Yes, he is my nephew by marriage.

285 Q. Is it Ricardo's one of Ricardo's siblings' sons?

A. Yes, his sister's son.

286 Q. How old is Mr. Barillas?

A. I have to do the math. He's 45 now.

287 Q. And he had led you to believe that he was an accountant?

A. I know he is an accountant.

288 Q. If you have read the affidavit material filed by my clients, you'll see that the Institute relevant Institute in Guatemala indicates that he has never completed his accounting program?

MR. LEON: Well, there's no evidence from that institute no admissible evidence from that institute or record on this application.

So you can ask the question a different way,

but I don't think it's fair to put it that way.

BY MR. MANDERVILLE:

289 Q. So can I anticipate that you would take the position that we don't accept the validity of that particular exhibit?

MR. LEON: Well, you can take that on any of the hearsay evidence that's in these affidavits from different sources. This is an application and it's evidence in dispute.

MR. MANDERVILLE: Okay. Just wanted to have your position on it. That's all.

MR. LEON: Yes.

MR. MANDERVILLE: We're certainly not going to argue it today.

MR. LEON: I'm not trying to preclude you asking her what her

MR. MANDERVILLE: No, I understand that.

MR. LEON: understanding is on that.

MR. MANDERVILLE: No, you are just letting me know ahead of time that we may be squabbling over that, and I accept that and appreciate the warning, the advance warning.

BY MR. MANDERVILLE:

290 Q. Ms. Castillo, I would ask you to pull up the Responding Application Record, Volume 1,

which is Exhibit A1. It contains Mr. Korol's

first affidavit.

MR. LEON: Yes. Is there a clean copy?

MR. WOYCHESHYN: Here.

BY MR. MANDERVILLE:

291 Q. If you could turn to Exhibit A of that volume, please.

A. Yes.

292 Q. Exhibit A contains a few documents. First is a document entitled "Certificate of Accuracy" from the State of Florida.

A. Yes.

293 Q. And the second page is a translation, I presume, of the Association of Economists, Public Accountants and Auditors and Business Managers from Guatemala, I note addressed to Attorney Jose Luis Farfan Mancilla. Do you see that?

A. Yes, that's what it says.

294 Q. And I appreciate your counsel does not accept the relevance or the admissibility of this document, but do you agree with me the document says that in the second paragraph:

"Mr. Roberto Barillas Castillo is not registered in the registration book in this Professional Association," which

25 includes that of public accountants?

A. That's what it says, that he's not registered. But that doesn't mean that he is not an accountant.

295 Q. I understand that.

MR. LEON: Wait for his question.

THE DEPONENT: Oh.

BY MR. MANDERVILLE:

296 Q. On the next page within that exhibit there's a document, onepage document headed "Guatemala Association of Public Accountants and Auditors"?

A. Yes, I see that.

297 Q. Again, this is an English translation. It states:

"According to the letter we received, January 24th, 2011, requesting that we inform if Mr. Roberto Barillas Castillo is registered in this Professional Association as a Public Accountant and Auditor, we wish to advise you that the abovedescribed person is not registered in this professional association. Therefore, such person is not a member of the

Accountants and Auditors."

MR. WOYCHESHYN: "This Guatemalan."

MR. MANDERVILLE: Correct.

MR. LEON: That's what the

BY MR. MANDERVILLE:

298 Q. See that's what the document says?

A. Yes, that's what the document says.

299 Q. And the next document, it's again a onepage document with the heading "Association of Economists, Public Accountants and Auditors and Business Managers, Guatemala, January 27th, 2011"?

A. Yes.

MR. LEON: That's a translation.

MR. MANDERVILLE: Yes.

MR. LEON: Well, my Spanish isn't that good. The original documents are behind there.

MR. MANDERVILLE: I suspect your Spanish is significantly better than mine.

BY MR. MANDERVILLE:

300 Q. Well, Ms. Castillo, could you read the first Spanish page, "Colegio De Contadores Publicos..."

MR. LEON: Yes, I'm not disputing

MR. MANDERVILLE: Okay.

25 MR. LEON: that they're accurate

translations of what's said.

BY MR. MANDERVILLE:

301 Q. So, Ms. Castillo, you'd agree that according to these documents Mr. Barillas is not registered as a public accountant and auditor in Guatemala?

A. According to those documents, that's what it says, yes.

MR. LEON: Again, without accepting admissibility, I think it's easier just to allow her to answer and then we can deal with

MR. MANDERVILLE: I accept your counsel's caveat.

BY MR. MANDERVILLE:

302 Q. Am I to presume that you disagree with what those documents say?

A. I don't disagree or agree because I don't know the nature of those documents.

303 Q. It's your belief that Mr. Barillas is qualified as an accountant?

A. I don't know if I would say that because I know him as personal on a personal basis and I know he has graduated as an auditor and accountant.

25 304 Q. Well, do you know whether or not he is

a chartered accountant?

A. I don't know. I don't know the difference between one and the other.

305 Q. And you understood that Mr. Barillas is one of the principals of a company called BPA?

A. Yes, I know that.

306 Q. And you knew that he provided auditing services to Xela?

A. Yes, I know that.

307 Q. There's also mention in these affidavits of an individual named Jorge Porras?

A. Yes, he was mentioned in the respondent's affidavit.

308 Q. Were you familiar with Mr. Porras?

A. Yes, I know him.

MR. LEON: Just so that it's clear, again that's there's no direct evidence from Mr. Porras, and we don't accept the admissibility of the hearsay evidence that you've put forward.

BY MR. MANDERVILLE:

309 Q. You understand that Mr. Porras was or is a lawyer who was with BPA?

A. Yes.

310 Q. And you understand that he provided

corporate solicitor services for Xela in Guatemala?

A. I understood that was the case while BPA was working with Xela in Guatemala.

311 Q. According to you, when did Xela's relationship with BPA end?

A. I don't remember the exact date, but it was somewhere in 2009.

312 Q. Did you ever retain Mr. Porras personally?

A. Yes, I did.

313 Q. When?

A. In 2010.

314 Q. What did you ask him to do for you?

A. He helped me get a power of attorney.

315 Q. Is this the power of attorney dated in April 2010?

A. That's it.

316 Q. That power of attorney in favour of Mr. Barillas?

A. That's correct.

317 Q. Did Mr. Porras perform any other legal services for you personally?

I'm being very careful not to ask what advice you sought and obtained.

MR. LEON: No, I'm not sure the scope of

25 the privilege is limited to that. I'm not sure you

can ask her what he did or didn't do for her because that's privileged but and at least under our law.

BY MR. MANDERVILLE:

318 Q. Did you retain Mr. Porras to carry out any other or perform any other legal services other than the power of attorney we were just speaking of?

A. As far as I remember, I asked him for advice on another matter previously.

319 Q. A matter related to this application?

A. No, it doesn't have anything to do with the application.

320 Q. Did you retain Mr. Porras personally on any other occasions? You've told me about two.

A. Yes, not that I can remember.

321 Q. Before we continue, Mr. Leon, I'm going to ask your client some questions about leaving your offices in December 2009, and I guess I'm going to give you an opportunity to decide whether or not you want to invoke any sort of a common interest privilege over what transpired in the meeting because I am going to be asking for notes of those present if it wasn't a privileged

occasion.

MR. LEON: Well, you go ahead and ask your questions and we'll deal with them as they come along. I mean, it is our position that it was at least in part a privileged occasion, but I don't want to restrict you off the top.

BY MR. MANDERVILLE:

322 Q. Ms. Castillo, I'd ask you to refer to the second Reply Application Record. It's Exhibit 3. This contains your third affidavit sworn September 9, 2011.

A. Yes.

323 Q. I think this is my first time referring directly to this affidavit. Can you turn to page 14 of the document. That's your signature on the document?

A. That's my signature.

324 Q. And you swore the contents of this affidavit were true?

A. Yes.

325 Q. Beginning at paragraph 27 of this affidavit, you speak about events of December 2009, and you speak of a meeting that took place at Bennett Jones' offices in December 2009?

A. Yes, I'm responding to what they said,

so that's what it is.

326 Q. I'd ask you also to turn to my client's Supplemental Application Record which is Exhibit B. If you turn to tab 3 of that document, which should be the supplemental of Juan Guillermo Gutierrez?

MR. LEON: Yes, we have it.

BY MR. MANDERVILLE:

327 Q. Beginning at page 4 of that affidavit, your brother speaks of a conversation with Mr. Porras?

A. Yes, that's what it says there.

328 Q. I guess I would like you to read paragraphs 10 and 11.

MR. LEON: This is the evidence that we say is not admissible as it is hearsay, so but he wants you to read it, so read it.

THE DEPONENT: Okay.

MR. LEON: It says "we." It doesn't identify who "we" is. But if you're telling me that Juan Guillermo

BY MR. MANDERVILLE:

329 Q. You mean in the beginning of paragraph 11?

MR. LEON: Yes.

MR. MANDERVILLE: Oh, I okay.

25 MR. LEON: Was a part of that, then the

witness can consider that.

BY MR. MANDERVILLE:

330 Q. Mr. Leon, while your client is reading, I take it that you would be feeling similarly constrained with Mr. Barillas' evidence that is referred to in your client's affidavits?

MR. LEON: Well, I would rather deal with it on a questionbyquestion basis. I mean, she has you have what she said about it. So there are some Mr. Barillas is not a lawyer, so we're not talking about solicitorclient privilege. As the witness' affidavit said, she had a concern about the conduct that Mr. Barillas brought to her attention. So I'm not going to stop you from asking about that.

I mean, I think it's obvious. I don't want to interfere, but you've invited me to say something that Ms. Castillo did not authorize Mr. Porras to have the discussions that he had with whoever "we" is.

MR. MANDERVILLE: Well, my invitation to claim accommodant (phonet.) was privilege, if you wished to avail yourself of that, would go beyond Mr. Porras.

MR. LEON: With regard to Mr. Barillas,

there was no action where both of them were defendants at the time these conversations took place. I'm not suggesting that they were they were on the basis of an existing or contemplated proceeding where they had a common interest.

BY MR. MANDERVILLE:

331 Q. What of Ms. Kay?

MR. LEON: In terms of again, there was no common interest with Ms. Kay at all at that time. Whether there is now is probably irrelevant.

BY MR. MANDERVILLE:

332 Q. Ms. Castillo, have you read

A. Yes, I have read it.

333 Q. Now, you see at paragraph 10 of your brother's affidavit, he notes that there is a typo in the first sentence. It's May 27, 2011. He was called to a meeting with Mr. Porras in Guatemala?

A. That's what it says there.

334 Q. You've told me earlier that you understood that Porras was with Mr. Barillas in BPA and had been Xela's corporate counsel in Guatemala?

A. Yes, that's accurate.

335 Q. Towards the end of that paragraph, your brother says that:

"Porras announced to us at this meeting

that he had separated himself from Barillas because, 'He didn't agree with the things he had done,' and wanted to continue being our lawyer.'"

I take it that you don't know anything about that?

A. Well, I know he left BPA, but I don't know under what circumstances or anything else.

336 Q. To your understanding, when did Mr. Porras leave BPA?

A. I don't know the date.

337 Q. Do you know the year?

A. Not 2011 sounds accurate.

338 Q. Your brother in his affidavit goes on to describe some information received at meetings held with Mr. Porras in paragraph 11?

A. Yes, that's what he does.

339 Q. In subparagraph (a) of paragraph 11, it would appear that Mr. Porras has advised your brother of meetings at Bennett Jones' offices, which you agreed did occur in December 2009?

A. Yes, they occurred.

340 Q. Present at the meetings were Mr. Leon and Mr. Woycheshyn and yourself and your husband

and Mr. Barillas and Katherine Kay of the Stikeman

Elliott firm?

A. Yes.

MR. LEON: I should tell you, and you can Katherine Kay was there for only a short period of time, if that assists in your questioning.

MR. MANDERVILLE: It might.

BY MR. MANDERVILLE:

341 Q. And according to your brother's affidavit, he's informed by Mr. Porras that the purpose of the meeting at Bennett Jones' offices in December or meetings, plural, at Bennett Jones' offices in December 2009 was to plan the oppression lawsuit that you filed?

A. That was not the case.

342 Q. You say that is inaccurate?

A. That was as as far as I remember, that was not the purpose of the meeting.

343 Q. He goes on to state that:

"During the meetings, the lawyers at Bennett Jones and Katherine Kay were informed of the 'financial aid' which would be provided to the Castillos by my cousins" this is your brother

25 speaking of your respective cousins "in

Guatemala." is that accurate?

A. I don't even recall that ever being discussed in those meetings.

344 Q. So financial aid from your cousins for this application was discussed subsequently?

A. I have not received any financial aid from them.

345 Q. Zero?

A. That's accurate. I have not received any money from them.

346 Q. It goes on to state that:

"Katherine Kay was present, according to Porras, because her clients had also funded my brother" who is also your brother "Luis Arturo Gutierrez in suits bought by him against Xela and my father several years ago."

Is that accurate?

MR. LEON: That she was president or sorry, that she was present for the rest of it? I think you have to break that down.

BY MR. MANDERVILLE:

347 Q. Well, you've told me Katherine Kay was present?

25 A. Yes, but I don't know what capacity was

she there.

348 Q. Do you know now that she is the lawyer in Canada for your cousins?

A. Yes, I'm aware of that now.

349 Q. Well, that sentence states:

"She was present, according to Porras, because her clients had also funded my brother, Luis Arturo Gutierrez, in suits brought by him against Xela and my father several years ago."

Is that accurate to your knowledge?

A. I'm not aware of who was my brother's lawyer at the time.

350 Q. Sub (b) of paragraph 11:

"Porras indicated that my cousins paid Margarita $2.5 million to induce her to bring the oppression case and to cover her attorney's fees for same."

Is that accurate?

A. That's not accurate because nobody has paid me anything.

351 Q. Goes on to state:

"The transaction was framed as a backtoback loan to Margarita whereby

she would borrow up to $2.5 million

from GTC Bank in Panama against a financial instrument which Porras indicated was a certificate of deposit posted by my cousins as collateral."

Is that statement accurate?

A. I know I have a line of credit with the GT Bank in Guatemala, but I don't know what's and it's being backed up by my fiduciary. It's a fiduciary loan but out of my net worth. That's how I understand it is.

352 Q. Is it a bank in Guatemala or a bank in Panama?

A. It's a Guatemalan bank with since Panama it's probably a subsidiary from a Panamanian bank. I'm not sure exactly how that works.

353 Q. Was there any certificate of deposit posted by your cousins as collateral?

A. No, I don't think so. I don't think that's accurate.

354 Q. Well, do you know it's not accurate or do you just think?

A. I don't know. I don't know it's accurate but as far I know it's a fiduciary loan but go by my net worth.

25 355 Q. Who is the fiduciary?

A. It's my net worth.

356 Q. So

A. That's what it means; right?

357 Q. So your evidence today here that it's straight, "Here's my net worth. Would you please loan me $2.5 million," and the only collateral is your own net worth?

A. That's how I know it is.

358 Q. And your evidence today is that your cousins have had nothing to do with this loan?

A. I don't know if they had anything to do with it.

359 Q. Goes on to state:

"The vehicle for the loan was a Panamanian corporation called Hellenic Commercial Group, and through this corporation Barillas was also paid $1.5 million to bring the false criminal case against me" meaning your brother "in Guatemala relating to Boucheron."

Is that statement accurate to your knowledge?

A. I don't know anything about that.

360 Q. Was the vehicle for your loan a Panamanian corporation called Hellenic Commercial

25 Group to your knowledge?

A. No, I already told you how I went about getting the loan.

361 Q. So you are disagreeing with the statement that the vehicle for the loan was a Panamanian corporation called Hellenic Commercial Group.

MR. LEON: No, sorry all right, go ahead.

THE DEPONENT: I would disagree because I don't know anything about this corporation or this group or anything of that, and as far as I understand, I fill out all the forms that the bank require and they gave me the loan.

BY MR. MANDERVILLE:

362 Q. Goes on to state:

"Margarita signed a power of attorney appointing Roberto Barillas Castillo as attorneyinfact for purposes of executing the loan documentation in Guatemala"?

A. Yes.

363 Q. That's true; correct?

A. That's accurate. Yes, that's true.

364 Q. "Porras notarized the document in Miami

on April 23, 2010." That's accurate?

A. Yes.

365 Q. "The GTC Bank of Panama has a. representative office in Guatemala at G.T. Continental Bank"?

A. Yes, that's accurate. That's how I know it's in Guatemala.

366 Q. Sub (c): "With respect to the Boucheron case" and we'll talk some more about that in a little bit "Porras stated that Barillas has never been the shareholder, as he now claims, and that the intellectual author of the case was Juan Luis Aguilar" I'm sure I mispronounced that the lead litigation counsel for my cousins in Guatemala."

Do you know anything about that?

A. No, I don't know anything about that.

367 Q. Do you know whether or not Barillas Mr. Barillas is a shareholder of Boucheron?

A. I don't know what his capacity is with Boucheron.

368 Q. Sub (b), he goes on to state that: "Margarita and Ricardo first met with

my cousins' Guatemalan counsel in order

to plan their various actions in Canada and Guatemala in February, 2010 at the InterContinental Hotel in Guatemala City." Is that accurate?

A. I never met with my cousins' counsel.

369 Q. At any time?

A. No.

370 Q. Goes on to state:

"There was a subsequent meeting in Guatemala in March 2010 at the Unicentro Building in the offices of Pepsi."

Is that accurate?

A. If you mean meeting with my cousins, yes, that's accurate.

371 Q. In March 2010?

A. Yes.

372 Q. What was the purpose of that meeting?

A. We were getting reacquainted and just to talk about general things.

373 Q. What specific things did you talk about?

A. I cannot recall exactly what was talked about.

374 Q. Did you talk about the possible

25 commencement of this lawsuit?

A. I don't recall if I did or not.

375 Q. Did you talk about financial assistance from your cousins for this lawsuit?

A. No, I didn't.

376 Q. How come you can remember that?

A. Because I know that I never asked them for money or any financial.

377 Q. I take it this was a prearranged meeting with your cousins?

A. We were in Guatemala visiting my motherinlaw, and I understand that's we were there, so that's why it was arranged.

378 Q. I take it it wasn't a spontaneous decision on you and your husband's part, "Let's go to Pepsi." It was a prearranged meeting; correct?

A. Oh, to meet in that specific place?

379 Q. Yes. Did your cousins tell you about why they wanted to meet with you or what did you tell them about why you wanted to meet with them?

A. I don't remember the specifics on that. You have to remember that I grew up with them, so there was as soon as we establish a connection again, the connection was still there.

380 Q. In Juan Arturo's or Juan Guillermo's

last affidavit he deposes to the fact that your

cousins are suing you, among others, in a number of lawsuits down in Guatemala; correct?

A. Yes, my name is included in the main lawsuit because in some of the changes my name was included there.

381 Q. They've named you as a defendant in actions claiming improper behaviour by the company and your father and your brother and you?

A. I'm not sure exactly how many or what is the premise of them.

382 Q. And I understand you encountered one of your cousins at a music concert, Christmas, New Year's, 2008, in around there?

A. Yes.

383 Q. That was a chance encounter, I understand?

A. Completely by chance.

384 Q. Prior to that time, when was the last time you had been in contact with one of your cousins?

A. I cannot remember a date but it's probably before the before the Avicola lawsuit started.

385 Q. So in the mid1990s perhaps?

25 A. That's accurate.

386 Q. So a gap of 12, 13 years
A. Yeah, probably.
387 Q. approximately? And at the time you're meeting with your cousins in March 2010, you do understand that you're still a director of Xela?
A. Yes, I was still a director.
388 Q. And you understand that Xela contends that these are the cousins who defrauded it of many millions of dollars?
A. Yes, I understand that's the case.
389 Q. You understood at the time that there was a court in Bermuda that had found as fact that your cousins had defrauded Xela and your father of millions of dollars?
A. Yes, I understand that.
390 Q. And it's your evidence today that you can't recall what this meeting was about?
A. I don't recall exactly what was talked about, yes.
391 Q. How long did the meeting last?
A. Half an hour, 45 minutes. I'm not sure.
392 Q. And your husband Ricardo was there as well?

25 A. Yes.

393 Q. And was Mr. Barillas there as well?

A. Yes, he was with us.

394 Q. And was anyone else from your side, for want of a better term, there?

MR. LEON: Yes, I don't accept that

MR. MANDERVILLE: No, I appreciate that.

BY MR. MANDERVILLE:

395 Q. Who else was at the meeting?

MR. LEON: You can ask her who was there and what she remembers about it.

BY MR. MANDERVILLE:

396 Q. Who else was at the meeting?

A. Three of my cousins.

397 Q. Which ones?

A. Or two of them. I'm not you see, I remember exactly was Juan Jose Gutierrez and Felipe Bosch. I don't remember if anybody else.

398 Q. Did you take any notes at the meeting?

A. No, I did not.

399 Q. Did your husband take any notes at the meeting?

A. No, he didn't.

400 Q. Did Mr. Barillas take any notes at the meeting?

25 A. Nobody took notes at the meeting.

401 Q. You remember that?

A. No, I don't think we were taking notes because it was an informal meeting.

402 Q. Were there lawyers from the cousins on the cousins' behalf there?

A. I don't remember if there there was someone else but it wasn't in the capacity of being a lawyer. I don't remember who it was. I am not good with names.

403 Q. With respect to the loan you obtained from the Panamanian bank, did you sign a loan application?

A. Yes, I did.

404 Q. Did you provide financial net worth statements for that?

A. Yes, I did.

405 Q. I'd like to have those produced, Mr. Leon.

MR. LEON: Well, we are going to refuse.

REFUSAL

BY MR. MANDERVILLE:

406 Q. On what basis, please?

MR. LEON: Relevancy.

MR. MANDERVILLE: Well, your client has

deposed, in particular in her third affidavit, that

she's experiencing financial hardship. Her financial net worth statements might verify that or not. They're relevant given what she's deposed to.

MR. LEON: Well, we can deal with that at some point. That's my position.

BY MR. MANDERVILLE:

407 Q. I'd also like a copy of the loan application, please.

MR. LEON: Same answer. That, in particular, I don't see the relevance. Ordinarily how one pays for to fund a lawsuit is not relevant in the context of that lawsuit.

I've let you ask about this because you are attempting to make it relevant in the material that was filed by your clients to an extent, but I don't think it goes into the details of her how she is obtaining money to pay for this very lawsuit.

REFUSAL

BY MR. MANDERVILLE:

408 Q. Ms. Castillo, why would you go to a Guatemalan bank for a loan for an Ontario lawsuit when you could go down the street to Bank of Nova Scotia?

A. That was a decision that we made with

my husband to go to a Guatemalan bank.

409 Q. Do you have assets in Guatemala? I believe your assets are in Ontario, are they not?

A. Yes, they are.

410 Q. Do you have assets in Guatemala?

A. No, I don't have any assets in Guatemala.

411 Q. Do you have assets in Panama?

A. No, I don't have any.

412 Q. Turn to paragraph 38 of your affidavit, please, your third affidavit.

A. The third one?

413 Q. Yes. Page 12.

A. Yes, what paragraph you said?

414 Q. Page 12, paragraph 38.

A. I have read it.

415 Q. You'll see what you've sworn to there, that you are not in a financial position to personally pay the professional fees necessary to pursue a legal action.

"I asked my cousins in Guatemala if they could assist in arranging financing. They did so by arranging for me to obtain a line of credit to finance my application."

Do you see that?

A. I see that.

416 Q. And you've sworn that that is true?

A. The wording probably is not exactly how I would put it that moment right now. The way I understand it is not arranging by it but just pointing us in the right direction, I would say.

417 Q. So you've sworn that it's true that you asked your cousins in Guatemala if they could assist in arranging financing for you; correct?

A. That would be correct, yes.

418 Q. Well, you've sworn to it. It is correct?

A. Yes, it is correct but it's not that they gave me the financial. They pointed me in the right direction

419 Q. You go on to swear that it's true that they, your cousins, did so by arranging for you to obtain a line of credit to finance this application; correct?

A. That's what it says in my affidavit.

420 Q. That's true, isn't it? You swore that it is.

A. Yes, but "arrange" is probably a very broad word there.

25 421 Q. Did they arrange for you to obtain a

line of credit to finance the application or not?

A. I don't know if they had anything to do with it or not.

422 Q. So when you swore, "They did so by arranging for me to obtain a line of credit to finance my application," you swore that without regard to whether or not it was true?

A. No, that's probably what I understood at the moment, but I don't know exactly to what point you're thinking that this the arrangements were because

423 Q. Now, you swore that this was true

MR. LEON: I'm sorry, she hadn't finished.

MR. MANDERVILLE: Sorry. My apologies.

THE DEPONENT: Because like I said I went to the way the bank does it. I fill out an application, I presented my papers and they approve.

BY MR. MANDERVILLE:

424 Q. Now, you swore this affidavit on September 9, 2011, and the financing was put in place sometime in 2010; correct?

A. Yes.

425 Q. Are you now saying when you swore in

September 2011, "My cousins did so by arranging for

me to obtain a line of credit to finance my application," that that is inaccurate?

A. No, I'm just saying that the word "arranging" probably is not the right word that I should have used that day when I swore this affidavit. It's more like they pointed me in the right direction, if you can say it like that, saying what bank.

426 Q. I have a handful more questions and then we'll break, if that's okay with you.

MR. LEON: Are you okay to keep going a bit?

THE DEPONENT: I'm fine, yes.

BY MR. MANDERVILLE:

427 Q. Turn to paragraph 34 of that same affidavit of yours, please, at page 11.

A. I'm going to read it.

428 Q. All right. No, please do. I want you to.

A. I finished reading it.

429 Q. You've sworn there that during this meeting at Bennett Jones' offices on December 10th, 2009, that Ms. Kay, Katherine Kay of Stikemans indicated that she was not in a position to act for

Roberto or Jorge. She also indicated that she had

been retained by your cousins in Guatemala?

A. Yes, that's what she told us at that moment.

430 Q. So in December 2009, more than a year before you start this application, Ms. Kay is attending a meeting and telling you she has been retained by the cousins to act on their behalf?

A. Yes, that's accurate.

431 Q. You go on to do swear:

"My cousins understood that I was becoming frustrated with Xela and were willing to be supportive of my attempts to resolve my concerns whether through litigation or otherwise"?

A. Yes, that's what it says in my affidavit.

432 Q. And that's true?

A. Yes.

433 Q. So, Ms. Castillo, if I understand correctly, you're swearing that you've been told by your cousins' lawyer that your cousins were willing to be supportive of your attempts to pursue litigation if you chose to; correct?

25 A. I don't think she was the one that told

me that.

434 Q. Well, could you read I'll have you read the third sentence, "My cousins understood that I was becoming frustrated."

Could you read the next sentence after that?

A. Okay, yes, if that's what she said. I don't remember what was said in that meeting.

435 Q. But you have sworn that Ms. Kay provided you with that information; right?

A. Yes, that's what I understand.

436 Q. So if I understand correctly, in December 2009, more than a year before you start this application, you were told by the cousins' lawyer that they will support you should you choose to commence litigation; correct?

MR. LEON: "Be supportive." I'm not sure those two are the same thing.

BY MR. MANDERVILLE:

437 Q. You were told your cousins would be supportive of you should you choose to commence litigation; correct?

A. That's correct.

438 Q. And later on in the same sworn affidavit you knew you were not in a financial

position to personally pay professional fees to

pursue a legal action. You asked your cousins if they could assist in arranging financing and they did so by arranging a line of credit to finance the application; correct?

A. Well, I already said that they didn't per se arrange for me to do it.

439 Q. But you've sworn that that's what happened; correct?

A. That's what happened.

440 Q. Do you want to break now, Mr. Leon, if that's okay?

MR. LEON: Sure.

Luncheon Recess at 12:35 p.m.

Resuming at 1:57 p.m.

BY MR. MANDERVILLE:

441 Q. Ms. Castillo, you understand you're still under oath?

A. Yes, I do.

442 Q. Before we broke for lunch, we were talking about, among other things, the affidavit of your brother sworn in August 2011.

A. Where is that?

443 Q. It's found in the Supplemental Application Record, Exhibit B at tab 3.

MR. LEON: Yes.

THE DEPONENT: Yes. I'm sorry, yes. So where do you want me to be?

BY MR. MANDERVILLE:

444 Q. To paragraph 11, please, which I guess would be at page 5 now of the affidavit.

A. Oh, I think I don't have the same one that you do because I don't have any paragraph 11 in this one.

445 Q. It begins at page 4, paragraph 11. You should see, if you have the correct affidavit should

MR. LEON: Which affidavit are you referring to?

BY MR. MANDERVILLE:

446 Q. Juan Guillermo's affidavit of August 2011 in the Supplemental Application Record, tab 3. Paragraph 11 begins at page 4 and continues on to page 5.

MR. LEON: Sorry, I've got the wrong document here. Supplemental Application Record. I've got it here. Tab 1?

BY MR. MANDERVILLE:

447 Q. Tab 3.

MR. LEON: Tab 3. Yes.

BY MR. MANDERVILLE:

448 Q. Do you have page 5 in front of you, Ms. Castillo?

A. Page 4 and page 5.

449 Q. Page 5 is a continuation of the assertions by Mr. Porras, all under paragraph 11 of the affidavit, and we talked about up to subparagraph (d) of what is set out there.

I want to continue with subparagrah (e), and take the time to read it and (f), and then I'll ask you a few questions about it.

A. I've finished reading.

450 Q. Subparagraph (e) of 11 in that affidavit concerning statements by Mr. Porras states:

"As far as why he was coming forward now, Porras indicated that he had been a paid informant of my cousins, Ms. Kay's clients, while acting as our lawyer, and that he was to have shared the $1.5 million paid to Barillas, along with the other BPA partner, Anibal Arellano. Porras says that Barillas and Arellano doublecrossed him and cut him out of his share, so Barillas and Arellano ultimately shared

25 in the $1.5 million by themselves."

Do you know anything about the truth or falsity of that statement?

A. No, I don't know anything about that.

451 Q. And then sub (f) of the same paragraph states:

"Lastly, Porras indicated that he feared retaliation by my cousins and would only testify if he was compelled by judicial process under conditions that would ensure his safety."

Again, do you know anything about the accuracy of that statement?

MR. LEON: That he said it or that he believed it?

BY MR. MANDERVILLE:

452 Q. Do you know whether or not he said it?

A. Don't know.

453 Q. Do you know whether or not he believed it?

A. I don't know.

454 Q. Now, I understand that Xela attempted on a number of occasions, but more recently, attempted settlement discussions with your cousins in the winter of 2009, the beginning of the winter

of 2009; is that correct?

A. There was talk about going to a settlement discussion in the winter 2009, yes, that's accurate.

455 Q. And, in fact, there was a settlement meeting, correct, or a few of them?

A. I was present in one that was in 2010.

456 Q. Can I refer you to a document titled "Affidavit Juan Guillermo Gutierrez Sworn September 27, 2011." That's Exhibit C to your examination.

MR. LEON: Your notice said you were crossexamining on her affidavits. I must have read it wrong. Got it.

BY MR. MANDERVILLE:

457 Q. Turn to paragraph 9 of the affidavit, and I guess I'd like you read paragraphs 9 through 11 and then I'll have some questions about those.

A. Okay.

MR. LEON: I know you didn't draft these affidavits, but those paragraphs sure are long.

MR. MANDERVILLE: I was going to refrain from the same observation.

THE DEPONENT: Up to 11 you said?

MR. MANDERVILLE: Yes.

MR. LEON: Just so that it's clear on the

record again, these paragraphs are replete with

hearsay evidence which we say is inappropriate on the application.

BY MR. MANDERVILLE:

458 Q. Are you familiar with someone named Mauricio Herman?

A. Yes, he's a friend of my husband and mine.

459 Q. And to your knowledge, is it accurate to say for your brother to have deposed that in late 2008, Mauricio Herman, which he describes as being a friend of your husband's, and Roderico Rossell initiated the possibility of settlement discussions with your cousin?

MR. LEON: Now, that's about three questions. Can we break it down?

BY MR. MANDERVILLE:

460 Q. Look at paragraph 9 of your brother's affidavit here, Ms. Castillo. Do you see the second sentence:

"The conversations were initiated in October or early November 2008 through a mutual friend of Ricardo Castillo and Roderico Rossell, a gentleman named Mauricio Herman."

25 To your understanding, is that statement

accurate?

A. The way I remember, that's how it happened, yes. Actually, I we were at a board meeting, and I got a phone call before I went into the meeting from Ricardo telling me that Mauricio had called him because Mr. Roderico Rossell had approached him to see if there was any way he could get Ricardo's number to call him to maybe talk about this.

461 Q. Okay.

A. And I immediately relayed that information to Juan and my dad.

462 Q. And then subsequently there was an initial settlement conference involving you and Juan, among others, and your cousins in Guatemala in February 2009?

A. Yes.

463 Q. And you attended at that settlement conference?

A. I attended that one, yes.

464 Q. You signed a Nonaggression and Confidentiality Agreement along with your brother?

A. Yes, I did sign that.

465 Q. Is that Exhibit B to

MR. LEON: Just let her look at it.

MR. MANDERVILLE: Sure.

THE DEPONENT: The actual one, yes. Yes, I remember signing this.

BY MR. MANDERVILLE:

466 Q. And that is your signature on the Spanish version of the document?

A. Yes.

467 Q. And your brother goes on to state that the original Nonaggression and Confidentiality Agreement was signed by Margarita, your father and Juan and was exchanged with the cousins on March 11, 2009, the date of the second settlement meeting.

Are you aware of a second settlement meeting?

A. I was not present at a second meeting but I know that I knew that it was going to happen.

468 Q. And it did happen?

A. For what I was told by Juan, yes.

469 Q. In paragraph 10 of his affidavit, your brother makes known, you told me about it, that you encountered your cousin Felipe Bosch at a music concert Christmas, New Year '08, '09?

A. Yes.

25 470 Q. He indicates that he was advised of

this meeting through using a security team and that you did not disclose it?

A. That's not accurate.

471 Q. Okay.

A. They learned about that meeting because I told my dad that I saw my cousin in that concert.

472 Q. When would you have told your dad that?

A. That I don't recall, when I told him.

473 Q. Was it before the settlement discussion that you participated in in February 2009?

A. I don't remember the exact date.

474 Q. When you attended the settlement conference in February 2009, were you personally hopeful they would be successful?

A. Oh, yes, I was very hopeful that we would be successful.

475 Q. Did you take steps to prepare for the meeting?

A. What do you mean by that?

476 Q. Review any documents, discussing with your brother and your father and anyone else at Xela who was involved the issues you wanted to raise at the settlement meeting?

A. Well, I knew some of the issues and

besides I was told by my dad that I was just a

support system there, so I wasn't provided any documents to bring or to carry or to talk about.

477 Q. Did that upset you?

A. No, I understood that my position was to be the if you want to say the family aspect of the meetings because it was business but it's also family.

478 Q. In paragraph 11 of this affidavit, your brother states halfway down:

"Despite the importance of this first settlement meeting, Margarita declined to meet with our team that morning and she showed up to our office literally half an hour before we were to leave for the settlement meeting."

Is that accurate?

A. I don't think I would say declined to be there. I asked if it was necessary for me to be there, and if I wasn't there, it was because I was told that it wasn't necessary for me to be there and I was told to be there at a certain time and that's what I did.

479 Q. He goes on to state that:

"We were subsequently informed by a

security personnel that rather than

meet with us and our lawyers that morning, Margarita spent the morning meeting with her nephew, Roberto Barillas Castillo, at the home of her motherinlaw."

Is that accurate?

A. Well, I met with him, yes. He lived in that house and I was with my motherinlaw and he was in the house. But it wasn't instead of. It was you said "rather than meeting." No, it wasn't rather than meeting. It was I was told that it wasn't necessary, my presence, at the preparation meeting, and that's why I didn't go.

480 Q. Following the initial meeting, your brother states that:

"After the initial settlement meeting, we reconvened at our offices in order to debrief our lawyers, who were not allowed to participate in the negotiations. We also had to debrief my father, who was in Jupiter, Florida."

Do you recall that that's accurate?

A. Yes, and I we actually talked to my father over the phone while we were riding from the

meeting place back to the office.

481 Q. In a car?

A. In the car, yes.

482 Q. Goes on to state:

"Before we could begin our debriefing sessions, however, Margarita excused herself in order to visit her motherinlaw, who was elderly. We were subsequently informed by our security personnel that she again met with her nephew, Roberto Barillas Castillo."

Is that accurate?

A. That's not how I remember. I was there for the debriefing and everybody was going to go to someone's birthday party, and I excused myself from that birthday party in order to go spend time with my motherinlaw. And like I said before, Roberto lived in the house. He was there too.

483 Q. So Roberto lived in the same house as your motherinlaw?

A. Yes.

484 Q. I'd ask you to turn, Ms. Castillo, to your third affidavit, which is in the Second Reply Application Record, Exhibit 3.

25 A. Page, you said? I'm sorry.

MR. LEON: He didn't say.

THE DEPONENT: Oh, you didn't say.

BY MR. MANDERVILLE:

485 Q. I'm keeping you in suspense.

A. I thought you said.

486 Q. I'd ask you to turn to page 13, please.

A. 13. I'm there.

487 Q. Could you read paragraph 41, please?

A. I have read it.

488 Q. Okay. You say that you met with your cousins in Guatemala in the fall of 2009. What was the purpose of that meeting?

A. To get reacquainted with them.

489 Q. Who arranged that meeting?

A. It was arranged. I'm not exactly sure how it happened.

490 Q. And where was this meeting held?

A. You already asked me about it and stated before it was at the InterContinental Hotel.

491 Q. I believe that was the meeting that was in March 2010.

MR. LEON: Do you want to check on that?

THE DEPONENT: No, I know. I know. Where did you think it's

BY MR. MANDERVILLE:

492 Q. Juan Guillermo's affidavit in the Second Application Record, Exhibit B, paragraph 11(d) at page 5.

MR. LEON: Tab?

MR. MANDERVILLE: Tab 3.

MR. LEON: Yes.

MR. MANDERVILLE: At page 5.

BY MR. MANDERVILLE:

493 Q. Just part of paragraph 11(d).

A. Yes, I've read it.

494 Q. Do you agree with me, at least according to that document, and I believe, and you can correct me, I believe you agreed with me previously that the meeting with your cousins at the Pepsi offices occurred in March 2010?

A. Yes.

495 Q. And I'm talking about what you say at paragraph 41 of your third affidavit, that you met with your cousins in the once in the fall of 2009, and you've told me that was a getacquainted meeting, and I asked you where did it take place.

A. That was the one at the InterContinental Hotel.

MR. LEON: In other words, she says your

client's affidavit is wrong.

BY MR. MANDERVILLE:

496 Q. So, when Juan Guillermo recounts Mr. Porras saying that you met with your cousins in February 2010 at the InterContinental Hotel, that's mistaken in your view and it occurred in the fall of 2009?

A. Yes, that's mistaken there.

497 Q. And who attended at that meeting?

A. It was Ricardo, myself, Juan Jose, Felipe and Roberto.

498 Q. Just the five of you?

A. Yes.

499 Q. And who suggested scheduling the meeting?

A. That I'm not sure. I could not say.

500 Q. Did you ask for it to be scheduled?

A. No, I didn't.

501 Q. Did you ask Mr. Barillas to arrange it?

A. No, I didn't.

502 Q. How were you contacted about having a meeting?

A. Ricardo told me.

503 Q. Did Ricardo say who had contacted him?

A. I did not ask him at the time.

25 504 Q. What was discussed at this meeting?

A. I don't remember exactly what it was discussed, but it was, like I said, to get acquainted, a friendly meeting. We ask about each other's families and as far as I remember that was all that was discussed.

505 Q. Did you talk about possibly obtaining financing with them at that time?

A. I don't recall about the specifics we talked about that day.

506 Q. Did you talk about your professed dissatisfaction with Xela?

A. That's a possibility. They were surprised that I did not attend any other meetings. They if I recall correctly, they expressed their surprise that I did not attend any other meetings in the settlement agreements because it was their understanding I was going to be there. And when I was asked by my father not to assist to the to go to the next one, they specifically told them that I was some medical, some that I had something medical or I was sick or something that was an excuse that was not accurate.

507 Q. Who is "they"? You said "they" told them. Who is "they"?

25 A. Okay, "they" would be Juan is the

one writing the emails and "them" would be the cousins.

508 Q. So it's your evidence that Juan told your cousins that you couldn't attend because

A. I read that I'm sorry.

509 Q. Because you had a health issue?

A. Don't exactly remember if it's a health issue or I was sick or something with that in that respect. That's what they what Juan told them. And I know that because I read the email that was sent.

510 Q. And this meeting takes place relatively shortly before your meetings at Bennett Jones in Toronto in December of 2009?

A. At what meeting you are referring to?

511 Q. This meeting in the fall of 2009 at the InterContinental Hotel in Guatemala City takes place weeks or a month before your meeting at Bennett Jones' offices in December 2009?

A. Yes.

512 Q. So do you recall whether or not you expressed to your cousins any dissatisfaction with your involvement at Xela at the meeting of the fall of 2009?

25 A. I don't remember exactly what I said or

didn't say.

513 Q. Do you recall in general what you said?

A. No, I don't.

514 Q. Is it your evidence it was nothing more than a getacquainted discussion?

A. As far as I remember, that's what it was.

515 Q. Did you keep any notes of the meeting?

A. No, I did not.

516 Q. Did Ricardo?

A. No, he didn't.

517 Q. Did anyone else?

A. No. It was an informal meeting. There was no reason to keep notes on it.

518 Q. Was it in a hotel room?

A. Yes.

519 Q. Whose room?

A. I don't know. I...

520 Q. Well, was it your room?

A. No, I wasn't staying there.

521 Q. Was it Ricardo's room?

A. Obviously if I wasn't staying there, he wasn't staying there either.

522 Q. What prompted you to be in Guatemala in

25 the fall of 2009?

A. We would go occasionally to go visit my motherinlaw.

523 Q. What was the purpose of this particular visit to Guatemala?

A. Her birthday is at the end of October, so that's why we chose that date.

524 Q. Had this meeting been arranged before you went down?

A. No, not that I know of.

525 Q. You were a director of Xela at that time; correct?

A. Yes, I was.

526 Q. Did you disclose to your cousins at this meeting any information about Xela?

A. I have never disclosed any information about Xela to them.

527 Q. So you did not at this meeting?

A. No.

528 Q. Did you disclose any information about Xela to Roberto Barillas?

A. No, I didn't.

529 Q. We know you were in Guatemala for the settlement meeting in February 2009?

A. Yes.

25 530 Q. Were you there again at any time

between February '09 and this meeting in, you think, the latter part of October 2009?

A. Not in 2009, no.

531 Q. Go to paragraph 41 of this affidavit. Ms. Castillo, you go on to state at the first sentence of paragraph 41 that you met with your cousins again a second time in the winter of 2010?

A. Yes.

532 Q. When did that meeting take place?

A. Excuse me?

533 Q. When did that meeting take place?

A. At the end of February, beginning of March. I don't remember exactly. I know I was in that time in Guatemala, but I don't know exactly the date.

534 Q. Where did that meeting take place?

A. That's the meeting that took place at the Pepsi building.

535 Q. So if I can summarize correctly, you had a meeting with your cousins in the fall of 2009 and then again in late February, early March 2010?

A. Yes.

536 Q. And prior to your departure as a director of Xela in April 2010, did you have any

other meetings with your cousins during that time

frame?

A. No, I didn't.

537 Q. Did you have any other conversations with your cousins or their representatives during that time frame?

A. No.

538 Q. Could you turn to paragraph 48 of that same affidavit please, Ms. Castillo. When did you ask your cousins if they could assist in arranging financing for the litigation?

A. I'm not sure. I don't remember exactly the date.

539 Q. Was it by way of a phone call? Was it by way of a meeting?

A. I don't remember that.

540 Q. Would there be an email to your cousins asking for assistance in financing?

A. I haven't exchanged any emails with them.

541 Q. At any time?

A. No.

542 Q. Would you have sent them a letter requesting this?

A. No.

Q. So your evidence is it was a verbal

request?

A. Don't remember doing it myself, so I don't know exactly how, when it was, but it was verbal if it wasn't written.

544 Q. Well, it says, "I" you swear, "I asked my cousins in Guatemala if they could assist in arranging financing." That's you asking; correct?

A. Well, that's what I said there, yes, I but I don't remember actually asking myself, even though I said that here.

545 Q. If it was not you, who would it have been, Mr. Barillas on your behalf?

A. No, it would have been Ricardo.

546 Q. So is it your evidence you did not personally ask or that you may have and you can't recall?

A. I don't my evidence, I don't remember exactly.

547 Q. And according to your affidavit, you're asking your cousins to assist in providing you with money; correct?

A. No, I wasn't asking them for the money, if that's what you're asking me.

25 548 Q. No, I'm saying according to your

affidavit which says, "I asked my cousins in Guatemala if they could assist in arranging financing" according to that you're approaching your cousins, either directly or through Ricardo, and asking if they can assist in providing you with a source of money; correct?

A. Yes, that's what it says here.

549 Q. And that's not something that you can remember how it came about?

A. No, I don't remember how it came about.

550 Q. What response did you or Ricardo get to that request?

A. I don't remember exactly what was the response.

MR. LEON: Well, if she doesn't remember exactly making it, I'm not sure how she'd remember the response but...

BY MR. MANDERVILLE:

551 Q. Well, was it a negative response?

A. No.

552 Q. It was a positive response; correct?

A. Yes.

553 Q. They were willing to help?

A. Yes, they were willing to help.

Q. Now, you've told me that you arranged

for the loan from the Guatemalan bank yourself. Did you go down to Guatemala and prepare the loan documentation, fill in the loan documentation?

A. I don't remember saying that I arranged the loan myself. I filled out the forms and I signed the forms and I gave them to Jorge Porras when he came to Miami

Reporter Appeals.

A. When I signed my the power attorney.

555 Q. So you prepared the documents either in Ontario or Florida?

A. I don't remember exactly how much I filled it out at home and how much I filled out when he was there. He assisted me to fill out the remaining information. I don't recall exactly how that came about.

556 Q. Can you explain to me why you decided to do this by way of a power of attorney rather than applying yourself?

A. Because I'm not physically in the country all the time, Guatemala, so it makes sense to do it like that.

557 Q. And is the loan or the line of credit exclusively in your name or is it in other people's

25 names as well?

A. It's in my name.

558 Q. Only?

A. As far as I know, it's in my name. The application was in my name.

559 Q. Does Mr. Barillas not have access to it as well?

A. Well, he has access to it to make transfers to me. With the power attorney he can go to the bank and ask for the transfer.

560 Q. That's right. So the bank must know he has that authority; correct?

A. Yes, I assume it is that the case.

561 Q. I'm going to ask your counsel for some undertakings, and, with respect, I may get a curt response.

MR. LEON: Never curt.

BY MR. MANDERVILLE:

562 Q. In the circumstances, Mr. Leon, I'm going to ask for the loan documentation in Ms. Castillo's or Mr. Barillas' possession concerning this particular loan agreement?

MR. LEON: Didn't you already ask for that?

MR. MANDERVILLE: I asked for the application form.

MR. LEON: I'll refuse on the same basis.

REFUSAL

BY MR. MANDERVILLE:

563 Q. I'd ask in addition for the actual loan agreement?

MR. LEON: Same answer.

REFUSAL

BY MR. MANDERVILLE:

564 Q. Ask for a copy of the current loan statement indicating any transfers in or out of the account?

MR. LEON: Same answer, only with more vigor.

REFUSAL

MR. MANDERVILLE: Off the record.

OfftheRecord Discussion.

MR. LEON: Based on any questions that you asked, I do not understand any basis for relevance of any of this, but, in particular, why you should be entitled to know what payments have been made.

MR. MANDERVILLE: I believe I've already asked for any statements of the net worth that were provided to the bank.

MR. LEON: I believe you did and

MR. MANDERVILLE: And I believe you said

25 no.

MR. LEON: I refused.

BY MR. MANDERVILLE:

565 Q. Now, I want to change topics a little bit, Ms. Castillo. There was, as I understand it, a bit of a controversy concerning Mr. Barillas in the fall of 2009 over monies owing by BPA to Xela; correct?

A. I believe it was the contrary, the other way around, Xela owed BPA for some services rendered.

566 Q. Was there also not an issue about $100,000 owing to Xela by Barillas?

A. It is not he the one that owes Xela, from what I understand.

567 Q. What is your understanding?

A. It is a different company. It's Boucheron, a company called Boucheron.

568 Q. Boucheron is a Xela subsidiary; correct?

A. It's not under Xela. I don't believe it's a Xela subsidiary.

569 Q. What is your understanding of what Boucheron is?

A. It's a company that provide services.

25 570 Q. What services does it provide?

A. Don't know exactly the matter, but as far as I understood at the moment, it was to pay some of the salaries for the employees in Guatemala, executives in Guatemala.

571 Q. Executives for who, for Xela?

A. I don't know. I told you I don't know what the purposes was.

572 Q. Your understanding was a company set up to pay salaries of executives?

A. Yes.

573 Q. Executives in whose employ?

A. Well, yes, Xela employees.

574 Q. So you did not understand that it was a Xela company?

A. I don't think it was ever viewed as a Xela subsidiary.

575 Q. Can I ask you to take a look at Mr. Korol's affidavit. It is in the Responding Application Record, Volume 1.

MR. LEON: Sorry, which?

BY MR. MANDERVILLE:

576 Q. Responding Application Record, Volume 1, Exhibit A1. Tab 1 is the first affidavit of Mark Korol, sworn June 15th, 2011. You know

Mr. Korol to be the chief financial officer of

Xela?

A. Yes.

577 Q. At paragraph 10 of his affidavit, page 7, Mr. Korol discusses the incorporation of Boucheron?

A. No.

578 Q. I would ask you to read paragraph 10, please.

A. Okay.

MR. LEON: Now, again, this appears to be information not within his, Mr. Korol's, personal knowledge, so I take the same position on that. This is prior to his employment.

BY MR. MANDERVILLE:

579 Q. Can you also turn to Exhibit B, which Mr. Korol refers to in paragraph 10. First turn to Exhibit B. It's a wire transfer request dated November 12th, 2002. Is that your signature approving the wire transfer request?

A. Yes, I was the second signature there.

580 Q. If you continue on, two pages later, after the wire transfer requisition, there's an invoice under the letterhead of PriceWaterhouseCoopers?

25 A. Yes.

581 Q. Do you have that in front of you?

A. Yes, I have it in front.

582 Q. It appears to be an invoice in connection with the incorporation of Boucheron and another company, but Boucheron Universal Corp. on behalf of Xela; correct?

A. That's what the invoice appears to be.

583 Q. And I acknowledge your counsel's caution, but do you have any reason to question the accuracy of that document?

A. That, the invoice?

584 Q. Yes?

A. No.

585 Q. Any reason to question the accuracy of Mr. Korol's statement that Boucheron was incorporated on behalf of Xela?

A. I don't know exactly how it was incorporated, so I cannot say "yes" or "no" to that statement.

586 Q. Is it fair to say that's not something that is controversial?

MR. LEON: If you look sorry.

THE DEPONENT: You asked me what? I'm sorry.

BY MR. MANDERVILLE:

587 Q. Is it fair to say that the issue of Boucheron being incorporated on behalf of Xela is not something that is controversial?

A. Oh, I don't know why it would be if that's the way it was that's how it is expressed here.

588 Q. And I take it you don't have any evidence on that issue to contradict that of Mr. Korol?

A. No, I wasn't involved in any of those administrative matters at the time.

589 Q. I mean, I take it it was pure coincidence that you signed the wire transfer?

A. I was the second signature because they always needed two signatures in there and I am always I am mostly always in Toronto so I was asked to be a second signature, so I accepted to be second signature.

MR. LEON: That supplements her answer before in terms of things that she did for Xela that you asked her about.

MR. MANDERVILLE: Okay.

BY MR. MANDERVILLE:

590 Q. I was asking you about an issue between

concerning BPA and monies that Mr. Barillas alleged were owed to him and monies that Xela alleged were owed to it by Mr. Barillas; correct?

A. I'm sorry, can you repeat it?

591 Q. I should because it was awkwardly phrased. I was asking you about an issue that arose in the fall of 2009 between Mr. Barillas and Xela, and I want your recollection, as best you can, and you can disagree with what I am about to suggest.

As I understand it, the controversy, if you will, concerned some monies which Mr. Barillas claimed he was owed by Xela for auditing services, and it also concerned some money that Xela contended were owed to it by Mr. Barillas for other services; correct?

A. I recall the services towards BPA. I don't recall the other way around.

592 Q. Do you recall there was $100,000 in issue which Xela was of the view Mr. Barillas should be refunding to Xela?

A. I recall hearing that amount of money, but I don't know exactly owed to whom.

593 Q. You don't recall what the issue was on

25 that front?

A. Something to do with the bank account, I believe.

594 Q. The amounts owing to Mr. Barillas by Xela was in the order of about $32,000, you said; correct?

A. Don't remember the exact amount, but I think that's the amount that is being talked about.

595 Q. And you agreed in the fall of 2009 to mediate to some extent the dispute?

A. Yes, I was approached to talk to Roberto to come and talk to my father, and I facilitated that meeting.

596 Q. What's your understanding of what transpired as a result of your efforts and the meetings?

A. Roberto and my father met and they discussed what they wanted from each other, which basically my they had decided to finish their involvement with BPA, so they were asking for the accounting documents and papers and books and things that BPA had from Xela subsidiaries, and I believe Roberto mentioned to him that there were some outstanding invoices for services rendered.

597 Q. What role did you play?

25 A. I was just sitting at the table

listening.

598 Q. Were you not aware at the time that Xela was of the view that Mr. Barillas had misappropriated or embezzled approximately $100,000 U.S. of Xela's funds in Boucheron?

A. I was aware of that, but to my understanding that was not the reason of the meeting was not to discuss that matter.

599 Q. Did Mr. Barillas, to your understanding, satisfy all the conditions that were asked of him before you released the funds to him?

A. When I asked Juan if it was okay to release the funds as he I told him for what I if I remember correctly the words, for what I understand, Roberto already BPA finalized all the things that they had to do, so he said okay to pay them.

600 Q. I'd ask you to read paragraph 14 of Mr. Korol's affidavit.

A. 14, you said?

601 Q. Yes, I did. That's at page 9.

MR. LEON: Again, there's all sorts of hearsay in there without saying even the source of the hearsay.

THE DEPONENT: I've finished.

BY MR. MANDERVILLE:

602 Q. See, at the very bottom of page 9, top of page 10, Mr. Korol states:

"Barillas turned over the accounting books and records in Guatemala but he refused to cooperate with Grant Thornton by providing backup support or working papers for end of year balances. This action directly resulted in Grant Thornton issuing a qualified audit opinion to the detriment of Xela's best interests and resulting in damage to the respective companies."

Do you accept that statement as accurate?

A. I don't know exactly what transpired when they were doing this, so I don't know if that's accurate or not.

603 Q. Mr. Barillas turning over the accounting books and records, that is something that occurred during your tenure as a director?

A. Yes. But it should

MR. LEON: Sorry.

THE DEPONENT: I am not finished. It

should say "BPA", not "Barillas" because it was the

company that was providing the service.

BY MR. MANDERVILLE:

604 Q. However, this would have occurred in the fall of 2009 while you were still a director of Xela; correct?

A. Yes.

MR. LEON: "This" being what?

MR. MANDERVILLE: Barillas turning over accounting books and records in Guatemala.

BY MR. MANDERVILLE:

605 Q. Do you have any recollection, Ms. Castillo, about discussion concerning Barillas' alleged refusal to cooperate with Grant Thornton by providing backup support of working papers?

A. No, I don't know anything about that.

606 Q. Was it ever suggested to you that you should not have released the funds to Mr. Barillas because he had not lived up to his end of the deal?

A. I did not release the funds until I was told by Xela to that it was okay to release them, and that's how it happened.

607 Q. And your evidence is that you were told by Xela it's okay to release the funds to Mr. Barillas?

25 A. Yes.

608 Q. All right. And is it also your evidence that you were told by Xela that the $100,000, allegedly embezzled, was a separate issue and would be dealt with separately?

A. I don't think I ever spoke to anyone in Xela respecting in that respect, but what I know it was it didn't have anything to do with the BPA matter.

609 Q. How do you know that?

A. Because it wasn't discussed when my father and Roberto were talking about resolving the books and the invoices.

610 Q. Were you present for the discussion with your father and Mr. Barillas?

A. Yes, I was there. Yes, I was there.

611 Q. Where did it take place?

A. At my house.

612 Q. Now, in February 2010 there was a board meeting of Xela. That would be the sort of winter quarters board meeting; correct?

A. Yes.

613 Q. And you attended that meeting?

A. I was at that meeting.

614 Q. And at that meeting, as you know, a

resolution was passed authorizing laying of a

criminal complaint against Mr. Barillas?

A. I learned about that resolution when I read the affidavits.

615 Q. You contend that you did not know about it at the meeting?

A. No, I left the meeting before it finished.

616 Q. And you left the meeting upset?

A. I left the meeting upset but it wasn't anything to do with this resolution or that was passed after I left. It wasn't because of that that I left.

617 Q. And you got up and it's been characterized that you stormed out of the meeting.

I take it you don't accept that characterization, but you got up and left the meeting upset because of another issue?

A. I got up, took my papers and left the meeting.

618 Q. Did you say anything to the rest of the board?

A. No, I just got up and left.

619 Q. What time of day would that have been?

A. Late in the afternoon. I wasn't

looking at my watch.

620 Q. According to your second affidavit, paragraph 46, you got upset and left because there was a typo in the list of the shareholder?

MR. LEON: No, no, that's not her evidence.

BY MR. MANDERVILLE:

621 Q. There was a PowerPoint presentation of the list of shareholders and your name wasn't on the list?

MR. LEON: Well...

THE DEPONENT: That's more than a typo.

BY MR. MANDERVILLE:

622 Q. Was there any doubt at that time that you were a Xela shareholder?

A. Can you repeat the question?

623 Q. Was there any doubt at that time that you were a Xela shareholder?

A. Not in my mind, but the presentation that they were doing was the shareholders of Xela moving forward and I was not in that list.

624 Q. Did you say to anyone, "How come I'm not on that list?"

A. I did.

625 Q. To whom?

A. I said it in the board. Like I said it

25 like we are talking at this table right now, and I

said, "How come I'm not in the list?"

626 Q. What was the answer you got?

A. "It's an honest mistake."

627 Q. Sorry?

A. I was told, "It's an honest mistake."

628 Q. Do you have any reason to believe otherwise?

A. It really upset me that I was not in that list and I have been I felt I was being pushed out; so that upset me when I read it like that, when I saw it like that.

629 Q. To your knowledge, who are the Xela shareholders?

A. My father and Juan and myself through Alberta companies and the Gutierrez family trust.

630 Q. And so the listing for you would be a listing of your Alberta numbered company?

A. That would be the listing that would probably be there.

631 Q. That would be sort of what would show up? And your brother and your father, of course, would know, okay, that particular Alberta company is Margarita's; correct?

A. Yes, I know which one it is but they

25 that was the official. But we never did it. When

we talked about who were the shareholders, I don't recall it ever being said like the numbered companies. It was said the names.

632 Q. So on this PowerPoint presentation how did it appear, Alberta companies or personal names?

A. Personal names.

633 Q. And to your recollection your father's name was there and your brother's name was there and your name was not there?

A. That's correct.

634 Q. And that upset you so that you got up and left the room?

A. Well, I asked and the answer was not well, it was insulting to say that it's just "an honest mistake." And then Juan proceeded to have a temper tantrum that I did not appreciate, so I decided I'm not going to keep stay here, and I got up and left.

635 Q. Well, do you anywhere in your affidavits speak of being told it was an honest mistake or that your brother had a tantrum?

A. I don't recall if I ever specified that matter.

636 Q. And when Mr. Korol and your brother

deposed that you were upset because the resolution

was passed to authorize a criminal complaint against your nephew, Mr. Barillas, they're mistaken?

A. Yes, that's not accurate because that wasn't spoken while I was at the meeting.

637 Q. Is there any indication in the minutes that Director Margarita Castillo took issue with the omission of her name on the shareholders' list?

A. I haven't seen the minutes of that meeting, so I don't know if it's stated or not.

638 Q. I believe they're an exhibit to an affidavit. I'll tell you there is no mention of that.

MR. LEON: She didn't control the minutes. She didn't receive a draft to approve them or review them, so I don't think you can fault her for that.

BY MR. MANDERVILLE:

639 Q. During your tenure as a director, Ms. Castillo, you read the minutes when they would come to you?

A. Yes, I did.

640 Q. Did you ever object to any of them?

A. No.

25 641 Q. Did you never point out to Mr. Korol to

say, "Wait a second, you missed something here" or "You should change something"?

A. When we would talk about the minutes, it was at the time of the board meeting that the minutes from the previous meeting was approved. I recall that at one moment I reminded him that he was probably doing too much copy and paste because the list of the companies or the person at one point it was he had more things listed that they were actually in there. But that was just like a pointing out like I think you are doing too much cut and paste and should review that list there.

642 Q. So you recall doing that?

A. Yes, at one point I did that.

643 Q. And the February 2010 board meeting was the last board meeting you attended?

A. That's correct.

644 Q. And by the time of that board meeting you had already met with your cousins at least once and counsel for the cousins and your legal counsel to discuss litigation?

MR. LEON: Sorry, can you repeat that if you are asking her about what she did with her legal counsel?

BY MR. MANDERVILLE:

645 Q. At the time of this board meeting, February 2010, you've told me you had already met with your cousins and on at least one occasion and their legal counsel and your legal counsel to discuss, among other things, the possible commencement of litigation?

MR. LEON: No, she didn't say that, to my recollection. She acknowledged there was a meeting.

BY MR. MANDERVILLE:

646 Q. Can you turn to your third affidavit, in the Second Reply Application Record, Exhibit 3.

A. Second Reply?

647 Q. Yes. In particular, I would ask you to turn to page 10 of your affidavit.

A. Yes, I'm there.

648 Q. Paragraph 32.

A. Yes.

649 Q. You swear that:

"On December 8th, 2009, Ricardo, Roberto" would be Roberto Barillas

"Jorge" would be Mr. Porras

"and I met with my lawyers at Bennett Jones. At this point I was seeking

advice on my obligations as a

director of Xela with respect to the Boucheron activity. This included exploring whether I would find it necessary to start a legal proceeding against Xela or Juan." Correct?

A. Yes, that's correct; that's what it says there.

650 Q. My previous question to you was that at the time of the meeting, directors' meeting in February 2010, where you became upset and left, you had at that point had meetings with your cousins, had meetings a meeting at least with your cousins' lawyer and a meeting with Bennett Jones to discuss the possibility of commencing litigation; correct?

A. I don't recall being the commencing litigation prior to being part of that meeting or the motivation for that meeting.

651 Q. So when you've sworn that it's true at paragraph 32 of your affidavit that this meeting I'm saying that parenthetically "included exploring whether I would find it necessary to start a legal proceeding against Xela or Juan"?

MR. LEON: I think you have to read the

sentence before that too.

MR. MANDERVILLE: Well, and I did read that into the record before, Mr. Leon.

MR. LEON: I know you did.

BY MR. MANDERVILLE:

652 Q. If I take your sworn evidence at face value here, Ms. Castillo, is it not true that one of the things that you were meeting Bennett Jones about was possible commencement of litigation?

A. With emphasis on the word "possible" because it wasn't for sure.

653 Q. Do you want to take 10 minutes?

MR. LEON: Sure.

Recess at 3:04 p.m.

Resuming at 3:18 p.m.

BY MR. MANDERVILLE:

654 Q. Ms. Castillo, we were talking a little earlier about the Xela board meeting of February 2010, and I understand that shortly following that board meeting and that board meeting was in Fort Lauderdale; correct?

A. That's correct.

655 Q. I understand that shortly following that board meeting you went to Guatemala?

A. I came back to Toronto and then at the

end of the month I went to Guatemala.

656 Q. Was that when you met with your cousins at the Pepsi offices?

A. Yes.

657 Q. Now, I want to talk to you a little bit about what I'm going to call the Xela estate freeze. Do you know the process I'm speaking of when I use that term?

A. Yes, I do.

658 Q. As I understand it, in 1996 your father arranged for you and Juan and he to have Alberta holding companies?

A. Yes, it was in 1996.

659 Q. And you and Juan obtained independent legal advice in connection with the arrangements that your father wanted to put in place?

A. Yes, that's what I remember.

660 Q. Am I correct that the intention, your father's intention, was to give you and Juan shares in Xela through the companies but that you wouldn't be able to redeem them until your father passed away?

A. Yes, that was the way it was, as I understand understood it at the time.

25 661 Q. And you understood your lawyer's advice

about this is the intention of what these documents are saying?

MR. LEON: I don't think you can ask that question.

MR. MANDERVILLE: Fair enough.

BY MR. MANDERVILLE:

662 Q. Do you today have any issue with the independent legal advice you obtained back then?

MR. LEON: No, you can't ask that either. That's why

BY MR. MANDERVILLE:

663 Q. Why is that, Mr. Leon?

MR. LEON: It's legal advice. It's privileged, isn't it?

BY MR. MANDERVILLE:

664 Q. I'm not asking what the advice was. I'm asking if there was any assertion now that there was an issue in connection with that advice.

MR. LEON: I think that's the same thing.

BY MR. MANDERVILLE:

665 Q. You've told me you understood your father's intentions with the estate freeze?

A. In 1996, yes, I understood.

666 Q. And you understood that his intention

25 was that, among other things, you and Juan would

not be able to redeem your shares in Xela until your father passed away; correct?

A. Yes, that's what I understood at the time.

667 Q. You understood that the various documents that were prepared were done in an effort to achieve that intention?

A. Yes, that's what I understood at the time.

668 Q. And at the time you didn't have any particular objection to that?

A. No, I didn't have any objections to that at the time.

669 Q. Now, Ms. Castillo, at a certain point in 2010 you, through Mr. Leon, let Xela know that you were not happy with how things had unfolded during your tenure with Xela?

A. I think that's how you can put it. There some correspondence that was back and forth.

670 Q. If you feel I'm inaccurate in how I'm putting it, by all means correct me.

A. I don't know exactly what context you want.

671 Q. Well, I understand there was

correspondence exchanged between Mr. Leon and Xela

and then Xela's counsel attesting to your dissatisfaction with how things were happening at Xela?

A. Yes, I think that's how you can put it, yes.

672 Q. And

MR. LEON: Sorry, just a small matter. I don't recall actually writing to Xela. I recall corresponding with Mr. Rodriguez.

MR. MANDERVILLE: And that's fine. I'm not I'm certainly not suggesting an ex parte conversation. I wondered if your initial letter had gone to the company and then they involved a lawyer.

MR. LEON: I don't recall.

BY MR. MANDERVILLE:

673 Q. And one of the issues which remains live is the value of your shares in Tropic?

A. That's correct.

674 Q. And in connection with that, and after the parties had entered into confidentiality agreements, they agreed to share some documents?

A. Yes, that's what I remember.

675 Q. One of the document Xela provided to

your financial advisor was a valuation prepared by

Mr. Badham?

A. I don't know exactly what documents were provided to my advisor, but I've heard about that valuation by Mr. Badham.

676 Q. Ms. Castillo, can you turn to the Supplemental Application Record of my clients, Exhibit B.

MR. LEON: Supplemental Application Record. B?

BY MR. MANDERVILLE:

677 Q. It's Exhibit B, tab 2, which would be the supplemental affidavit of Mark Korol.

Exhibit A to the document is to Mr. Korol's supplementary affidavit is a valuation prepared by Mr. Badham?

A. You said A?

678 Q. Tab 2, sub A.

A. Yes, that's what it says on the front page.

679 Q. Michael Badham, FQ Valuations, September 15, 2010?

A. Yes.

680 Q. Have you seen that document before?

MR. LEON: Before this affidavit or

25 before

BY MR. MANDERVILLE:

681 Q. Before today? I presume you

A. Oh, sorry.

682 Q. Do you see that Mr. Korol deposes that this was provided to Mr. Cohen, your financial advisor, in October 2010?

MR. LEON: He says he believes it was produced in October 2010.

BY MR. MANDERVILLE:

683 Q. Is there any dispute about that?

MR. LEON: I don't know of any. See, a part of the thing was it was provided to Mr. Cohen, not to me and not to my

MR. CRANE: The email dated October 26, 2010 at 10:34 a.m. from Mr. Cohen to Mr. Korol may be of some assistance to Mr. Leon's

MR. LEON: And he says the (inaudible) is a result of reviewing the draft valuation memorandum prepared by Michael Badham. I don't think that's any different than what's been produced here.

BY MR. MANDERVILLE:

684 Q. I apologize, Mr. Leon. Is it was it not provided to your office?

MR. LEON: If I recall

MR. MANDERVILLE: Let's go off for a

second.

OfftheRecord Discussion.

BY MR. MANDERVILLE:

685 Q. Ms. Castillo, you'd agree with me that based on Mr. Korol's affidavit in Exhibit 2, it would appear that the Badham valuation was provided to your financial advisor in October 2010?

A. That's what it says there.

686 Q. And that would have been a couple of months before you started your application?

A. Yes.

687 Q. In fact, it was your evidence that you and perhaps your counsel did not actually see the valuation until some time subsequent to the commencement of the application?

A. That's accurate. I didn't see it before I saw the actual affidavit that was attached to it.

688 Q. Your financial advisor, Mr. Cohen, is, among other things, considering or assessing the accuracy of that valuation; correct?

A. That's what I understand that he is doing, yes.

689 Q. I'd ask you to turn to Mr. Korol's

first affidavit, which is in the Responding

Application Record, Volume 1. In particular, if you open Mr. Korol's affidavit and turn to page 11 at the bottom, paragraph 17.

A. Yes, I've finished it.

690 Q. Mr. Korol states there that no funds from Fresh Quest have been utilized to fund political activities in Guatemala.

Do you take any issue with that statement concerning Fresh Quest?

MR. LEON: Sorry, where are you reading from?

THE DEPONENT: Here.

BY MR. MANDERVILLE:

691 Q. It starts, "Funds from Fresh Quest were utilized to fund political activities in Guatemala. This is untrue."

A. And your question was?

692 Q. Mr. Korol asserts that no funds from Fresh Quest were utilized to fund political activities in Guatemala. Do you accept the accuracy of that or do you know one way or the other?

A. I don't have any information regarding specifics, so I don't agree or disagree.

25 693 Q. Ms. Castillo, I would like you to turn

to your third affidavit, please. It's in your Second Reply Application Record.

MR. LEON: Yes.

BY MR. MANDERVILLE:

694 Q. Paragraph 32, please, page 10.

A. Yes, I've

695 Q. Have you read it through?

A. Yes.

696 Q. The fourth sentence you state: "With that in mind" that being "exploring whether I would find it necessary to start a legal proceeding against Xela or Juan. With that in mind, I had Roberto and Jorge explain the Boucheron situation to my lawyers." What was, to use your phraseology, the "Boucheron situation"?

A. It is discrepancy for what I was what I was being told by Roberto or whatever I was told when I asked my father about that.

697 Q. I would like to you elaborate what was the Boucheron situation? What were you being told by Roberto, what were you being told by your father?

25 A. Originally, Roberto told me that he was

having some issues with the bank. They were asking him questions because he was the legal representative of the company and he didn't have those answers.

So he asked Juan for the appropriate answers and he never got an answer. That's what he told me.

So I asked my father and he said, "Oh, that's already been resolved." That's what I got from him.

698 Q. Okay.

A. Meaning "him" meaning my father.

699 Q. So your father told you "that's already been resolved," and am I correct then that all of the other information you got about the socalled Boucheron situation came from Mr. Barillas?

A. Yes, and directors told me that the matter with the bank, to the directors' knowledge, was not resolved. That's what he was told me that time.

700 Q. So this is Mr. Barillas telling you all this?

A. Yes.

701 Q. And was there anyone else besides Mr. Barillas who was giving you information about Boucheron?

A. No.

702 Q. What explanation did you ask Mr. Porras to provide when you say, "I had Roberto and Jorge explain the Boucheron situation to my lawyers"?

A. Just in general. I didn't know specifically something.

703 Q. And was Mr. Barillas concerned that the laws in Guatemala might be violated?

A. I don't know what his concerns were. I don't I'm not in his head, so I don't know what he was thinking.

704 Q. Who arranged for Mr. Barillas and Mr. Porras to come to Toronto?

A. They talked to me about coming and I did not say, "Don't come."

705 Q. So they flew up from Guatemala on their own?

A. Yes. As I remember, yes.

706 Q. Who paid for them to come?

A. I don't know.

707 Q. You? Did you pay?

A. I don't recall paying for that.

708 Q. Is that something you would remember if you did pay?

A. Roberto would come up anyway every year

25 to visit us and I never we didn't pay for his

trips.

709 Q. What about Mr. Porras, how often would he come up to visit you?

A. No, he didn't come to visit me. He was one time when they were still working at PwC and a certain point they had to come for another matter which related to another of the PwC clients, and it was the end of summer, so they were here, they stayed with us. Roberto stayed with us.

710 Q. And Mr. Porras stayed with you as well in the summer months?

A. In that time, yes.

711 Q. And that was he was up here to do in connection with his legal business for Xela; right?

A. No, it just had something to do when they worked at PwC still. So I don't know. I didn't question him what he was doing here.

712 Q. All right. In December 2009 was when Mr. Porras comes up here. You don't know who paid for him to come?

A. No, I don't know.

713 Q. Did Ricardo?

A. I don't know if he did. I don't think so. I take care of the accounts.

Q. So you do know that you didn't and you

know that Ricardo didn't?

A. I don't recall Ricardo doing it but I know I didn't.

715 Q. You take care of the accounts, so that's something you would recall; correct?

A. Well, yes.

716 Q. Can you tell me why you would be seeking Canadian legal advice about a Guatemalan situation?

A. I don't know exactly what you are asking me there. I don't understand the question.

717 Q. You say, "I had Roberto and Jorge explain the Boucheron situation to my lawyers." The lawyers in this instance being Bennett Jones.

I said can you tell me why you would have Jorge and Roberto be explaining to Canadian lawyers a Guatemalan situation?

A. That's due to the fact that I was a director of Xela and I was looking for the best interests of the company and wanted to know if there was anything that could I cannot pronounce that word. I can think of the word in Spanish but not English, so give me a moment. I'll go about it other way. That could be detrimental for anything

to do with Xela.

718 Q. So you were concerned that something might be going on that was detrimental to Xela?

A. Yes.

719 Q. And in December 2009, you were a director of Xela; correct?

A. I was.

720 Q. Did you raise this with members of the board?

A. I would have raised anything about it with my father privately.

721 Q. Did you?

A. Yes, I probably did. Most likely I did.

722 Q. Did you or did you not?

A. I did.

723 Q. When would you have raised it with your father?

A. I don't know the exact date.

724 Q. Would it have been before the meetings with Bennett Jones?

A. Most likely.

725 Q. So sometime before December 8th, 2009 you raised with your father concerns about the Boucheron situation?

25 A. Actually, I stayed away from the

Boucheron situation because that didn't concern me directly, but I always thought that if there was anything that what could be detrimental for Xela, I just wanted to find out. I was always dismissed when my father went, "That's nothing that you need to know. That's not your concern," so...

726 Q. How did you approach your father on this particular issue?

A. I don't recall exactly the exact way I would approach him about it.

727 Q. Was it an email, a phone call?

A. Could have been in person. Most likely in person.

728 Q. What do you recall saying to him?

A. I don't recall what exactly we talked about.

729 Q. Well, I appreciate you may not it's been a few years. I appreciate you may not recall exactly, but what do you recall?

A. Well, he asked, "What is the" what was going on with that, like why was that an issue.

730 Q. Based upon the information you'd received from Mr. Barillas?

A. Yes, because that was the only

information that I would receive about it. When I

asked questions to my father, I was never given any explanation.

731 Q. Was that the occasion when your father said, "Don't worry, it's all resolved"?

A. That could be one of the situations, yes.

732 Q. You're not sure?

A. Like I told you, I had different conversations at different points in time, and we talked about so many different things, that I don't know exactly. I cannot pinpoint when and where.

733 Q. Did you tell your father, "I am concerned about this situation. I'm going to go speak to lawyers in Toronto about it"?

A. I don't recall exactly what I told him but I

734 Q. Did you tell him that?

A. That I was concerned, yes, I did.

735 Q. Did you tell him, "I'm going to speak to lawyers in Toronto about it"?

A. I don't recall telling him that.

736 Q. Did you tell him, "Mr. Barillas and Mr. Porras are coming up here and we're going to discuss the Boucheron situation with my lawyers"?

25 A. No, I didn't tell him that.

737 Q. Any reason why?

A. Well, I didn't feel it was necessary for me to tell him everything I was doing.

738 Q. Did you appreciate that when you met with Bennett Jones in the company of Mr. Barillas and Mr. Porras among others that you were, among other things, discussing the company for which you are a director?

A. I wasn't discussing anything. I was getting information from them. I wasn't providing any information.

739 Q. Off the record.

OfftheRecord Discussion.

BY MR. MANDERVILLE:

740 Q. So you never mentioned to your father or I presume to your brother or anyone else at the board, "I'm concerned about the Boucheron situation. I'm going to have Mr. Barillas and Mr. Porras come up here and we will meet with lawyers in Toronto to discuss it"?

A. No, I did not mention that to my father. He would be the only person I would have mentioned something like that, but I didn't talk to him about that.

25 741 Q. Did you talk with anyone else at Xela

about that?

A. No, I didn't.

742 Q. And this meeting takes place very shortly after your meeting with the cousins, correct, in Guatemala?

A. Yes, in the same year.

743 Q. I think it was within two months?

A. Yes.

744 Q. You say in paragraph 32:

"At no point during this meeting was any confidential privileged information provided to Roberto or Jorge. Rather, they were the ones providing information to me and my lawyers."

Did you make notes of that meeting?

A. No, I did not take any notes.

745 Q. Did your lawyers make notes of that meeting?

A. That I don't know. I assume they did.

746 Q. Given that you swear that there was no confidential privileged information provided, I'd like your lawyer's notes of that meeting, please.

MR. LEON: No.

REFUSAL

BY MR. MANDERVILLE:

747 Q. Why is that, Mr. Leon?

MR. LEON: They're privileged.

BY MR. MANDERVILLE:

748 Q. So, Ms. Castillo, when you say at no point during this meeting was any confidential privileged information provided, is that inaccurate?

A. Provided by me. I didn't provide anything.

749 Q. "At no to point during this meeting was any confidential privileged information provided to Roberto or Jorge. Rather, they were the ones providing information to me and my lawyers."

Are you inclined to sort of resile from what you've said there and say there was, indeed, privileged information exchanged?

MR. LEON: Well, you're asking her a legal question as to what's privileged. You see

MR. MANDERVILLE: No, I realize that, Mr. Leon, and I appreciate you giving me your position on this because I wouldn't mind getting it.

MR. LEON: It's litigation privilege. You'll see that it says, "I would find it

necessary whether I would find it necessary to

start a legal proceeding against Xela or Juan." So it was provided to the lawyers as part of

BY MR. MANDERVILLE:

750 Q. In contemplation of litigation or for the substantial purpose of contemplating litigation?

MR. LEON: We can argue about what the

BY MR. MANDERVILLE:

751 Q. No, but that's the position you're going to take?

MR. LEON: The position I'm going to take is that any notes that we have are privileged.

BY MR. MANDERVILLE:

752 Q. So, Ms. Castillo, two points then arising from

MR. LEON: No, sorry, I don't mean to be cute about it. The question is, when you say in contemplation of litigation, in contemplation of what? You can't assume what the litigation was that it was in contemplation of, if I can put it that way.

MR. MANDERVILLE: You don't think that's too cute?

MR. LEON: No, I don't. That's not the way

it happened.

BY MR. MANDERVILLE:

753 Q. Well, two points I want to raise with you, Ms. Castillo. You've told me before that when I said you were speaking to your lawyers about commencing a legal proceedings against Xela and Juan, you told me that wasn't really what it was about. I take it that is what it was really about; correct?

A. I meant I was exploring that, if it would be necessary at one point.

754 Q. The substantial purpose of the meeting was the commencement of this litigation; correct?

A. Of that particular meeting?

755 Q. Yes.

A. It was more exploring and trying to understand what everything was. That's what I recall from the meeting at that moment.

756 Q. And when you say:

"At no point during this meeting was any confidential privileged information provided to Roberto or Jorge. Rather, they were the ones providing information to me and my lawyers," I take it you want to change your sworn statement here now

and say, "Oh, yes, there was privileged

information provided to my lawyers"?

MR. LEON: No, that's you're missing. That's not what she said and that's not what that says. She says, "They were providing information to me and my lawyer."

BY MR. MANDERVILLE:

757 Q. None of which was confidential or privileged?

MR. LEON: She says that she "...that no confidential privileged information was provided to Roberto or Jorge."

As I read that, she wasn't giving any information that she had as a director of Xela or otherwise. She was receiving information.

MR. MANDERVILLE: I see the point you're making, Mr. Leon.

MR. LEON: Sorry, I don't mean to interfere, but you whenever you crossexamine on something when I was there, I know.

BY MR. MANDERVILLE:

758 Q. Ms. Castillo, is it your evidence that it was merely one of the items discussed about considering the possibility of commencing litigation, or was a substantial purpose of this

meeting the commencement of litigation?

A. No, it was not about commencement of litigation. It was one of the items.

759 Q. I will renew my request for notes, and I accept that they may be subject to redaction.

MR. LEON: Well, I'll maintain my refusal, but I will take a look at them. If I change my position, I'll let you know.

REFUSAL

BY MR. MANDERVILLE:

760 Q. And in addition to Mr. Leon's notes, I would also request Mr. Woycheshyn's notes.

MR. LEON: I'm pretty sure I don't have any notes.

MR. MANDERVILLE: I had assumed that was going to be the answer.

MR. LEON: And if I did, you wouldn't want them anyway. I understand your request from Bennett Jones.

MR. MANDERVILLE: Yes.

MR. LEON: Okay.

BY MR. MANDERVILLE:

761 Q. Now, Ms. Castillo, your nephew, Roberto Barillas, is not a lawyer, is he?

A. No, he's not.

Q. So there'd be no privilege attached to

information provided to him; correct?

MR. LEON: She said she didn't provide him with any information.

BY MR. MANDERVILLE:

763 Q. Did Mr. Barillas take any notes at this meeting, bring any papers?

A. That I don't remember.

764 Q. Are you still in contact with Mr. Barillas?

A. Yes.

765 Q. I'd like an undertaking for you to obtain all notes and papers of his arising from this meeting, please?

MR. LEON: No, I don't think she's her obligation extends that far in the context of a crossexamination on an affidavit.

REFUSAL

BY MR. MANDERVILLE:

766 Q. Turning to paragraphs 33 and 34 of your affidavit, I would ask you to read through it, please.

A. Sorry, 33 and 34?

767 Q. Yes.

A. I have reviewed that.

25 768 Q. And in 33 and 34 of this affidavit you

are deposing to some of what occurred at a second meeting at Bennett Jones' offices?

A. Yes.

769 Q. This one was held on December 10, 2009?

A. Yes, that's what I remember.

770 Q. At that time you are still a director of Xela?

A. Yes, I was.

771 Q. And in addition to your husband Ricardo, Roberto Barillas, Jorge Porras and yourself, presumably Mr. Leon and Mr. Woycheshyn, a lawyer by the name of Katherine Kay from Stikeman Elliott was present at that meeting; correct?

MR. LEON: She was there for part of the meeting.

THE DEPONENT: Yes.

BY MR. MANDERVILLE:

772 Q. And during the first part of the meeting, Ms. Kay advised that she could not act for Roberto Barillas or Jorge Porras because she was retained by your cousins?

A. That's the way I understand, but more that it's separate, two separate statements. First, I say I understand that she was present

there because they had approached her and she said

that they she could not represent them in Canada. Don't know exactly the reason for that, but then after she mentioned that she was in the past had been retained by my cousins.

773 Q. Where does it say here it was in the past?

A. Well, I added "in the past" right now. But she had been retained by my cousins. I don't know when.

774 Q. And this is where Ms. Kay advises you and those present in the room that your cousins understood you were becoming frustrated with Xela and were willing to be supportive of your attempts to resolve your concerns whether through litigation or otherwise; correct?

A. Yes, that's what it says there.

775 Q. Ms. Castillo, do you have any knowledge, information or belief about why Mr. Barillas and Mr. Porras felt they should obtain separate legal representation in Canada?

A. No, I don't know.

776 Q. Were Mr. Barillas' concerns that you were meeting about, did they go anywhere beyond the socalled Boucheron situation in Guatemala?

25 A. I don't know what his can you repeat

the question actually?

777 Q. Sure. Mr. Barillas' concerns that he was meeting with you and your lawyers about, did they, to your knowledge, go anywhere beyond the socalled Boucheron situation that you referenced?

MR. LEON: Sorry, I don't understand your question either, whether you are asking about are you asking does she know sorry, are you asking whether Mr. Barillas disclosed concerns beyond Boucheron or are you I'm just not sure what you're getting at.

MR. MANDERVILLE: Fair enough. Those are the best sorts of questions.

BY MR. MANDERVILLE:

778 Q. You've told me previously that Mr. Barillas and Mr. Porras had attended in Toronto, at whose behest you don't know, to explain the Boucheron situation to your lawyers; correct?

A. I have said that; correct.

779 Q. And to your knowledge, did Mr. Barillas' attendance in Toronto go to any reason beyond explaining the Boucheron situation?

A. No idea. I don't know that.

780 Q. You don't know whether or not that is

25 the case?

A. Well, besides coming to talk to us about this, he came to visit my family, my cousins.

781 Q. Other than a social visit, the only business reason that you know of was the Boucheron situation?

A. Yes, that's what I remember knowing at the time.

782 Q. And, similarly, Mr. Porras attended for the express purpose of discussing the Boucheron situation?

A. That's what I remember.

783 Q. You're not aware of any other business reason, legal reason for Mr. Barillas or Mr. Porras to be attending in Toronto?

A. No, I don't know exactly if they had any other reasons besides those.

784 Q. How long was Ms. Kay at this meeting?

A. I don't remember the exact time but it was very short. If I remember correctly, it was short.

785 Q. How long did the meeting last?

A. I don't know. I think you have asked me about the meetings, and I don't have a recollection of time.

25 786 Q. Well, you've been actually very

informative in telling me the board of directors meeting of Xela typically lasted all day long.

A. No, those were scheduled that way. Other things are just depending how it goes. I don't know exactly how long in minutes or hours it lasted.

787 Q. Well, this December 10th meeting which involved a number of people and you deposed that after Ms. Kay left you had two consultants from Navigant join the meeting. Did the meeting last all day, half day? What do you recall?

A. I already answered you that I don't recall how long it took, the meeting.

788 Q. You stated at the end of paragraph 34 of your affidavit:

"To my knowledge, Jorge wanted to be present at the meeting so that he could disclose what he and Roberto thought was illegal activity of Xela."

That's what you swore to?

A. Yes, that's what I said in my affidavit.

789 Q. And this suggestion of illegal activity would be illegal activity concerning the Boucheron

25 situation?

A. I don't remember exactly the time, but it was a lot about Boucheron.

790 Q. Was there anything else you recall?

A. I don't remember.

791 Q. Did Ms. Kay take any notes of the meeting?

A. That I don't remember.

792 Q. Were any notes of the meeting made while Ms. Kay was in attendance at the meeting?

A. That I don't remember.

793 Q. Counsel, again I'd ask you to produce your notes made of the meeting during the time that Kay was in attendance. There would be no privilege during the time that she was there.

MR. LEON: No, I'm going to refuse, but as I told you, I will take a look and let you know my answer.

REFUSAL

BY MR. MANDERVILLE:

794 Q. At the moment, your refusal is based on what assertion?

MR. LEON: I'll make it based on relevance.

MR. MANDERVILLE: And just so there's not

MR. LEON: Sorry, relevance and privilege.

I don't know what's in those notes, and so to the extent that there may be material in those notes that I consider privileged, then I'm not going to produce them.

And part of the problem may be figuring out what whether she was in the room, but without looking at the notes, I don't know that. So without looking at them, I can't properly answer your question.

BY MR. MANDERVILLE:

795 Q. Will you undertake to ask Ms. Kay to forward you her notes of that meeting?

MR. LEON: No.

REFUSAL

MR. MANDERVILLE: That would at least enable you to look at them.

MR. LEON: I'm not going to give that undertaking.

BY MR. MANDERVILLE:

796 Q. And your refusal is based on what?

MR. LEON: I don't think in a crossexamination I have the obligation to go to somebody who I have no control over to ask them to produce notes. I don't think even on a discovery I

25 have that obligation, but not on a

crossexamination.

BY MR. MANDERVILLE:

797 Q. Now, Ms. Castillo, you swear here that

MR. LEON: I mean well, I don't want to get into giving evidence, so I'll just leave it.

BY MR. MANDERVILLE:

798 Q. Sorry, Mr. Leon?

MR. LEON: Sorry, I was going to say something, but I don't want to be seen as giving evidence, so I'll just stay out of it and let you ask your questions.

BY MR. MANDERVILLE:

799 Q. You state in the last sentence of paragraph 34, to your knowledge "Jorge wanted to be present at the meetings so that he could disclose what he and Roberto thought was illegal activity of Xela"? Correct?

A. Yes, that's what I wrote in my affidavit.

800 Q. This concern you never brought to the attention of the board?

A. Not that I recall it.

801 Q. You never brought it to the attention

25 of your father?

A. Not that I remember that I can remember.

802 Q. Did you ever bring it to the attention of your brother Juan?

A. No, I did not talk to Juan about it.

803 Q. I propose we stop for the day, Mr. Leon.

MR. LEON: Yes.

Whereupon the Examination was adjourned at 4:04 p.m.

I hereby certify that the foregoing is a true and accurate transcription of my notes to the best of my skill and ability.

_____

Mary Jane Corcoran, C.S.R.

ComputerAided Transcription

Reproductions of this transcript are in direct violation of O.R. 587/91 Administration of Justice Act January 1, 1990 and are not certified without the original signature of the Court Reporter

This is Exhibit "F" referred to in the Affidavit of JUAN GUILLERMO GUTIERREZ sworn March 22, 2020.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI (LSO#70332Q)

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

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 GUTIÉRREZ and JUAN ARTURO GUTIÉRREZ

Respondents

SECOND REPLY APPLICATION RECORD

Date: September 9, 2011

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

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(COMMERCIAL LIST)

B E T W E E N:

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- and -

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Respondents

SECOND REPLY AFFIDAVIT OF MARGARITA CASTILLO

(Sworn September 9, 2011)

I, Margarita Castillo, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

Introduction

1. I am the applicant in this proceeding, a shareholder and director of Tropic International Limited ("Tropic"), a shareholder of 696096 Alberta Ltd. ("Alberta Co.") and a former director of Xela Enterprises Ltd. ("Xela"). As such, I have knowledge of the matters contained in this affidavit either from my personal knowledge, or where indicated, from information provided to me by others, which in all cases I believe to be true.

2. I swear this affidavit in support of my application, which seeks to have my shares in Tropic and Alberta Co. bought out. I swore my principal affidavit on this application on

January 17, 2011 (my "January Affidavit") and a reply affidavit on July 29, 2011 (my "Reply Affidavit").

3. I swear this further affidavit in reply to the supplemental affidavits of:

(a) Mark Korol ("Korol"), Chief Financial Officer of Xela, sworn August 11, 2011;

(b) My father, Juan Arturo Gutiérrez ("Arturo"), sworn August 11, 2011; and

(c) My brother, Juan Guillermo Gutiérrez ("Juan"), sworn August 12, 2011 (collectively, the "Supplemental Affidavits").

4. The core of my evidence on this application is set out in my January Affidavit and my Reply Affidavit. I will not repeat that evidence here. I have not attempted to respond to every point raised in the Supplemental Affidavits. Rather, I have only responded to specific matters. As such, where I do not respond to a particular matter, any non-response should not be interpreted as my agreement with evidence in the Supplemental Affidavits.

The value of my Tropic Shares

5. Korol's supplemental affidavit attaches a copy of a valuation with respect to the "Fresh Quest/Tropic Inc. companies", which Xela obtained from Michael Badham on September 15, 2010 (the "Badham Valuation"). I do not know why this valuation report was not previously put into evidence in this proceeding. While I understand that a copy had been produced to Farley Cohen of Cohen Hamilton Steger LLP ("Mr. Cohen"), I had not previously received a copy. In fact, Xela's consistent position as shown in letters from their lawyers (see Exhibit "Q" of my January Affidavit) was that this valuation information was "proprietary to Xela".

6. I note that the Badham Valuation states that, "[s]hareholders should perform their own due diligence review of the business and should not rely on these calculations as evidence of a thorough business review". This is precisely what I have been trying to do since 2010, and the reason why I retained Mr. Cohen to provide an independent valuation of my Tropic shares. For almost a year, Juan and Arturo had access to the Badham Valuation and I did not.

7. As of the date of this affidavit, Mr. Cohen's valuation is not yet complete.

8. I note that paragraphs 2 and 3 of Korol's supplemental affidavit refer to the Badham Valuation being with respect to the "Fresh Quest/Tropic Inc. companies". The specific companies are not identified.

9. In paragraph 8 of Juan's supplemental affidavit, with respect to our personal financial statements, Juan states that we "must have been using the rough approximate values of the Fresh Quest Group of companies which we estimated and would have been at the time in the approximate range of $20,000,000 to $25,000,000 range based upon Fyffe's approach in 2008". I do not know what difference, if any, there is between the "Fresh Quest/Tropic Inc. companies" used in the Badham Valuation and the "Fresh Quest Group of companies" used in Fyffe's approach. I note that Fyffe's approach from 2008 would not explain the values given to my Tropic shares in the 2007 personal financial statements (included in Exhibit "D" to my Reply Affidavit).

10. Further, if Juan's statement at paragraph 8 of his supplemental affidavit that the "family collectively looked at the group for the purposes of banking" is correct, this means that both of us were misrepresenting the value of our Tropic shares to the International Finance Bank. In my case, I did not know about this misrepresentation because, as stated in my January Affidavit and

Reply Affidavit, I relied on Xela management in determining what the value of my Tropic shares were when I prepared my personal financial statements.

11. In terms of the preparation of my personal financial statements, I note that Korol's supplementary affidavit does not respond to the specific points in my Reply Affidavit, including Exhibits "B", "C" and "D", which show that Xela management (specifically Jim O'Connell) prepared the valuation data in my personal financial statements. Juan's supplemental affidavit at paragraph 8 states that "far too much is being made of this issue" and that he does not have a copy of his personal financial statement "handy". Juan does not indicate what efforts, if any, he made to try and locate copies of his personal financial statements.

February 2010 Board Meeting

12. At paragraphs 2 to 4 of his supplemental affidavit, Arturo gives evidence with respect to the February 2010 Xela Board meeting. During the time that I was present at the meeting, there was no mention whatsoever of Roberto Barillas ("Roberto") and Xela proceeding with a criminal complaint against him. In reviewing the Minutes of that Board meeting (attached as Exhibit "B" to Arturo's supplemental affidavit), I note that Roberto's company, BPA, is not mentioned until the end of the document. This suggests that the topic was not raised until the end of the meeting. As indicated in my prior affidavits, I was not present for the entire Board meeting.

13. In response to paragraph 3 of Arturo's supplemental affidavit, when I had discussions with my father regarding my resignation from the Xela Board of Directors, there was never any mention that it was due to "the conflict with Barillas". Rather, the focus of our discussions, as described in my January Affidavit, was on my requests for information regarding the value of my Tropic shares and the proposed sale of those shares to Xela. Arturo told me that he was not

going to provide me with any information on the valuation of Tropic or provide me with any of Tropic's financial statements (both of which I requested). He then said it would be "more elegant" for me to resign from the Board.

14. In response to paragraph 4 of Arturo's supplemental affidavit, it is true that I spoke with my father on the telephone approximately one day before the April 29th Board Meeting. It is also true that my father asked if I was going to resign. When I told him that I was not going to resign, Arturo demanded that I not attend the April 29th Board meeting. I had no prior notice of this meeting. As the Minutes of the February Board meeting (Exhibit "B" to Arturo's supplemental affidavit) indicate, the date for the next Board meeting was not discussed until the end of meeting. Again, I was not present for the entire February Board meeting.

My Removal as a Director of Tropic

15. Paragraph 5 of Arturo's supplemental affidavit refers to a Special Meeting of Shareholders of Tropic dated April 29, 2010. I had no notice of this meeting. In fact, I did not even know such a meeting happened until I read Arturo's supplemental affidavit. The Minutes of this "Special Shareholder Meeting" (attached as Exhibit "C" to Arturo's supplemental affidavit) indicate that I did not attend the meeting, but do not state whether I was provided notice of the meeting.

16. I note that Arturo's supplemental affidavit does not state when these Minutes were drafted, nor does he attach any shareholders' resolution. Further, Arturo does not explain why, as of July 29, 2011, I was still listed as a Tropic director according to the Provincial Corporate Registry. I note that the Corporate Registry does show that I was removed as an officer of

Tropic on or about May 18, 2010. A copy of these corporate searches was included at Exhibit "M" to my January Affidavit.

The payments I received from Xela

17. At paragraphs 6 to 7 of Arturo's supplemental affidavit (dated August 11, 2011), he appears to be responding to paragraph 28 of my January Affidavit (despite the fact that he was ordered by the court to provide any such reply evidence by June 20, 2011). Arturo's statement at paragraph 6 that "my children never loaned anything to the company" ignores the fact that in November 2004 my husband and I took out a mortgage on our Muskoka cottage with Scotiabank for $1,275,000. Attached as **Exhibit "A"** is a copy of the Charge/Mortgage of Land. Ricardo and I gave the mortgaged funds to Xela. At the time, Arturo promised Ricardo and me that Xela would repay the entire mortgage.

18. Attached to this affidavit as **Exhibit "B"** is a copy of our annual mortgage statement dated December 31, 2010. It shows that the amount owing on this mortgage as of that date was $546,628.09. Up until late April 2011, Xela had been making payments on this mortgage. It has since stopped making any payments. Attached as **Exhibit "C"** is a copy of our monthly account statement dated May 20, 2011, which shows that Xela's last payment on this mortgage was made on April 28, 2011.

19. In addition to the mortgage on our cottage, approximately 7 years ago, my husband and I both took out loans against our life insurance policies for more than $100,000 and paid those funds to Xela.

20. At paragraph 7 of Arturo's supplemental affidavit, he states that before Xela stopped making monthly payments to me, Ricardo and I were receiving "about twice as much" as Juan.

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In making this statement, Arturo includes the amounts Ricardo received from Digalta. Since 2008, Digalta has not been an affiliated with Xela. I have no idea how my father would know how much money Ricardo was receiving from Digalta during this period. Further, I note that Arturo's evidence is inconsistent with evidence of Xela's Chief Financial Officer. Paragraph 26 of Korol's affidavit dated June 15, 2011, states that "coincidentally the amount paid to Juan Guillermo Gutierrez...is roughly equivalent to the amounts received by the Castillos for the same time period when the net income of Digalta of Ricardo and the director's fees of Margarita are considered".

21. Despite these inconsistencies and inaccuracies, given that Digalta was a company that Ricardo was running on his own, I do not understand why any salary he received from Digalta is relevant to my application.

My Alleged Involvement in an Arrangement between Xela Management and Roberto

22. As described in more detail at paragraphs 39 to 48 of my Reply Affidavit, after Xela and Roberto had negotiated an arrangement for the payment of BPA's account and the return of certain accounting papers, Arturo asked me to get involved to help transfer the monies to Roberto.

23. Juan's supplementary affidavit attaches selected versions of email exchanges between us in September and October 2009. I note that these do not appear to be official translations. Attached to my affidavit as **Exhibits "D", "E", "F"** and **"G"** are copies of email exchanges between Juan and me from October 5, 2009 to October 9, 2009. All of these emails have been translated by All Languages Ltd.

24. I note that the emails that are attached as Exhibits "A" and "B" to Juan's supplemental affidavit pre-date the email from October 26, 2009, in which Juan informed me that Roberto had substantially complied with his obligations and I was to give the funds to Roberto. This email was attached as Exhibit "E" to my Reply Affidavit.

25. Contrary to paragraph 6 of Juan's supplemental affidavit, I never ensured that the $100,000 would be returned to Xela. Whenever I spoke to Juan about this issue, I told him what Roberto had told me – that Juan should speak directly with Roberto about the issue. This is consistent with my email to Juan dated January 29, 2010, which was attached as Exhibit "C" to Juan's supplemental affidavit. At no point did I provide an "undertaking", a "commitment" or any other type of promise to get this money back for Xela. I was what my father had asked me to be – a mediator.

Power of Attorney

26. At paragraphs 9 and 10 of Arturo's supplemental affidavit, he refers to a power of attorney that I signed on April 22, 2010 in favour of my nephew, Roberto. I did grant Roberto this Power of Attorney so that he could assist me with obtaining a private loan from a Guatemalan bank. Contrary to Arturo's statement that this confirms his suspicions that my cousins in Guatemala have been paying me to bring this application, this is not true. Arturo's nephews (my cousins) have never "paid me" anything to bring this application. Rather, I was forced to bring this application to protect my financial interests and the financial security of my children.

9

December 2009 meeting with BPA

27. The supplemental affidavits of Juan and Arturo refer to meetings that occurred in December 2009. The source of this information is my former lawyer and Roberto's former business partner, Jorge Porras ("Jorge"). I note that Jorge, who is a resident of Guatemala, has not sworn an affidavit in this application.

28. By December 2009, I had become increasingly frustrated with:

(a) Juan's management of Xela's business (as described at paragraph 56 of my January Affidavit);

(b) Juan and his family receiving a disproportionate amount of monies from Xela (as described at paragraph 60 of my January Affidavit);

(c) Juan increasing his focus and attention on running for president in Guatemala (as descried at paragraph 63 of my January Affidavit);

(d) Xela's money being redirected to various political causes in Guatemala (as described in paragraphs 65 to 78 of my January Affidavit); and

(e) Juan and Arturo refusing to provide me with information that I (and my advisors) needed in order to value my Tropic shares (as described in paragraph 84 of my January Affidavit).

29. Further, as discussed in both my Reply Affidavit and Juan's supplemental affidavit, in the Fall of 2009 there was an ongoing dispute between Xela and BPA. During the time that I was attempting to mediate this dispute, Roberto indicated to me that the amount of money that Xela

10

was using for political contributions was substantial (much more than I had understood to be the case).

30. It is in this context that I wanted Roberto to meet with me and my lawyer to explain the Boucheron situation. Given the fact that Arturo and Juan were denying me access to information, I felt it was important for me to independently investigate the allegations Roberto was making with respect to Boucheron. It was my obligation as a director of Xela to determine whether the company was involved in any illegal activity or other misconduct. Because I was not in a position to independently confirm Roberto's allegations, I retained the services of Peter McFarlane and Navigant Consulting Inc. to investigate the matter.

31. There were two meetings that took place in December 2009; one on December 8 and the other on December 10. Below is a summary of those meetings. In providing this summary, it is not my intention to waive any solicitor and client privilege.

32. On December 8, 2009, Ricardo, Roberto, Jorge and I met with my lawyers at Bennett Jones. At this point, I was seeking advice on my obligations as a director of Xela with respect to the Boucheron activity. This included exploring whether I would find it necessary to start a legal proceeding against Xela or Juan. With that in mind, I had Roberto and Jorge explain the Boucheron situation to my lawyers. Contrary to the allegation at paragraph 11 of Arturo's supplemental affidavit, at no point during this meeting was any confidential privileged information provided to Roberto or Jorge. Rather, they were the ones providing information to me and my lawyers. Based on that information, my lawyers made certain recommendations of forensic accounting firms that would be able to investigate the Boucheron allegations that Roberto and Jorge were making.

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33. This led to a second meeting on December 10, 2009. At the beginning of the meeting Ricardo, Roberto, Jorge, myself, my lawyers from Bennett Jones and Katherine Kay were present. My understanding was that Ms. Kay was present at the initial part of the meeting because Roberto and Jorge had approached her to represent them in Canada.

34. During the first part of this December 10th meeting, Ms. Kay indicated that she was not in a position to act for Roberto or Jorge. Ms. Kay also indicated that she had been retained by my cousins in Guatemala. My cousins understood I was becoming frustrated with Xela and were willing to be supportive of my attempts to resolve my concerns whether through litigation or otherwise. After providing this information, Ms. Kay left the meeting and Peter McFarlane and Anthony Long (both from Navigant Consulting Inc.) joined the meeting. For the remainder of the meeting, Roberto and Jorge explained the Boucheron background and allegations to Mr. McFarlane and Mr. Long. Both Roberto and Jorge were anxious to explain the Boucheron activity. To my knowledge Jorge wanted to be present at the meeting so that he could disclose what he and Roberto thought was illegal activity of Xela.

35. As with the December 8th meeting, at no point during the December 10th meeting did I disclose any confidential or privileged information about Xela. The sole sources of information were Roberto and Jorge.

36. At no point during either December meeting did Jorge ever suggest that he was "Xela's lawyer". To the contrary, given the work that BPA had done for me and Ricardo, I understood that Jorge was present strictly as a business partner of BPA who was providing information to me in my capacity as a director of Xela and Tropic.

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37. Contrary to paragraph 11(a) of Juan's supplemental affidavit, no decision about any sort of "financial aid" was made at the December 2009 meetings. As stated, at that point my focus was trying to determine whether Xela and any of its officers or directors were engaged in any unlawful actions (including any actions that I was not aware of that may be oppressive to me as a director or shareholder).

The Financing Required to Protect My Interests

38. In early 2010, around the same time that Arturo removed me from the Board of Xela and stopped my monthly draws (all of which is described in my January Affidavit), I was seriously considering taking legal action against Xela, Juan and Arturo. However, I knew I was not in a financial position to personally pay the professional fees necessary to pursue a legal action. I asked my cousins in Guatemala if they could assist in arranging financing. They did so by arranging for me to obtain a line of credit to finance my application. I am fully obligated to repay all amounts I draw down from this line of credit. This financial arrangement has nothing to do with the ongoing litigation between my cousins and the Xela subsidiary, Lisa.

39. Even after I had the financing in place, I had not decided whether I was prepared to start a lawsuit against Xela, Arturo or Juan. I still believed that we could resolve our issues without litigation. This is why I participated in a without prejudice process with Xela in the Fall of 2010. Unfortunately, that process failed. It was not until January 6, 2011, when Xela's U.S. lawyer wrote to my lawyers and falsely accused me of disclosing confidential information to Roberto (as described in paragraphs 125 to 132 of my January Affidavit) that I knew I had no choice but to start my application. I note that this was approximately eight months after I had the financing in place, which ultimately enabled me to start the application.

40. Contrary to the allegation at paragraph 12 of Arturo's supplemental affidavit and paragraph 11(b) of Juan's supplemental affidavit, my cousins have not paid me $2,500,000, or any amount, to bring this application. As indicated, I draw down on the line of credit to the extent necessary to finance the fees associated with this application and to replace the income that I no longer receive from Xela (which my family had received every month for over 25 years).

41. Since 2009, I have met with my cousins in Guatemala on two occasions: once, in the fall of 2009 and a second time in the winter of 2010. My cousins have had no input whatsoever into the conduct of my application. This is a matter that is solely determined by me and my lawyers. I have not disclosed any confidential information with respect to Xela or Tropic either while I served as a director or since my removal. At all times, I have been aware of and complied with the obligations I owed to Xela and Tropic.

42. I have no knowledge whether Jorge was a "paid informant" of my cousins as alleged at paragraph 11(e) of Juan's supplemental affidavit. There is no reason why I would have any knowledge of this.

Disputed Facts and Issues

43. The Supplemental Affidavits attempt to raise a number of allegations, all of which have nothing to do with my application. These include the December 2009 meetings with my lawyers and BPA and the financing of my application. These allegations are being raised solely in an artificial attempt to tie together my application with the Respondents' Action and make it appear as though there are significant facts in dispute between me and the Respondents, when there are not.

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44. My application remains focused on four areas:

(a) My ownership of Tropic shares;

(b) The fair value of my Tropic shares;

(c) My ability to receive the fair value of my Tropic shares; and

(d) My ability to receive the fixed value of my beneficial interest in Xela, which is held through Alberta Co.

45. These issues continue to be unrelated to the issues raised in the Respondents' Action and my cousins in Guatemala. I have never been part of any conspiracy, nor have I ever attempted to prejudice Xela's position in the Avicola litigation with my cousins. All I have attempted to do is to protect my shareholder interests in Tropic and Xela.

46. I swear this affidavit in further support of my application.

SWORN before me, at the City of Toronto, in the Province of Ontario this 9th day of September, 2011.

Christopher McKenna
Commissioner for Taking Affidavits in and for the Province of Ontario

MARGARITA CASTILLO

THIS IS EXHIBIT "A" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A commissioner for taking affidavits
in and for the Province of Ontario

Province of Ontario

Charge/Mortgage of Land

Form 2 - Land Registration Reform Act

DMSL 03/97

B

FOR OFFICE USE ONLY

(1) Registry [X] Land Titles [ ] (2) Page 1 of 2 pages

(3) Property Identifier(s) Block Property Additional: See Schedule [ ]

(4) Principal Amount Up to a maximum of
ONE MILLION TWO HUNDRED SEVENTY-FIVE THOUSAND AND XX / 100 Dollars $ $ 1,275,000.00

(5) Description
Part of Lot 5, Concession 14, being Part 1, Plan 35R-15054, Township of Medora, now Township of Muskoka Lakes, in the District Municipality of Muskoka
As in Deed No. 262945

and more particularly described in schedule attached
Township of Muskoka Lakes
District Municipality of Muskoka
Land Registry Division of Muskoka (No.35) at Bracebridge

New Property Identifiers Additional: See Schedule [ ]

Executions Additional: See Schedule [ ]

(6) This Document Contains: (a) Redescription New Easement Plan/Sketch [ ] (b) Schedule for Description [X] Additional Parties [ ] Other [ ]

(7) Interest/Estate Charged Fee Simple

(8) Standard Charge Terms - The parties agree to be bound by the provisions in Standard Charge Terms filed as number 9816 and the Chargor(s) hereby acknowledge(s) receipt of a copy of these terms.

(9) Payment Provisions

(a) Principal Amount $	(b) Interest Rate	(c) Calculation Period
$ 1,275,000.00	********** % per annum	**********

	Y	M	D			Y	M	D
(d) Interest Adjustment Date	**********			(e) Payment Date and Period	On Demand	(f) First Payment Date	**********	
(g) Last Payment Date	**********			(h) Amount of Each Payment	********** Dollars $		**********	
(i) Balance Due Date	**********			(j) Insurance	see Standard Charge Terms - 9816 Dollars $		**********	

(10) Additional Provisions

Continued on Schedule [ ]

(11) Chargor(s) The chargor hereby charges the land to the chargee and certifies that the chargor is at least eighteen years old and that
We Roberto Ricardo Castillo and Margarita Castillo are spouses of one another.

The chargor(s) acknowledge(s) receipt of true copy of this charge.

Name(s)	Signature(s)	Date of Signature Y	M	D
CASTILLO, Roberto Ricardo	X	2004	11	09
CASTILLO, Margarita	X	2004	11	09

(12) Spouse(s) of Chargor(s) I hereby consent to this transaction.

Name(s)	Signature(s)	Date of Signature Y	M	D

(13) Chargor(s) Address for Service
1086 Murphy Rd., Muskoka, Ontario

(14) Chargee(s)
THE BANK OF NOVA SCOTIA

(15) Chargee(s) Address for Service
10 Wright Blvd., Stratford, Ontario, N5A 7X9

THIS IS EXHIBIT "B" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A commissioner for taking affidavits
in and for the Province of Ontario

Scotiabank™ | Scotia Total Equity® Plan

THE BANK OF NOVA SCOTIA 47852
7600 WESTON ROAD, UNIT #3
WOODBRIDGE ONTARIO L4L 8B7 905-850-1805

Your *Scotia Total Equity* Plan number: 304473433
Property Address:
PRTLT5CON14PRT1PLAN35R-150-54
1086 MURPHY ROAD
MUSKOKA LAKES TOWNSHIP ON
Questions about your Scotia Total Equity Plan statement?
Call us at 1-877-268-4228

Your STEP Credit Limit is the total amount of credit available within your plan that can be allocated to different borrowing solutions. If you have available credit, you can save money by converting higher cost borrowing into your STEP.

The Amounts You Owe reported on this statement only include transactions that have been applied to your accounts at December 31st. It is possible that you have made transactions that do not yet appear and have not been deducted from your Available Credit.

The Scotiabank Group Privacy Agreement has been revised. Please refer to the Scotiabank website at *www.scotiabank.com*.

Please turn over for your mortgage statement

SBHAS12100_2971879_019 E 0 47852 10563

MR R.RICARDO CASTILLO
MRS MARGARITA CASTILLO
135 GORDON ROAD
TORONTO, ON M2P 1E6

Your annual statement

on December 31, 2010

Overview of your *Scotia Total Equity*® Plan

Your overall STEP credit limit		**$840,000.00**
Minus amounts you owe:		
Mortgages (see over)	$546,628.09	
Loans	$0.00	
Lines of credit	$183,950.91	
Credit cards	$0.00	
Overdraft Protection	$0.00	
Total Amount you've borrowed		**$730,579.00**
Total credit available to you on December 31, 2010		**$109,421.00**

How you're using your Scotia Total Equity Plan

Account type and number	Account credit limit ($)	Amount you owe ($)	Available credit ($)
Mortgages			
Scotia Mortgage 1364106		$546,628.09	
Loans			
You do not hold this account type in your STEP			
Lines of credit			
ScotiaLine® Personal Line of Credit *0955	$204,000.00	$183,950.91	$20,049.09
Credit cards			
You do not hold this account type in your STEP			
Overdraft Protection			
You do not hold this account type in your STEP			
Total		**$730,579.00**	**$20,049.09**
Plus additional credit available by contacting your branch			$89,371.91
Total credit available to you on December 31, 2010			**$109,421.00**

Simple tips that can help you pay off your mortgage faster.

1. Choose the shortest amortization period and the largest payment amount you can afford.
2. Take advantage of Scotiabank's *15% + 15%®* prepayment privileges.
3. *Match-a-Payment* ®.

Visit your nearest branch or *www.scotiabank.com* for more information.

MR R RICARDO CASTILLO , MRS MARGARITA CASTILLO

Your annual mortgage statement

from January 1 to December 31, 2010

Your mortgage balance

Principal balance on January 1, 2010	**$575,167.08**
Minus Regular principal payments you made	$28,538.99
Principal balance on December 31, 2010	**$546,628.09**

Mortgage payments you made in 2010

Total principal you paid	$28,538.99
Total interest you paid	$9,659.58
Total amount you paid in 2010	**$38,198.57**

Your regular mortgage payments

Your payment frequency	Monthly
Principal and interest payment	$3,316.18
Property tax payment	$0.00
Your total regular mortgage payment	**$3,316.18**

Your property tax balance

Our records indicate you pay your property taxes directly to the taxing authority. If you wish us to administer your property taxes, your Servicing Branch will be pleased to make the necessary arrangements.

Your mortgage number: **136410-6**
Type of Mortgage: **Variable Rate***
Term: **5 years**
Renewal date: **May 1, 2012**
Your annual interest rates on:
January 1, 2010 **1.50000%**
December 31, 2010 **2.25000%**

Property Address:
PT LT 5 CON 14 PT 1
1086 MURPHY RD
MUSKOKA LAKES TOWNSHIP, ON

Questions about your mortgage?
Call us at 1-877-268-4228.

Save thousands on your mortgage.

Simply switch from monthly payments to weekly or bi-weekly payments and you could save thousands of dollars in interest costs plus, pay your mortgage off sooner. For details, visit *www.scotiabank.com/mortgages.*

Protect your family and your mortgage.

A Protection Plan from ScotiaLife Financial™ helps pay your family's mortgage in the event of an illness, disability or the unexpected. Contact your branch.

Important Information

Please keep this statement if needed for income tax purposes. Please review your statement carefully and call us if you have any questions.

The Scotiabank Group Privacy Agreement has been revised. Please refer to the Scotiabank website at *www.scotiabank.com.*

All borrowing parties with retail borrowing products may now elect to receive separate cost of borrowing disclosure documents such as monthly or annual statements. For further information, please contact your branch.

THIS IS EXHIBIT "C" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A commissioner for taking affidavits
in and for the Province of Ontario

Scotiabank®

47852
7600 WESTON ROAD, UNIT #3
WOODBRIDGE ONTARIO L4L 8B7

SBSAV10300_5640625_002 E D 47852 06058

MR R.RICARDO CASTILLO
135 GORDON ROAD
TORONTO ON
M2P 1E6

Your account number:
91132 01696 84

Questions?
Call 1 800 4-SCOTIA
(1 800 472-6842)

For online account access:
www.scotiabank.com

Your Powerchequing account summary

Opening Balance on April 21, 2011	$31,572.09
Minus total withdrawals	$3,327.18
Plus total deposits	$4,000.25
Closing Balance on May 20, 2011	$32,245.16

Important
Please review your statement promptly to check and verify the entries. If there are any errors or omissions, you must tell us in writing within 30 days of your statement date.

Here's what happened in your account this statement period

Date	Transactions	Amounts withdrawn ($)	Amounts deposited ($)	Balance ($)
Apr 21	Opening Balance			31,572.09
Apr 28	Credit memo Wire Payment Xela Enterprises Ltd.		4,000.00	35,572.09
Apr 28	Service charge	10.00		35,562.09
May 2	Mortgage payment #136410-6	3,316.18		32,245.91
May 20	Interest		0.25	32,246.16
May 20	Service charge Record Keeping Fees	1.00		32,245.16
May 20	Closing Balance			$32,245.16

Accelerate your savings with the *Scotia Power Savings Account* (SPSA). Open an SPSA today, get a high interest rate, and put more savings in your pocket.. For more information, please visit www.scotiabank.com/spsa. Minimum balance required.

SBSAV10300_5640625_002 - 0046059 HRI - - 01 - 01 - 22 - - 012115

THIS IS EXHIBIT "D" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A commissioner for taking affidavits
in and for the Province of Ontario

Subject: Re: Xela - BPA issue
From: Juan Gutierrez (Jgutierrez@xela.com)
To: marcas@rogers.com
Date: Monday, October 5, 2009 11:56:44 AM

Hi Margarita,

Given daddy's health situation, I haven't brought up the subject. He gets very agitated about these things, so I'll be sending you a reply on the subject during the day.

Regards

>>> Margarita Castillo <marcas@rogers.com 05/10/2009 11:06 am>>>
Hi dad, hi Juan,

I haven't received any reply from you regarding my last two emails.

On my part, I had a conversation with Roberto, and BPA will carry on with its cooperation with Grant T... this week. In the message I sent you last week there are other points which I think it's convenient to discuss in order to reach the best agreement for both parties.

I await your reply,

Regards,
Margarita

Subject: Re: Asunto Xela - BPA

From: Juan Gutierrez (Jgutierrez@xela.com)

To: marcas@rogers.com;

Date: Monday, October 5, 2009 11:55:44 AM

Hola Margarita,

Por la situacion con la salud del papi no le he tocado el tema. El se altera mucho con estos temas. Por esto, yo te estare respondiendo sobre esto durante el dia de hoy.

Saludos

>>> Margarita Castillo <marcas@rogers.com> 05/10/2009 11:06 am >>>
Hola Papi y Juan,

No he recibido ningun comentario de parte de ustedes referente a mi ultimo dos email.

Yo por mi parte tuve una conversacion con Roberto y BPA procedera con la colaboracion con Grant T... esta semana. En lo que les envie la semana pasada se mencionan otros puntos, los cuales creo que sera bueno hablar de ellos para llegar al mejor acuerdo para ambas partes.

Que a la espera de respuesta de parte de ustedes.

Saludos
Margarita

THIS IS EXHIBIT "E" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A commissioner for taking affidavits
in and for the Province of Ontario

Subject: RE: Fw: Account Statements and Agreement with Xela
From: Juan Rodriguez (Jrodriguez@crgplaw.com)
To: jgutierrez@xela.com, marcas@rogers.com, Arturo@xela.com
Date: Thursday, October 8, 2009 2:52:29 PM

[content of the e-mail in English]

----Original Message----
From: Juan Gutierrez [mailto:jgutierrez@xela.com]
Sent: Thursday, October 08, 2009 1:52 PM
To: Margarita Castillo; Arturo Gutierrez
Subject: Re: Fw: Account Statements and Agreement with Xela
Importance: High

High Priority

Hi,

See my reply in the attached letter.

Regards,

Juan G

[e-mail browser link] 31/08/2011

>>> Margarita Castillo <marcas@rogers.com> 9/30/2009 11:41 AM >>>
Daddy, Juan,
Here is what I got from Roberto yesterday. I await your comments and hope that this matter can be concluded in the best and fastest way possible.
Regards,
Margarita

----Forwarded Message----
From: Roberto Barillas <rbarillas@bpa.com.gt>
To: Margarita Castillo <marcas@rogers.com>
Cc: R Castillo <rcastillo@rogers.com>; Anibal Arellano <aarellano@bpa.com.gt>; jporras jporras <jporras@bpa.com.gt>
Sent: Tuesday, September 29, 2009 6:19:06 PM
Subject: Account Statements and Agreement with Xela

Auntie,

In order to confirm what we talked about today, we are 95% ready to receive Grant Thornton's auditors as soon as you confirm that Xela/J.A. Gutierrez-J.G. Gutierrez have fulfilled the requirement of delivering the cashier/certified cheques for pending fees, based on the updated account statement that I send in the file named "General Status of the BPA Relationship", attached. I'm also sending you the UNSIGNED letters of Jorge and Ricardo Weber regarding the subject of commissions arising from the promotion and sale of shares in Marco Polo. In a separate e-mail, I'll forward you the messages that Jorge and Ricardo sent me, to confirm the origin of their letters.

I then look forward to hearing from you in order to coordinate all the review process. In the case of our fees for audit review, they should give you an amount equal to 50% of what we estimate. Once you confirm the delivery of the respective cheques, we will get in touch with Sergio Pineda in order to confirm the meeting at our offices.

Sincerely,

Roberto Barillas
Partner - Director

Tel.: (502) 2360-9265 - 75
Fax: (502) 2360-9285

31/08/2011

Subject: RE: Fw: Status de Cuentas y Acuerdo con Xela

From: Juan Rodriguez (jrodriguez@crgplaw.com)

To: jgutierrez@xela.com; marcas@rogers.com; Arturo@xela.com;

Date: Thursday, October 8, 2009 2:52:29 PM

I approve of the letter. JJR

Juan J. Rodriguez, Esq.
jrodriguez@crgplaw.com

1395 Brickell Avenue Suite 700
Miami, FL 33131
Phone (305) 372-7474
Fax (305) 372-7475
http://www.crgplaw.com

-----Original Message-----
From: Juan Gutierrez [mailto:jgutierrez@xela.com]
Sent: Thursday, October 08, 2009 1:52 PM
To: Margarita Castillo; Arturo Gutierrez
Subject: Re: Fw: Status de Cuentas y Acuerdo con Xela
Importance: High

** High Priority **

Hola,

Te respondo mediate carta attached.

Saludos,

Juan G

>>> Margarita Castillo <marcas@rogers.com> 9/30/2009 11:41 AM >>>
Papi y Juan,
aqui les estoy enviando lo que recibi de Roberto ayer. Espero sus comentarios y que esto termine de la mejor forma y lo mas pronto posible.
Saludos
Margarita

----- Forwarded Message ----
From: roberto Barillas <rbarillas@bpa.com.gt>
To: Margarita Castillo <marcas@rogers.com>
Cc: R Castillo <rcastillo@rogers.com>; Anibal Arellano <aarellano@bpa.com.gt>; jporras jporras <jporras@bpa.com.gt>
Sent: Tuesday, September 29, 2009 6:19:06 PM
Subject: Status de Cuentas y Acuerdo con Xela

Tía,

Para confirmar lo platicado el día de hoy, estamos al 95% listos para atender a los auditores de Grant thornton al momento que se confirme de tu parte que Xela/ J.A. Gutierrez-J.G. Gutierrez han cumplido con entregarte los cheques de caja/certificados de los honorarios pendientes, con base en el estado de cuenta actualizado que te hago llegar en el documento denominado "Status General de la Relación BPA, adjunto. Así también estoy enviando las cartas NO firmadas de Jorge y Ricardo Wever con relación al tema de la comisión, por la promoción y venta de acciones de Marco Polo. En otro e-mail aparte a este te haré llegar los forwards de los e-mails de Jorge y Ricardo enviados a mi, para confirmar el origen de sus cartas.

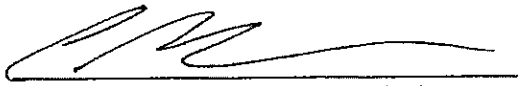
Quedo entonces a la espera de tus noticias para coordinar todo el proceso de revisión. En el caso de nuestros honorarios para la revisión de los auditores, deberían de entregarte el monto equivalente al 50% de lo estimado por nosotros. una vez sea confirmado por ti, la entrega de los cheques respectivos, nos comunicaremos con el Lic. Sergio Pineda, para confirmar la reunión en nuestras oficinas.

Saludos cordiales,

Roberto Barillas
Socio - Director

Tel: (502) 2360-9265 - 75
Fax: (502) 2360-9285

THIS IS EXHIBIT "F" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011



A commissioner for taking affidavits
in and for the Province of Ontario

October 7, 2009

Dear Margarita,

As you know, the following was agreed at the September 9, 2009 meeting in Toronto:

a) That Roberto Barillas, of the BPA - Soluciones Integrales de Negocios S.A. accounting and auditing firm would give us back the accounting books and supporting documentation for the following companies, the accounting of which had been assigned to them:

1. PAHULA, S.A
    a. Accounting books updated as at December 31st, 2008:
        i. General ledger
        ii. Daily ledger
        iii. General accounts book
        iv. Inventory book
        v. Purchase and sale book
    b. Returns for all taxes paid to SAT during 2008
    c. Book of SAT-approved invoices

2. SERVICIOS MARFIL, S.A
    a. Accounting books updated as at to December 31st, 2008:
        i. General ledger
        ii. Daily ledger
        iii. General accounts book
        iv. Inventory book
        v. Purchase and sale book
    b. Returns for all taxes paid to SAT during 2008

3. FRUTA MUNDIAL, S.A. & AGROEXPORTADORA NOBLEZA, S.A.
    a. Unlimited access to the auditor's working papers granted to Grant Thornton's auditors, as well as the willingness to cooperate fully with Grant Thornton so that it may successfully audit Fruta Mundial and Nobleza.
    b. Certified deeds of land purchase-sale agreements signed by Fruta Mundial, bearing the corresponding revenue stamps.

4. MAYACROPS, S.A. & LA FLORESTA, S.A.
    a. Unlimited access to the auditor's working papers granted to Grant Thornton's auditors, as well as the willingness to cooperate fully with Grant Thornton so that it may successfully audit Mayacrops and La Floresta.

5. METROBOWL
    a. Final auditor's report as at December 31st, 2008. To date, only a draft has been submitted.

b) You would be given a cheque for $23,386.00, to guard until it is given to Mr. Barillas as payment to BPA for its professional services, at the time he delivers the abovementioned information. The receipt for all surrendered documents would be signed by the following persons: Anibal Arellano, Jorge Porras, Eduardo San Juan and Claudio Riedel. Said cheque was handed to you on September 15, 2005, as previously agreed.

The thing is that, contrary to what Roberto himself agreed at the September 9, 2009 meeting, to this date he has refused to submit the agreed documents. Independent of the agreement, he now asks for the payment of fees arising from the organization of said information prior to its submission. He was asked to indicate his cost per hour for said service (fees which we were willing to pay in good faith although they were not included in our previous agreement).

In any case, Roberto made no submission until last Wednesday, September 30, 2008. During our meeting of September 9, 2009, and in other messages, we stated that it was urgent that we receive the documents Roberto and BPA agreed to submit due to the close timing. During the September 9 meeting I clearly explained to them the consequences that not having the requested information as soon as possible would have for Fruta Mundial's business, given that the audit process must be completed before the end of September.

The time for that process has gone and Roberto and BPA's fees proposal has been delivered too late.

Regarding the two BPA invoices attached to your e-mail of September 30, 2009, these invoices belong to the 2009 accounting services. They are not acceptable given that the services they refer to were completed as at December 31st, 2008, so Roberto is sending invoices for services that were not requested nor provided.

In your e-mail of September 30, 2009, Roberto asks for the payment of a commission for the sale of Marco Polo S.A. Neither BPA nor Roberto Barillas were hired at any time to sell that company. At the September 9, 2009 meeting, we clearly challenged the statements that Roberto made regarding that negotiation. I remind you that the agreement we reached on September 9, 2009, did not include said subject or the sum of $100,000.00 owned by our company that Roberto has improperly retained since the end of 2008.

In view of Mr. Barillas' refusal to act as agreed, we kindly ask you to return the abovementioned cheque. We appreciate the help you provided as custodian of that cheque as well as the part that your husband Ricardo played so that this negotiation was carried out. Sadly, in view of Roberto's failure to comply, it is impossible to uphold that agreement.
We will see how to solve the issue of the undue withholding of the companies' books. The worst consequence of said withholding is our incapacity to file audited statements

at the banks so we can maintain our line of credit. We could be looking at million-dollar damages.

Regards,

Juan Guillermo

7 de octubre de 2009

Querida Margarita,

Como es de tu conocimiento, en reunión de fecha 9 de septiembre 2009 en Toronto, se acordó:

a) Que el Lic. Roberto Barillas, de la firma de contadores y Auditores BPA – Soluciones Integrales de Negocios S.A., nos entregaría de vuelta los libros contables y documentación de soporte de las siguientes entidades, cuya contabilidad se había encargado a dicha firma:

1. PAHULA, S.A.

    a. Libros contables – actualizados al 31 de diciembre 2008:
        i. Libro Mayor
        ii. Libro Diario
        iii. Libro de Balances Generales
        iv. Libro de Inventarios
        v. Libro de Compras y Ventas.
    b. Declaraciones de todos los impuestos presentados ante la SAT durante el año 2008.
    c. Talonario de facturas autorizadas por la SAT.

2. SERVICIOS MARFIL, S.A.
    a. Libros contables – actualizados al 31 de diciembre 2008:
        i. Libro Mayor
        ii. Libro Diario
        iii. Libro de Balances Generales
        iv. Libro de Inventarios
        v. Libro de Compras y Ventas.
    b. Declaraciones de todos los impuestos presentados ante la SAT durante el año 2008.

3. FRUTA MUNDIAL, S.A. & AGROEXPORTADORA NOBLEZA, S.A.
    a. Acceso sin restricciones a los papeles de trabajo del auditor a favor de los auditores representantes de Grant Thornton, así como disposición de cooperar con Grant Thornton en lo necesario para que estos puedan concluir satisfactoriamente la auditoría de Fruta Mundial, así como de Nobleza.
    b. Testimonios de las escrituras de compra venta de terrenos por parte de Fruta Mundial con los timbres correspondientes.

4. MAYACROPS, S.A. & LA FLORESTA, S.A.
    a. Acceso sin restricciones a los papeles de trabajo del auditor a favor de los auditores representantes de Grant Thornton, así como disposición de cooperar con Grant Thornton en lo

necesario para que estos puedan concluir satisfactoriamente la auditoría de Mayacrops, así como de La Floresta.

5. METROBOWL
   a. Informe final de auditoría al 31 de diciembre 2008. Hasta el momento solo ha sido entregado en borrador.

b) Se te entregaría a tí un cheque por la suma de $23,386.00 en custodia, a ser entregado al Lic. Barillas como pago a BPA por sus servicios profesionales, en el momento que él te hiciera entrega de la documentación relacionada anteriormente. El recibo de la documentación entregada sería firmado por las siguientes personas: Lic. Aníbal Arellano, Lic. Jorge Porras, Sr. Eduardo San Juan y Sr. Claudio Riedel. Dicho cheque te fue entregado con fecha 15 de septiembre 2009 en cumplimiento de lo acordado.

Es el caso que contrario a lo acordado por el mismo Roberto en la reunión de fecha 9 de septiembre 2009 él hasta ahora se ha negado a entregar la documentación acordada. Fuera del acuerdo, ahora ha solicitado se le pague un honorario por organizar dicha información para hacer entrega de la misma. Se le solicitó que nos diera un costo por hora por dicho servicio (lo cual nosotros en buena fe estábamos dispuestos a aceptar pagar esos honorarios, a pesar de estar fuero de lo ya convenido).

En todo caso, Roberto no presentó sino hasta el pasado miércoles 30 de septiembre 2008. Durante nuestra reunión del 9 de septiembre 2009, así como en otras comunicaciones, expresamos la urgencia de la entrega de los documentos acordados por Roberto y BPA debido a la sensitividad de las fechas. Claramente les expliqué durante la reunión del 9 de septiembre las consecuencias para el negocio de Fruta Mundial de no recibir la información a la brevedad debido a que la auditoría debe estar completa antes del fin de septiembre.

El tiempo para esto ya ha concluido y la propuesta de honorarios de Roberto y BPA ha sido entregada demasiado tarde.

En cuanto a las dos facturas de BPA adjuntas a tu email de 30 de septiembre 2009, corresponden a servicios contables durante el año 2009. Estas facturas no son aceptables debido a que los servicios en cuestión fueron concluidos al 31 de diciembre 2008, por lo que Roberto esta enviando facturas por servicios que no fueron requeridos y provistos.

En tu email de 30 septiembre 2009, Roberto reclama una comisión por la venta de Marco Polo S.A., en ningún momento BPA o Roberto Barillas fueron contratados para vender esa empresa. En la reunión del 9 de septiembre 2009 claramente rechazamos las aseveraciones de Roberto respecto a esta negociación. Te recuerdo que el acuerdo al que llegamos el 9 de septiembre 2009 dejó fuera tanto este tema

como los $100,000.00 propiedad de nuestra empresa que Roberto tiene indebidamente retenidos desde fines del 2008.

Ante la negativa del Lic. Barillas de cumplir con su palabra, te rogamos nos devuelvas el cheque en cuestión. Te agradecemos tu apoyo en servir como custodio de ese cheque, así como la intervención de tu esposo Ricardo para que ésta negociación se llevara a cabo. Desafortunadamente, ante el incumplimiento de Roberto, es imposible continuar con dicho acuerdo.

Veremos como solventar la situación de ésta retención indebida de los libros de las empresas cuya principal consecuencia negativa es la imposibilidad de presentar estados auditados a los bancos para continuar con nuestra línea de crédito. Los daños pueden ser millonarios.

Un abrazo,

Juan Guillermo

THIS IS EXHIBIT "G" REFERRED TO IN THE
AFFIDAVIT OF MARGARITA CASTILLO SWORN
BEFORE ME THIS 9TH DAY OF SEPTEMBER, 2011

A commissioner for taking affidavits
in and for the Province of Ontario

Subject: Xela - BPA issue
From: Margarita Castillo (marcas@rogers.com)
To: jgutierrez@xela.com;
Bcc: Arturo @xela.com;
Date: Friday, October 9, 2009 10:50:05 AM

October 8, 2009

Dear Juan,

This afternoon I received your October 7 letter in which you refer to several items of the agreement reached with BPA.

The e-mail I sent you on September 30 included an e-mail that Roberto had sent me previously, but I had not sent it to you because I was giving BPA the time to prepare the paperwork for our cooperation with Grant Thornton's people.

BPA's people are ready to receive them next week. If there was a misunderstanding, let's leave it behind and conclude this as best and as fast we can, without pointing fingers at each other.

Regarding the money, we will settle that issue later. I'll fix it.

So, please let our people in Guatemala know, so that they can tell Grant Thornton to get in touch with BPA.

Regards,

Margarita

P.S.: In another message I will answer your letter point by point so that everything is in order.

Subject: - Asunto XELA – BPA

From: Margarita Castillo (marcas@rogers.com)

To: jgutierrez@xela.com;

Bcc: arturo@xela.com;

Date: Friday, October 9, 2009 10:50:05 AM

8 de octubre de 2009

Querido Juan,

Hoy por la tarde recibí tu carta del 7 de octubre, en donde haces referencia de varios puntos del acuerdo con BPA.

- El email que te envié el 30 de septiembre contenia un email que Roberto me habia enviado anteriormente, pero yo no se los habia echo llegar ya que le estaba dando tiempo a BPA para que prepararan los papeles para la colaboración con los señores de Grant Thornton.

En BPA ya estan listos para recibirlos la próxima semana. Si hubo un mal entendido pues dejémolo atrás y terminemos esto de la mejor forma lo más rapido possible, sin estar señalando a la otra parte.

Referente al dinero lo arreglaremos después, yo me encargare de arreglarlo.

Asi es que por favor avísale a nuestra gente en Guatemala para que le den la orden a Grant Thornton de ponerse en contacto con BPA.

Un abrazo,

Margarita

PD En otra carta te aclararé punto por punto de tu carta para que quede todo en orden.

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

SECOND REPLY AFFIDAVIT OF MARGARITA CASTILLO
(Sworn on September 9, 2011)

BENNETT JONES LLP
Barristers & Solicitors
One First Canadian Place
Suite 3400, P.O. Box 130
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Jeffrey S. Leon (LSUC #: 18855L)
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Lawyers for the Applicant, Margarita Castillo

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

SECOND REPLY APPLICATION RECORD

BENNETT JONES LLP
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Lawyers for the Applicant,
Margarita Castillo

TAB 2

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

MARGARITA CASTILLO

Applicant

-and-

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

AFFIDAVIT OF HARALD JOHANNESSEN HALS

(Sworn March 22, 2020)

I, Harald Johannessen Hals, resident of Guatemala City, Guatemala, Central America, **MAKE OATH AND SAY:**

1. I am the President of Lisa, S.A., a Panama corporation ("**LISA**"). I make this Affidavit in support of the Debtor's Opposition to the Motion of the Receiver (returnable March 24, 2020) (the "**Motion**").

2. Beginning in 2005, LISA's efforts to collect unpaid dividends owed by the Avicola Group, including litigating the Leamington action in Bermuda, were funded by BDT Investments Ltd., a Barbados corporation ("**BDT**"), which at the time was wholly owned by Xela Enterprises Ltd. ("**Xela**"). On January 5, 2009, LISA and BDT documented LISA's then-

cumulative debt to BDT with a promissory note for US$16,910,000, secured by LISA's 1/3 stake in Villamorey. BDT eventually sued LISA in Panama on the promissory note, and in December 2012, it obtained a judgment against LISA in the amount of US$19,184,680, together with a lien against all of LISA's assets (collectively the "**BDT Judgment**"). A true and correct copy of the BDT Judgment is attached hereto as Exhibit A.

3. In April 2016, as part of his estate planning, Arturo formed The ArtCarm Trust, a Barbados Trust (the "**Trust**"), to which he irrevocably transferred various assets, including BDT, for the benefit of certain family members, but excluding Juan. Meanwhile, BDT continued to fund LISA's claims to recover Unpaid Dividends, and LISA's debt to BDT grew to approximately US$50 million (the "**BDT Claim**"). Thus, at the time the Receiver was appointed, BDT was LISA's single largest creditor, with a claim approximately ten times the size of the judgment held by Margarita Castillo that is the basis for the receivership (the "**Castillo Judgment**"). Still, BDT has consistently said that if LISA were to collect Unpaid Dividends, BDT would consider subordinating its rights under the BDT Judgment to the reasonable requirements of the receivership.

4. Since the earliest days of his appointment, the Receiver has adopted a confrontational approach toward BDT, challenging both the validity of Arturo's transfer of BDT into the Trust, as well as the genuineness of the BDT Claim itself. Regarding the first issue, I understand that any challenge to the transfer of BDT to the Trust in April 2016 is now time-barred under Barbados law.

5. As for the validity of the BDT Claim itself, the U.S. District Court for the Southern District of Florida has now examined the relationship between BDT and LISA and rejected the argument advanced by Villamorey (and seemingly adopted by the Receiver) that LISA's debt to BDT was a sham. In BDT's lawsuit to garnish approximately US$13 million of LISA's Unpaid Dividends held in an account at Banco Santander International ("**BSI**") in Miami (the "**Garnishment Proceedings**"), Villamorey moved to set aside the BDT Judgment, arguing that LISA's purported underlying litigation financing debt to BDT was fictitious and a fraud. However, on February 7, 2020, U.S. District Judge Marcia G. Cooke adopted in full the recommendation of Magistrate Judge Goodman that she deny Villamorey's motion,

concluding that ". . . the record does not establish by clear and convincing evidence that a fraud on the court (as that theory is defined in Florida law) occurred. As a result, the Undersigned respectfully recommends that Judge Cooke deny the motion." A true and correct copy of the Magistrate Judge's October 18, 2019 Report and Recommendation, which was adopted by the District Court, is attached hereto as Exhibit B.

6. After several rounds of discovery (including documentary evidence of BDT's disbursements for LISA's benefit), briefing and oral argument surrounding the relationship between BDT and LISA, the U.S. District Court rejected Villamorey's argument that BDT had defrauded the Court by asserting its rights under the BDT Judgment. The underlying BDT Debt is valid and not subject to further challenge in these receivership proceedings.

7. As of The amount of Unpaid Dividends owed to LISA is estimated to approach $400 million, including interest. LISA's efforts to collect those dividends have been focused primarily in Panama (the "**Panama Proceedings**"), where LISA has an Order for disgorgement of Unpaid Dividends against Villamorey (the "**December 5, 2018 Payment Order**"), and in Miami, where the Garnishment Proceedings are pending.

The Panama Proceedings

8. LISA commenced the Panama Proceedings as part of its attempt to recover Unpaid Dividends. In September 2008, Villamorey brought a Counterclaim (the "**Counterclaim**") against LISA, alleging damages of approximately $200,000. Villamorey was granted a freezing order (*embargo*) and a seizure order (the "**Seizure Order**"), allowing it to suspend dividend payments to LISA and to seize and hold (*secuestro*) any Unpaid Dividends during the course of the Panama Proceedings (the "**Seized Dividends**"). Villamorey financial statements for 2011 and 2016 reflect Seized Dividends amounting to least $14,465,062.

9. As a condition for the Seizure Order, Villamorey should have been required to deposit the Seized Dividends with the Court, but it was not. Instead, the Court granted Juan Luis Bosch – one of the Nephews and a stakeholder and long-time President of Villamorey – the status of trustee (*depositario judicial*) over the Seized Dividends, pursuant to which he agreed to make them available should the Court request them. Additionally, the Court

imposed a reporting requirement on Juan Luis Bosch that included ongoing disclosure of the location and any movement of the Seized Dividends (which LISA understands were initially on deposit at a bank in Panama), any additional dividends declared by Villamorey, and any other facts material to Juan Luis Bosch's status as a trustee of the Seized Dividends. Additionally, Villamorey was required to post three insurance bonds through ASSA Compañía de Seguros, S.A., a Panama corporation to guarantee payment of any damages suffered by LISA as a consequence of the Seizure Order.

10. LISA has alleged that – without LISA's knowledge or consent – Villamorey subsequently moved the Seized Dividends from their location on deposit in Panama into an account at Santander Bank in Miami, Florida, where Villamorey placed them into the stream of commerce by pledging them as collateral for a loan from Santander to a company owned by the Nephews for the acquisition of a telecommunications company in Guatemala, to the exclusion of LISA. LISA also understands that Juan Luis Bosch resigned as President and Director of Villamorey, eliminating all links between Juan Luis Bosch and Panama. Additionally, Villamorey financial statements obtained by LISA for 2016 and 2017 reflect further declared dividends in LISA's favor of $4,748,054 and $5,317,000 respectively.

11. Further, LISA understands that, without LISA's knowledge or consent, the Nephews caused a trust to be created in Guatemala in September 2018 – while LISA's demand for offset of the Counterclaim and release of the Seized Dividends in the Panama Proceedings (*i.e.*, the court filing that led to the Castillo Judgment) was pending – to which the Nephews purported to transfer all Villamorey assets, including the Seized Dividends. LISA believes that Juan Luis has failed to disclose these facts to the Court in the Panama Proceedings, notwithstanding the reporting obligations imposed on him.

12. Meanwhile, during the course of the Panama Proceedings, Villamorey sought an additional award of costs, which had the eventual effect of increasing the alleged value of the Counterclaim to $894,718. Additionally, Villamorey requested that LISA's shares in Villamorey be auctioned in satisfaction of the Counterclaim. In response, although it had disputed them, LISA voluntarily conceded the alleged damages in the Counterclaim and requested that the Counterclaim be satisfied with a portion of the Seized Dividends and that

the remainder of the Seized Dividends be delivered to LISA. The Court in the Panama Proceedings agreed with LISA and, on December 5, 2018, issued the December 5, 2018 Payment Order as follows: (a) denying Villamorey's application to auction LISA's shares in Villamorey to satisfy the Counterclaim; (b) declaring Villamorey's damages under the Counterclaim satisfied in full through a reduction of the Seized Dividends by $894,718; and (c) ordering Villamorey to release to LISA the balance of the Seized Dividends, wherever they may be located. A true and correct copy of the December 5, 2018 Payment Order is attached hereto as Exhibit C.

13. Villamorey appealed the December 5, 2018 Payment Order, which was rejected on July 12, 2019. Villamorey subsequently filed a constitutional appeal (*amparo*), which was and summarily rejected on September 27, 2019.

14. In November 2019, LISA filed a constitutional appeal (*amparo*) of its own to compel the Court to specify the amount of Seized Dividends to be disgorged by Villamorey to LISA under the December 5, 2018 Payment Order. That *amparo* was accepted and resolved in LISA's favor, whereupon LISA submitted Villamorey's financial statements and other documents demonstrating that the amount Villamorey is required to pay LISA under the December 5, 2018 Payment Order is $23,635,398. The Panama Court's ruling on that evidence is imminent.

The Garnishment Proceedings

15. The Garnishment Proceedings were recently dismissed on a finding by the U.S. District Court for the Southern District of Florida that the writ of garnishment had expired. BDT's options include appellate proceedings and/or a new garnishment action. I understand that BDT has placed Banco Santander International on notice that any movement of the previously-garnished funds would be treated as a fraudulent transfer.

16. After the Receiver was appointed, LISA began to inquire into potential third-party loans sufficient to satisfy, among other things, the Judgment and the expenses of the Receivership. In December 2019, LISA received a verbal commitment for such a third-party

loan on terms acceptable to LISA (the "**Loan**"). All of the Loan details were managed and approved by LISA's Board of Directors, Xela's instigation, involvement or approval.

17. Upon learning of the lender's commitment to make the Loan, LISA informed the Receiver, stating specifically that the Loan was adequate to satisfy the Castillo Judgment and all reasonable expenses of the Receivership. LISA asked the Receiver to provide a payoff for the Castillo Judgment, together with an estimate of the receivership expenses, which the Receiver supplied. When the Receiver demanded to be told the Loan details, LISA declined out of fear that the Receiver's involvement would jeopardize Loan, and on the grounds that the Receiver's interest in the Loan did not extended beyond knowing that it would be adequate to satisfy the Castillo Judgment and the expenses of the receivership. Because LISA had not told Xela any of the details about the loan, Xela was unable to provide any further information about it to the Receiver

18. Dissatisfied with this response, and seemingly unreceptive to the Loan, the Receiver hired counsel in Panama and apparently instructed him: (1) to amend LISA's Articles of Incorporation to increase the maximum number of Directors from five to six; and (b) to add three new LISA Directors designated by the Receiver to the three Directors already in place. I understand that the Receiver's Panama counsel proceeded to try to execute those instructions without first obtaining a power of attorney to act for the Receiver, and without taking the threshold step of domesticating the Court's Appointment Order in Panama. Further, neither the Receiver nor his Panama counsel informed Xela or LISA in advance of their plans.

19. Consequently, when LISA's counsel in Panama observed that an unidentified person was trying to alter LISA's corporate structure, LISA quickly contested the changes, which were officially rejected by the Corporate Registrar for failure to comply with applicable procedures.

20. Meanwhile, the Loan has not funded. Although the lender has not articulated its reasons in writing, I was told that the lender became alarmed at the Receiver's attempt to insert himself into the Loan transaction.

Assignment of LISA's Claims to BDT

21. As LISA's debt to BDT has continued to mount, BDT has grown increasingly concerned about repayment, with particular concern about adequate collateral for what is now approximately US$50 million in debt. This concern explains the reasoning behind the 2018 document entitled Assignment of Causative Action, and it further explains why BDT proposed in 2020 to extinguish LISA's debt in its entirety in exchange for LISA's full 1/3 stake in the Avicola Group, including its claims for Unpaid Dividends. The proposal was accepted by LISA's Board of Directors in February 2020. Consequently, BDT now owns all of LISA's 1/3 stake in the Avicola Group, along with LISA's claims for Unpaid Dividends. The decision to assign its remaining assets to BDT in exchange for cancellation of the debt was make solely and entirely by LISA, without the consent or approval of Gabinvest, S.A. or Xela.

22. In connection with that transfer, BDT provided LISA with assurances that in the event BDT is able to recover LISA's Unpaid Dividends, it will – as before – consider subordinating those monies to the reasonable requirements of the receivership.

LISA's Interaction with the Receiver

23. LISA's Panama counsel has met on several occasions with counsel for the Receiver in Panama. During each meeting, LISA explained how Margarita's conduct in Canada entitles Xela to a judgment that would more than offset the Castillo Judgment and the expenses of the receivership. LISA lawyers repeatedly asked the Receiver's lawyers for a face-to-face meeting with the Receiver to discuss the issue and how it might impact the receivership. Recently, the Receiver has suggested through his Panama lawyer that a meeting might be

possible, but only on the condition that LISA first voluntarily consent to the Receiver's proposed changes to the LISA Board of Directors.

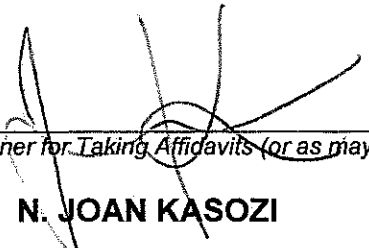
SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on March 22, 2020.

Commissioner for Taking Affidavits
(or as may be)

N. Joan Kasozi
(LSO# 70332Q)

HARALD JOHANNESSEN HALS

This is Exhibit "A" referred to in the Affidavit of HARALD JOHANNESSEN HALS sworn March 22, 2020.



Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI

(LSO# 70332Q)

-52-

AUTO No. 1838 (Exp. 31638-12)

JUZGADO DUODÉCIMO DEL CIRCUITO DE LO CIVIL DEL PRIMER CIRCUITO JUDICIAL DE PANAMÁ. Panamá, doce (12) de diciembre de dos mil doce (2012).

VISTOS:

En atención a lo solicitado por el demandante, se procede a resolver en la forma prevista en nuestro Código Judicial.

En consecuencia, el suscrito JUEZ DUODÉCIMO DEL CIRCUITO DE LO CIVIL DEL PRIMER CIRCUITO JUDICIAL DE PANAMÁ, DECRETA EMBARGO a favor de BDT INVESTMENTS INC. y en contra de LISA, S.A., hasta la concurrencia de DIECINUEVE MILLONES CIENTO OCHENTA Y CUATRO MIL SEISCIENTOS OCHENTA BALBOAS CON 00/100 (B/. 19,184,680.00) sobre lo siguiente:

1. Las acciones emitidas a favor de la sociedad LISA, S.A., inscrita a ficha 117512, rollo 11750, imagen 0186, cuyo presidente y representante legal es el señor CALVIN KENNETH SHIELDS, varon, estadounidense, casado mayor de edad, ingeniero, portador del pasaporte N° 158157083, con domicilio en N° 1176, Carolina Circle SW, Vero Beach, Florida, Estados Unidos de América en las siguientes sociedades:

   a. ALIMENTOS PARA ANIMALES, S.A., sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 572, folio 81, libro 3 de Sociedades Mercantiles, cuyo Gerente General y representante legal lo es el señor JULIO CESAR RIVERA PELAEZ, ambos con oficina en 42, calle 20-91, Zona 12, ciudad de Guatemala. De esta sociedad LISA, S.A., es la propietaria de 45,000 acciones, según consta en el Certificado de Acciones N° 1.

   b. AVICOLA LAS MARAGARITAS, S.A., sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 24735, folio 435, libro 103 de sociedades Mercantiles, cuyo Gerente General y representante legal lo es el señor GUILLERMO ANTONIO RAMIREZ MORALES; ambos con oficinas en Calz. Aguilar Batres 50-52, Colonia Castañas, Zona 11, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 375 acciones, según consta en el Certifiado de Acciones N°3.

   c. ADMINISTRADORA DE RESTAURANTES, S.A. sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 27794, folio 242, libro112 de sociedades mercantiles, cuyo Gerente General y Repersentante Legal lo es el señor CARLOS RENE GUZMAN, ambos con oficinas en 24 avenida, 34-05, zona 12, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 12 acciones según consta en el Certificado de Acciones N°. 3.

   d. COMPAÑIA ALIMENTICIA DE CENTROAMERICA, S.A., sociedad constituida de acuerdo a las leyes de Guatemala en inscrita a número 34068, folio 198, libro 121 de Sociedades Mercantiles, cuyo Gerente General y representante legal lo es el

señor MARCO ANTONIO SANCHEZ CASTAÑEDAS, ambos con oficinas en 46, calle 21-89, zona 12, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 12 acciones, según consta en el Certificado de Acciones N° 3.

e. IMPORTADORA DE ALIMENTOS DE GUATEMALA, S.A. sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 34065, folio 195, libro 121 de sociedades Mercantiles, cuyo Gerente General y Representante Legal lo es el señor CARLOS RENE GUZMAN, ambos con oficinas en 24 avenida, 34-05, zona 12, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 12 acciones según consta en el Certificado N° 3.

f. INDUSTRIA FORRAJERA DE MAZATENANGO, S.A., sociedad constituida de acuerdo a las leyes de Guatemala e inscrita a número 13585, folio 460, libro 69 de Sociedades Mercantiles, cuyo Gerente General y Representante Legal lo es el señor SERGIO BOSCO PIO SEVILLA NOGUERA, ambos con domicilio en Calz. Aguilar Batres 50-52, Colonia Castañas, zona 11. De esta sociedad LISA, S.A., es propietaria de 125 acciones según consta en el Certificado N° 3.

g. INVERSIONES EMPRESARIALES, S.A. sociedad constituida de acuerdo a las leyes de Guatemala e incrita a número 10772, folio 30, libro 59 de sociedades Mercantiles, cuyo Gerente General y Representante legal lo es el señor GUILLERMO ANTONIO RAMIREZ MORALES, ambos con domicilio en 42, calle 20-91, zona 12, Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 125 acciones según consta en el Certificado N° 3.

h. VILLAMOREY, S.A., sociedad constituida de acuerdo a las leyes de la República de Panamá, inscrita a ficha 9142, rollo 367, imagen 303 de la Sección de Micropeliculas Mercantil del Registro Público, cuyo presidente y representante legal lo es el señor JUAN LUIS BOSCH GUTIERREZ, ambos con oficinas ubicadas en el Edificio Empresarial Torre I, quinta avenida, 15-45, zona 10, de la Ciudad de Guatemala. De esta sociedad LISA, S.A., es propietaria de 3,333 acciones según consta en el Certificado N° 1

2. Sobre las sumas de dinero que en concepto de dividendos declarados tenga derecho a recibir la sociedad LISA, S.A., incluyendo los que a la fecha se hayan generado y no han sido entregados y los que se sigan generando hasta la concurrencia de lo adeudado, en su condición de accionista en las mencionadas sociedades.
3. Cualquier suma de dinero, derechos o créditos que resulten a favor de la sociedad LISA, S.A., dentro del proceso Ordinario de mayor cuantía con acción de secuestro que promueve LISA, S.A., contra VILLAMOREY, S.A., el cual se lleva a cabo ante los estrados del Juzgado Undécimo de Circuito Civil del Primer Circuito Judicial de Panamá, registrado bajo el número de demanda 556-99 y acción de secuestro número 7081-08.

4. Los dineros de propiedad LISA, S.A. que mantiene la sociedad VILLAMOREY, S.A., en depósito en sus cuenstas de banco GTC BANK INC.
5. Las sumas de dinero propiedad de LISA, S.A., que mantiene la sociedad VILLAMOREY, S.A., y que son objeto de medida de secuestro decretado mediante Auto N° 1624-08 del 27 de octubre de 2008, dictado dentro de la demanda de reconvención del Proceso Ordinario de Mayor Cuantía con Acción de Secuestro que promueve LISA, S.A., contra VILLAMOREY, S.A., el cual se lleva a cabo ante los estrados del Juzgado Undécimo de Circuito Civil, del Primer Circuito Judicial de Panamá, registrado bajo el número de demanda 556-99 y acción de secuestro número 7081-08.
6. Las sumas de dinero que mantenga la sociedad LISA, S.A., en los bancos de la localidad.

Comuníquese lo resuelto a quien corresponda para los fines legales correspondientes.

Fundamento de Derecho: Artículo 1643 del Código Judicial.

NOTIFIQUESE,

EL JUEZ,

LICDO. ~~JUAN~~ CARLOS TATIS

LICDA. ANA M. GALLARDO H.
SECRETARIA

/zgv.

REPÚBLICA DE PANAMÁ
JUZGADO 12 PARRO CIVIL DE PANAMÁ, PANAMÁ
ÓRGANO JUDICIAL

CERTIFICO: QUE PARA NOTIFICAR A LAS PARTES LA RESOLUCION QUE PRECEDE, SE HA FIJADO EDICTO Nº 1687

EN LUGAR PUBLICO DE LA SECRETARIA HOY 13

DE DICIEMBRE DEL AÑO 2,012

A LAS 4:00 DE LA TARDE

El Secretario

CERTIFICO: QUE ES FIEL COPIA DE SU ORIGINAL.

El Secretario

This is Exhibit "B" referred to in the Affidavit of HARALD JOHANNESSEN HALS sworn March 22, 2020.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI

(LSO# 70332Q)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 18-22005-CIV-COOKE/GOODMAN

BDT INVESTMENTS, INC.,

Judgment Creditor,

v.

LISA, S.A.,

Judgment Debtor,

v.

BANCO SANTANDER INTERNATIONAL,

Garnishee.
_____/

REPORT AND RECOMMENDATIONS RECOMMENDING THAT THE DISTRICT COURT *DENY* INTERESTED PARTY'S MOTION TO SET ASIDE FOREIGN JUDGMENT FOR FRAUD ON THE COURT

In William Shakespeare's play *Hamlet*, Marcellus, a guard, says, "Something is rotten in the state of Denmark." WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 4. If that famous phrase were to be modified and updated to the motion at issue here, concerning a default judgment obtained in Panama, then it might be: "Something *might* be foul in Panama." The difference between something which **is** rotten and something which **might** be foul is the difference on which this ruling turns.

In this garnishment action, the "latest installment in a global intra-family brawl

now in litigation for over 20 years," [ECF No. 217, p. 1], Interested Party Villamorey, S.A. filed a motion entitled as one to set aside "a foreign judgment for fraud on the court."[1] [ECF No. 217]. BDT Investments, Inc., the judgment creditor who initiated the garnishment action, filed an opposition memorandum [ECF. No. 235] and Villamorey filed a reply [ECF No. 275]. Although the Garnishee, Banco Santander International ("BSI"), did not technically join Villamorey's motion, it supports Villamorey's position and has filed submissions urging the fraud-on-the-court theory. For example, in its opposition [ECF No. 260-1] to BDT's Amended Final Summary Judgment Motion [ECF No. 215], BSI included a section entitled "BDT is not entitled to summary judgment because it obtained the Panama judgment through fraud." [ECF No. 260-1, p. 25].

United States District Judge Marcia G. Cooke referred Villamorey's motion to set aside the foreign judgment to the Undersigned. [ECF No. 242].

Although there are several atypical circumstances surrounding BDT's Panamanian judgement against the debtor, Lisa S.A. ("Lisa"), and although some of those odd factors might also be deemed suspicious and could be evidence of actual fraud, Villamorey has not met its burden. Specifically, it has not demonstrated by clear and convincing evidence that the judgment it wishes to vacate is based on "the most

[1] Villamorey's initial motion was filed in a redacted format, with many words and phrases blocked out. In response to an Order [ECF No. 257] from the Undersigned, Villamorey later submitted an unredacted version of its motion under seal. [ECF Nos. 268; 269]. This Report and Recommendations does not, however, discuss the under-seal information unless it was publicly disclosed elsewhere, in a filing or during a hearing.

egregious misconduct" -- the standard which Villamorey conceded at a hearing[2] is the applicable one. [ECF No. 320, p. 222]. Given this assessment, the Undersigned **respectfully recommends** that Judge Cooke **deny** Villamorey's motion to set aside the foreign judgment.[3]

I. Factual Background

A. *The State Court Action*

In February 2017, BDT filed an action in Florida state court to domesticate and enforce a $19 million judgment that it had obtained against Lisa in Panama. Lisa did not

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[2] The Undersigned held hearings on the motion to set aside the foreign judgment (and several other substantive motions) on September 18 and October 2, 2019. The total hearing time for all motions was almost 13 hours. [ECF Nos. 298; 307]. A significant portion of those hearings concerned Villamorey's motion to set aside the foreign judgment.

[3] As outlined below, Villamorey's motion concerns both the underlying judgment (which BDT obtained in Panama against Lisa) and the domestication of that judgment in Miami-Dade Circuit Court (before the garnishment was removed to federal court). BDT argued that Villamorey could not challenge the judgment here, contending that it needed to mount a challenge in Panama or perhaps Miami-Dade Circuit Court, where the judgment was domesticated.

By issuing a substantive recommendation on the motion, the Undersigned is not concluding that Villamorey was not required to pursue the challenge in Panama, nor am I finding that it did not need to challenge the domestication in Miami-Dade Circuit Court. I am not issuing a ruling or recommendation on those related legal challenges. Instead, the ruling is based on the view that Villamorey did not meet the difficult burden to set aside the foreign judgment for fraud **if** it were able to mount that challenge here. Phrased differently, this ruling assumes, for the sake of discussion only, that Villamorey is permitted to pursue the challenge in this garnishment action as an interested party in this now-removed federal action.

oppose the domestication -- to the contrary, it filed an affidavit saying that it did not object. BDT then served BSI with a writ of garnishment, claiming that the bank was holding $13.6 million in unpaid dividends that Villamorey owes to Lisa, who owns a third of Villamorey's shares.

BSI opposed the writ. BSI claims to have a perfected security interest in those funds based on a pledge from Villamorey to secure a BSI loan to another company. Villamorey also appeared in the state court action to assert its interest. BDT, BSI and Villamorey all appeared in this federal court lawsuit and have vigorously litigated many substantive motions. Lisa has not filed any submissions, but its counsel appeared at the first of the two hearings and also appeared at earlier discovery hearings in this case.

B. ***The Circumstances Supposedly Generating the Purported Fraud***

Villamorey's motion to set aside the foreign judgment was publicly filed on CM/ECF, but with redactions. The Undersigned is providing only the unredacted factual background from the motion (and, when appropriate, from the unredacted portions of BDT's response, Villamorey's reply, and statements made during an open-to-the-public court hearing).

On February 27, 2017, BDT commenced the state court proceeding (which has since been removed to this Court) in order to obtain recognition of a purported judgment and writ of attachment (together, the "Panamanian Judgment") that it had

obtained against Lisa in Panama. Specifically, the Panamanian Judgment is comprised of what appears to be a Panamanian writ of execution against Lisa, dated May 31, 2012, allegedly in BDT's favor and against Lisa in the amount of US $19,184,680 (the "Writ of Execution"), and a Panamanian writ of attachment in BDT's favor and against Lisa for the same amount, dated as of December 12, 2012 (the "Writ of Attachment").

On March 2, 2017, three days after BDT's commencement of the state court proceeding and before any mail service of the Purported Judgment, Calvin K. Shields, in his capacity as President of Lisa (the claimed judgment debtor and "Defendant" in this proceeding), filed a sworn Declaration of Non-Objection (the "Shields Declaration") in the state court proceeding stating that (i) he was aware of the Panamanian Judgment; (ii) he was aware of BDT's effort to domesticate the Panamanian Judgment in Florida; (iii) Lisa would not object to the recognition or enforceability of the Panamanian Judgment; and (iv) the amounts set forth in the Panamanian Judgment "are legitimately owed by Lisa, S.A. to BDT Investments, Inc." [ECF No. 268-1, p. 4]. At the time that the Shields Declaration was filed, Lisa and BDT and Xela Enterprises, Ltd. (which owns Lisa) were all represented by the same Miami law firm.

On March 10, 2017, three business days following the filing of the Shields Declaration, and well before the thirty-day statutory period for the filing of objections to recognition under Florida law [*see* Fla. Stat. §§ 55.604(2) and (4), including for fraud; *see* Fla. Stat. § 55.605(2)(b)], the Clerk of the Court (in apparent response to the Shields

Declaration) filed the Certificate of No Objection, which allowed BDT to seek immediate enforcement of the Panamanian Judgment against Lisa (an entity that was affiliated with BDT through common ownership at the time of the Judgment).

On March 14, 2017, BDT filed a Motion for Post Judgment Writ of Garnishment (the "Motion for Writ of Garnishment"), which sought the issuance of a writ of garnishment against BSI and claimed, among other things, that BDT did not believe that Lisa (its undisclosed affiliate) had "in its possession visible property on which a levy can be made sufficient to satisfy the judgment . . . ." [ECF No. 1-4, p. 3].

On March 17, 2017, the Clerk of the Court issued a Writ of Garnishment (the "Writ") to BSI, as Garnishee, which BDT immediately served on BSI on that same date. When BDT served the Writ, it also provided correspondence to BSI contending that Lisa was allegedly owed money by Villamorey.

On April 5, 2017, BSI filed its Answer to the Writ (the "Answer"), stating that "[a]t the time of service of the Writ, through and including the time of this Answer, BSI (a) was not and is not in possession or control of any tangible or intangible personal property of Lisa, S.A. (the "Judgment Debtor") and (b) did not and does not owe any debts to the Judgment Debtor," and that it had a perfected security interest on those funds. [ECF No. 1-8, pp. 2-3].

On May 1, 2017, BSI filed its Motion to Dissolve Writ of Garnishment in the state court proceeding, which sought dissolution of the Writ, including on the grounds that

the Certificate of No Objection entered by the Clerk of the Court was improperly entered in direct contravention of the 30-day objection period that applies to the recognition of foreign judgments in Florida under Fla. Stat. § 55.604(1). [ECF No. 1-10, pp. 120-75]. Also on May 1, 2017, Villamorey filed a separate Motion to Dissolve Writs of Garnishment and Garnishment on Account at Banco Santander International. [ECF No. 1-10, pp. 176-287]. No court has ever ruled on these Motions.

On May 18, 2018, BSI removed the above-captioned proceeding to this Court. [ECF No. 1].

BDT and Lisa objected to BSI's discovery requests, and the Undersigned ultimately entered an Omnibus Order authorizing BSI to "seek discovery designed to collaterally attack the garnishment action on the basis of fraud, particularly given the unique circumstances underlying the garnishment action." [ECF No. 158].

After that ruling (which overruled their objections), BDT and Lisa produced documents and provided information.

Although counsel for BDT advised this Court that "BDT and Lisa are not commonly owned, and BDT is not Lisa's 'affiliate'" [*see* ECF Nos. 123, p. 5, n. 3; 158, p. 12 (citing representations made by counsel)], documents produced after the entry of the Omnibus Discovery Order reflect that BDT and Lisa were affiliated entities with the same corporate parent, Xela Enterprises Ltd., both (i) at the time that Lisa executed the Promissory Note and Stock Pledge Agreement ("Note") on which the Panamanian

Judgment is purportedly based, and (ii) at the time that BDT obtained the uncontested Panamanian Judgment.

At all times relevant to the transactions at issue, Lisa had no office, no employees, no bank account, and no financial books or records. Further, all of Lisa's decisions, including its financial decisions, were made by Xela's President, Juan Guillermo Gutierrez. Xela, not Lisa, decided that Lisa would not defend BDT's lawsuit in Panama.

Instead of immediately seizing all of Lisa's pledged collateral (including its shares in Villamorey) upon default without judicial process, BDT filed a civil lawsuit against Lisa in Panama.

Lisa did not defend against BDT's lawsuit. Although Lisa's president acknowledged his awareness of the lawsuit which BDT filed against Lisa in Panama and further recognized the materiality of the millions of damages sought in the lawsuit, he was unable to explain who made the decision to not defend the lawsuit.

After obtaining its defalt judgment in Panama against Lisa for $19,184,680, which includes the $16,685,000 in principal provided for in the promissory note as well as an award of unspecified costs and expenses of $2,499,680[4] relating to the uncontested action, BDT obtained a writ of attachment in the Panamanian proceeding, entitling it to seize Lisa's shares in eight separate companies, including Villamorey.

Nevertheless, despite this entitlement, BDT took no action to seize Lisa's assets or

[4] BDT has not explained how it incurred approximately $2.5 million in costs and expenses in an uncontested lawsuit which yielded a default judgment.

shares.

Moreover, instead of acting against Lisa or its assets, BDT has apparently taken on more purported Lisa debt (or at a minimum, continued to make transfers which are being booked as debts to Lisa, a non-operating holding company).

On the other hand, BDT's opposition memorandum points to evidence which it deems to be support for the legitimacy of the debt (and which undermines Villamorey's fraud-on-the-Court theory). For example, BDT's 2012 Panamanian Judgment against Lisa was supported by what appears to be a duly executed 2009 promissory note between the parties (the "2009 Promissory Note"). The 2009 Promissory Note, in turn, was fully funded by BDT. The entry of the 2009 Promissory Note also predates BDT's Panamanian Judgment by nearly four years and predates BDT's discovery of Lisa's executable assets at BSI in 2016 by more than six years.

According to BDT, it learned of accrued dividends which Villamorey owed to Lisa and which were being supposedly held in Villamorey's BSI account during a November 2016 Villamorey shareholder's meeting in Panama. BDT attended as a secured creditor of Lisa. At that meeting, Villamorey's external auditor circulated an independent audit report of Villamorey which indicated that Villamorey had created a fund equal to the dividends it owed to Lisa.

In addition, BDT points to evidence that Villamorey's auditor confirmed during a restroom conversation that three time deposits representing the separate fund for

"dividends payable to Lisa, S.A." were being held by BSI in Miami. [ECF No. 266-1, p. 5]. The auditor also confirmed that Lisa was the only shareholder who had not received the dividends declared by Villamorey.

Armed with the information about the purported retention of the dividends owed to Lisa in Villamorey's account at BSI, BDT filed the Panamanian judgment with the clerk for the state court in Miami-Dade County. A few days later, on March 1, 2017, Shields signed a declaration of non-objection, providing Lisa's consent to BDT's domestication of its Panamanian judgment against Lisa. The declaration attested to the alleged fact that the amounts in the Panamanian judgment were "legitimately owed." [ECF No. 266-1, p. 8].

On March 6, 2017, the Clerk of the Court filed a Notice of Recording of Out of Country Foreign Money Judgment to the Judgment Debtor. [*See* ECF No. 1-3, p. 18]. On March 10, 2017, the Panamanian Judgment was domesticated in the State of Florida pursuant to a Certificate of No Objection (the "Florida Judgment").

During discovery in this federal action, BDT submitted documents which it says support the underlying debt resulting in the Panamanian judgment. At bottom, BDT explains that Lisa is the entity which participated in myriad lawsuits all over the world, with BDT funding the litigation with loans (because Lisa did not have a bank account). BDT provided documents showing the transfer of funds and emails purporting to classify certain transfers as part of BDT's loans for Lisa to use for the litigation.

Because Lisa did not have a bank account, however, the money for the purported loans were not transferred directly *to* Lisa. Instead, the loan funds were transferred to another entity (Xela) which was affiliated with both BDT and Lisa. However, the financial documents (e.g., the wire transfer instructions), as opposed to the emails, do not account for approximately $7.5 million of the funds which BDT says it provided to Xela (for use by Lisa) in a series of loans to fund worldwide litigation.

C. *The Parties' Contentions*

In its initial motion to set aside the foreign judgment, Villamorey's initial paragraph asked for this Court to set aside the **state court's** recognition of the Panamanian foreign judgment based on "fraud on the court." [ECF No. 268-1, p. 1]. In its final paragraph, however, it asked for an Order setting aside the **foreign judgment** (from Panama) and the related Certificate of No Objection. It did not ask that the state court's recognition of the judgment be set aside. It also asked for sanctions against BDT and Lisa.

Villamorey's motion and reply did not pinpoint a specific act of fraud, such as bribery of a judge, the manufacturing of bogus evidence, witness intimidation, bribing witnesses, kidnapping witnesses or otherwise making them unavailable or other extreme misconduct. Instead, Villamorey's challenge is that BDT and Lisa were involved in a "complicated scheme" to "use this Court and the tools of judgment enforcement (in this case, garnishment), not to pursue collection against Lisa, but to

pursue illegitimate claims against third parties." [ECF No. 217, p. 1].

Phrased differently, Villamorey alleges that "the Panamanian Judgment (which was not opposed by Lisa in Panama or in this proceeding) was obtained by **fraud and collusion** between BDT and Lisa and, now, has resulted in fraud on the court in this proceeding, which has been commenced to subvert the integrity of the judicial process for the improper purpose of collecting on an illegitimate debt." [ECF No. 217, p. 3 (emphasis supplied)]. More specifically, Villamorey alleges that BDT and Lisa "engaged in a scheme to obtain a fraudulent judgment based on a **fraudulent debt**, and, subsequently, to record and enforce that judgment in this Court." [ECF No. 217, p. 14 (emphasis added)].

Thus, at bottom, Villamorey's overarching argument is that there is no actual, legitimate debt owed by Lisa to BDT, that this phantom debt was manufactured and used to obtain a default judgment in Panama, and that the improperly-obtained judgment was registered in the United States so that a garnishment could be used against Villamorey and BSI.

Villamorey emphasizes the following factors:

First, the vigorous opposition which BDT and Lisa mounted against efforts to obtain discovery about the circumstances underlying the Panamanian default judgment suggests that BDT and Lisa were trying to cover up the purportedly improper, collusive scheme.

Second, none of the money at issue in the promissory note underlying the Panamanian default judgment was ever transferred to *Lisa* (which, despite being involved in myriad lawsuits all over the world, never had a bank account during any of the years at issue).

Third, BDT did not explain in its opposition (and never explained at either of the two hearings) why Lisa never had a bank account and never took steps to obtain one (in order to directly receive the millions of dollars it would need to fund worldwide litigation).

Fourth, there is approximately $7.5 million in alleged transfers from BDT to the Lisa affiliate which are not supported by financial documents such as wire transfer instructions. Instead, the $7.5 million is evidenced only by emails and entries on a spreadsheet as "loans" to Lisa.

Fifth, although BDT says that the loans booked to Lisa were used to fund litigation on Lisa's behalf, Shields testified that he was unable to answer basic questions about the funding and invoicing (and whether Lisa was the entity who directly engaged attorneys to represent it).

Sixth, Lisa's counsel, who was at the first of the two hearings, was unaware of any engagement agreement or retainer agreement which Lisa entered into with any lawyer or law firm in connection with more than 200 lawsuits throughout the world.

Seventh, there is no documentary evidence that BDT simultaneously booked the

wire transfers as "loans to Lisa." [ECF No. 266-1, p. 8]. Instead, it was an employee of an affiliate in common (i.e., Xela) who provided that classification.

Eighth, Lisa and BDT (debtor and creditor) were simultaneously represented by the same law firm when the Panamanian judgment was filed in Miami-Dade circuit court.

Ninth, there is no consideration for BDT's purported series of loans to Lisa.

Tenth, Lisa's president testified that he never independently confirmed that the funds transferred by BDT were actually received or used by Lisa.

Eleventh, it is illogical for Lisa to have agreed, in a $16.68 million promissory note, to repay the principal, plus interest, in 15 monthly installments of $1.25 million when it had no assets, no employees, no operations and no bank accounts.

Twelfth, there is no evidence to suggest that Lisa was involved in the negotiation of the note it ultimately signed. Instead, the evidence demonstrates that Xela, the other entity related to both Lisa and BDT, negotiated the note and controlled the financial transactions.

Thirteenth, BDT has not behaved like a typical creditor. It never seized Lisa's pledged collateral and it never seized Lisa's shares in Villamorey.

Fourteenth, Lisa did not defend against BDT's lawsuit and, to the contrary, *facilitated* BDT's collection efforts in the United States by arranging for its president, Shields, to sign the statement of no objection.

Fifteenth, the immediate entry of the Certificate of No Objection prevented parties from intervening and objecting to the recognition of the Panamanian judgment under Florida law. This immediately gave BDT the right to enforce the default judgment it obtained in Panama, which, in turn, led to the writ of garnishment at the heart of the litigation here.

Sixteenth, and finally, although BDT has branded the motion to set aside the foreign judgment as another attempt to "**re**litigate" the bona fides of the judgment [ECF No. 266-1, p. 2], Villamorey notes that there have not been any judicial decisions about the legitimacy of the promissory note or the judgment -- because Lisa did not contest the lawsuit, a scenario which led to a **default** judgment. Thus, Villamorey contends, there never was any earlier litigation about the judgment's propriety.

Initially, BDT's opposition describes Villamorey's motion as one which "concocted a fantastical scenario whereby BDT and Lisa engaged in a convoluted scheme to obtain a fraudulent judgment in Panama in *2012*, so that it could then be domesticated by BDT in Florida in *2017*, for the sole purpose of being used to garnish Lisa's assets at BSI [in *2018*]." [ECF No. 235, p. 2 (emphasis added)]. BDT emphasizes that the note predates the Panamanian judgment by four years and predates BSI's discovery of Lisa's alleged assets in the Villamorey account at BSI by more than six years. It also notes that Villamorey did not open the challenged account at BSI until 2014. Given these circumstances, BDT says it is "at best, ridiculous" to suggest these

historical developments are part of a "collusive tool to garnish Lisa's dividends in the Villamorey account at BSI." [ECF No. 235, p. 2].

Second, BDT contends that Villamorey overstated its position in a discovery hearing, when it argued the following to the Court:

> And so what we are saying that the underlying basis for this, we contend, is that **they will never be able to** -- well, I suggest to you that this is being resisted, we think, in part because this promissory note does not have the underlying **financial activity** to support that **any** debt was ever actually created.

[ECF No. 235-1, p. 57 (emphasis added)].

Although it did not produce wire transfer instruction documents for *all* the financial activity at issue in the promissory note, BDT provided documents for approximately $9 million of the transfers. Of course, Villamorey contends that this is unpersuasive because the transfers are not **to Lisa**.

Third, BDT contends that there is nothing nefarious about its arrangement with Lisa, comparing itself to a third-party litigation funder (of Lisa's lawsuits and legal proceedings throughout the world).

Fourth, BDT highlights its production of documentary evidence concerning its loans (made indirectly to Lisa through Xela, the affiliated entity) and points out that the $7.5 million for which it could not locate wire transfer instructions were supported by both corresponding emails and a master spreadsheet. Given these documents, BDT contends that Villamorey's fraud-on-the-court argument is inherently illogical:

> Therefore, to accept Villamorey's fantastical theory of fraud, one would have to believe that BDT and Lisa set this whole "scheme" in motion before all of those emails and wire instructions were sent in 2005, and that each email, wire instruction, note, spreadsheet, and judgment were all pretextually used to garnish Lisa's property at BSI in an account that was not even created until 2014, and for funds BDT did not even discover were at BSI until 2016.

[ECF No. 235, p. 9].

Fifth, BDT argues that the mere fact that Lisa did not oppose BDT's Panamanian judgment is not evidence of fraud. According to BDT, Lisa's actions (or failure to act) is "simply evidence of a judgment debtor that has recognized an unsatisfied judgment and chosen not to oppose the rightful collection of a debt that is truly owed." [ECF No. 235, p. 10]. Thus, BDT says, Villamorey has taken an "Olympian leap" and concluded that the lack of opposition is evidence of fraud. [ECF No. 235, p. 9].

Sixth, BDT notes that Villamorey has not pinpointed any actual fraud underlying the judgment. Instead, BDT says that Villamorey has substituted "blanket, inflammatory allegations" in lieu of actual testimony and evidence that the debt underlying the judgment is a fraud. [ECF No. 235, p. 10].

Finally, BDT advances several legal arguments, discussed below, about its view that Villamorey failed to clear the requisite, substantial legal hurdles to set aside a judgment for *fraud.*

II. Applicable Legal Standards and Analysis

At the latest of the two hearings concerning this motion, the parties expressly advised me of their position that it is for **the Court** to resolve the motion, even if there are disputed issues of fact, and that the motion is not one which is appropriate for jury assessment. The parties acknowledged on the record that the Undersigned could weigh the evidence in determining what recommendation to make to Judge Cooke.

Specifically, the following exchange [ECF No. 320, pp. 198-99] evidences the consensus that the motion is to be resolved only by a judge, **without submission to a jury, even if factual disputes are present:**

> MS. ESCOBAR[5]: Your Honor, you would have to find by clear and convincing evidence that there has been a fraud perpetrated on the Court, which, as you indicated -- and we state in our motion is fully satisfied in the context of this case, you **would <u>not</u> have to find that there's no issue of material fact.** That is the summary judgment standard. This is under Rule 60, which **doesn't require you to make a finding as to the existence or absence of material fact.**
>
> THE COURT: So, phrased differently, your position is that I can still grant your motion and set aside the foreign judgment as fraudulent, assuming it met the other standards of the type of fraud involved, **even if I find the presence of disputed material issues of fact?**
>
> MS. ESCOBAR: **Yes**, your Honor.
>
> THE COURT: And what is your position?
>
> MR. LEVINE[6]: That the motion is directed to the Court under Rule 60 D 3.

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[5] Ms. Escobar is one of Villamorey's attorneys. She participated in both hearings.

[6] Mr. Levine is BDT's attorney.

> I'm aware of – **I'm not aware, rather, of any case where a fraud on the court argument is presented to the jury.** I think that they have to meet clear and convincing evidence to the Court that perpetrated -- a fraud was perpetrated on the Court. If they can't do so, that fraud on the Court argument fails and the judgment stands and the jury isn't faced with whether or not there was a fraud. **That's not appropriate for the jury.** But I haven't seen any case law allowing that to get to the jury.

[ECF No. 320, pp. 198-99 (emphasis added)].

"Only the most egregious misconduct,[7] such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court.'" *Gupta v. Walt Disney World Co.*, No. 6:05-cv-1432, 2011 WL 13136612, at *3 (M.D. Fla. Aug. 19, 2011) (internal citations omitted) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)).

Moreover, "where relief from a judgment is sought for fraud on the court, the movant must establish by **clear and convincing evidence** the adverse party obtained the verdict through fraud." *Leon v. M.L. Quality Lawn Maint., Inc.*, No. 10-20506, 2018 WL 6250529, at *13 (S.D. Fla. Nov. 29, 2018) (citing *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007)) (emphasis added). Phrased slightly differently, "conclusory averments of the existence of fraud made on information and belief and

[7] Villamorey's counsel conceded, at the hearing, that the "most egregious misconduct" standard applies to its motion to set aside the foreign judgment. [ECF No. 320, p. 222 ("I agree it's egregious forms of fraud.")]. Moreover, its own motion represents that "perjury and fabricated evidence do not constitute fraud upon the court, because they 'are evils that can and should be exposed at trial,'" and "fraud upon the court is therefore limited to the more egregious form of subversion of the legal process . . . those we cannot necessarily expect to be exposed by the normal adversary process." [ECF No. 217, p. 14].

unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud." *Booker v. Dugger*, 825 F.2d 281, 283-84 (11th Cir. 1987) (citations, internal quotations marks, and alterations omitted).

Framed by this rigorous standard, less-egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. *Gupta*, 2011 WL 13136612, at *3. In other words, to warrant setting aside a judgment pursuant to the savings clause, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision. *Id.*

The Eleventh Circuit has defined "fraud on the court" as "that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Brown v. S.E.C.*, 644 F. App'x 957, 959 (11th Cir. 2016) (quoting *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985)).

The mere nondisclosure of allegedly pertinent facts also does not ordinarily rise to the level of fraud on the court. *See Gupta v. U.S. Atty. Gen.*, 556 F. App'x 838, 840-41 (11th Cir. 2014). "Instead, 'it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision' to set aside a

judgment under Rule 60(d)(3)." *Id.* at 841 (internal citations omitted).

Finally, even "[f]raud inter parties, without more, should not be fraud upon the court." *Brown*, 644 F. App'x at 959 (internal citations omitted).

The core of Villamorey's motion is that there is no actual debt owed by Lisa to BDT. But Shields testified, in his declaration, that the debt was legitimately owed.

Moreover, and perhaps most significantly, Villamorey is well aware that Lisa was, in fact, involved in approximately 200 or more lawsuits throughout the world. Villamorey conceded at the hearing that Lisa would have been obligated to pay its attorneys but that Lisa did not have a bank account.

To be sure, Lisa's lack of a bank account could be deemed strange and atypical, especially for an entity embroiled in a substantial amount of litigation requiring the payment of attorney's fees and costs. But that fact does not in and of itself necessarily mean that there was no debt or that Shields committed perjury when he testified that the debt was legitimate.

Villamorey is not, for all practical purposes, challenging the fact that Lisa was actively involved in litigation and that the lawyers had to be paid (unless they were involved on a contingency basis in all lawsuits throughout the world, a possibility on which Villamorey says it has no evidence). [*See* Hearing Transcript, ECF No. 320, pp. 4-8].

Likewise, Villamorey's theory is that none of the debt is legitimate. Under that

perspective, Lisa and BDT would not have been able to introduce *any* evidence surrounding the non-existent debt. But they did produce a promissory note and the Panamanian judgment based on the note. And they produced wire transfer instructions for more than half of the total amount of the funds they deemed as loans to Lisa (by payment to Xela, a related entity). They also produced emails and a spreadsheet to account for the remainder of the money transferred to fund the Lisa litigation.

But Villamorey argues that transfers from BDT to the other entity does not prove that the money was used by Lisa to fund the litigation. Villamorey contends that the litigation funding explanation provided by BDT "allows for gamesmanship" concerning "how transactions are characterized." [ECF No. 320, pp. 10-11]. It argues that the arrangement, even if it happened as BDT portrays it, puts BDT and Lisa "in a posture to act in a manner that's adversarial when they're all – clearly the facts, we would suggest, support our in-common enterprise run by a common individual who's making the direction with respect to both the transfers, how they're allocated and who receives them." [ECF No. 320, pp. 11-12].

Pressed to pinpoint a specific type of fraud which led to the garnishment, Villamorey's counsel contended that the Shields Declaration -- i.e., the one saying the Lisa debt to BDT was legitimate -- was false. But, as noted, this theory is contradicted, at least in part, by the promissory note, wire transfer instructions and other documents. But this theory would be insufficient to justify an Order setting aside the judgment or

domestication of the judgment as fraudulent because "perjury is not fraud on the court." *Burns v. Fox*, No. 1:10-CV-3667-WSD, 2016 WL 3226429, at *2 (N.D. Ga. June 13, 2016) (quoting *Forsberg v. Pefanis*, 634 F. App'x 676, 681 (11th Cir. 2015)); *see Rodriguez v. Honigman Miller Schwartz & Cohn LLP*, 465 F. App'x 504, 509-10 (6th Cir. 2012) ("Plaintiff's allegation that [a witness] made false statements in his affidavit is . . . insufficient to demonstrate deception of the court sufficient to sustain an action for fraud on the court because alleged perjury of a witness is not a ground for such an action."); *see also id.* at 508 (stating that fraud on the court requires misconduct "(1) On the part of an officer of the court; (2) That is directed to the 'judicial machinery' itself"); *Gupta*, 556 F. App'x at 841 (affirming denial of rule 60(d)(3) motion to set aside judgment when "Gupta's allegation that the government presented a perjured affidavit is at best tenuously supported by the documents Gupta presented to the district court, and the remainder of the allegedly fraudulent conduct amounts to mere nondisclosure").

The Undersigned fully appreciates that Shields' inability to provide meaningful and substantive answers at his deposition undermines BDT's position that the debt is legitimate (and simultaneously supports Villamorey's position that the debt is not legitimately owed by Lisa to BDT). But his unfamiliarity with the specifics and Lisa's failure to have a bank account or ongoing operations may also be consistent with the theory that Lisa exists merely to litigate and that BDT is a funder akin to a litigation

financier.

Villamorey highlights the cooperation of Lisa, a debtor, with its creditor, BDT, as a badge of fraud. Villamorey suggests that Lisa's failure to contest the lawsuit in Panama, its willingness to have a default judgment entered against it in Panama and its assistance in domesticating the judgment and enabling the issuance of a writ of garnishment (by filing the non-opposition declaration) are evidence of fraud and improper collusion.

The Undersigned does not agree. Those factors are odd, to be sure. And they might be some evidence of some type of impropriety. They might even be evidence of fraud against Villamorey or BSI -- which is separate and distinct from a fraud on the **Court** (which is what is necessary to set aside the judgment under Rule 60(d)(3)). The case *Leon v. M.I. Quality Lawn Maintenance, Inc.*, 10-20506-CIV, 2018 WL 6250529 (S.D. Fla. Nov. 29, 2018) illustrates this point.

In *Leon*, Defendants contended that Plaintiff Leon's perjury resulted in the entry of a fraudulent final judgment. They contended that Leon, with the assistance of another, orchestrated his firing so that he could advance a fraudulent claim of retaliatory termination under the federal Fair Labor Standards Act. The Court was not persuaded.

> However, Defendants' claim is conclusory in nature, does not provide clear and convincing probative facts, and is not supported by any direct evidence. Moreover, this type of allegation, even if true, does not demonstrate that a fraud was perpetrated **against the Court, rather than a**

> **litigant.** *See Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985) (stating "the 'fraud on the court' necessary to support either an independent action or to invoke the inherent power of a court is 'fraud which is directed to the judicial machinery itself ... not fraud between the parties or fraudulent documents, false statements or perjury.'"). Rather, in order to prevail on a fraud upon the court claim, a moving party must show that the opposing party's fraud subverted the integrity of the court to the extent that the fraud prevented the court from exercising impartial judgment. *R.C. ex rel. Alabama Disabilities Advocacy Program v. Nachman*, 969 F. Supp. 682, 690 (M.D. Ala. 1997), *aff'd sub nom., R.C. v. Nachman*, 145 F.3d 363 (11th Cir. 1998); 11 Charles Alan Wright, et al., Federal Practice and Procedure § 2870 (3d ed. 2017).

Leon, 2018 WL 6250529, at *13 (emphasis supplied).

The Undersigned finds that the record here (1) demonstrates by clear and convincing evidence that the circumstances surrounding the Panamanian judgment and BDT's recognition of it through domestication in a Florida state circuit court are atypical, mighty odd and sometimes inconsistent with the documents; (2) demonstrates by clear and convincing evidence that some of the circumstances underlying the judgment and the Florida domestication are arguably suspicious; (3) establishes by a preponderance of the evidence that some of these circumstances *are* indeed suspicious; and (4) establishes by a preponderance of the evidence that some factors could be viewed as badges of fraud.

What the record does *not* establish, though, is clear and convincing evidence of the "most egregious misconduct" necessary to prove a fraud on the Court. Moreover, the record does not establish by clear and convincing evidence that a fraud on the court (as that theory is defined in Florida law) occurred. As a result, the Undersigned

respectfully recommends that Judge Cooke **deny** the motion.

III. Conclusion

For the foregoing reasons, the Undersigned **respectfully recommends** that Judge Cooke **deny** Villamorey's motion to set aside the foreign judgment for fraud on the Court.

IV. Objections

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with the District Judge. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on October 18, 2019.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Marcia G. Cooke
All counsel of record

This is Exhibit "C" referred to in the Affidavit of HARALD JOHANNESSEN HALS sworn March 22, 2020.

Commissioner for Taking Affidavits (or as may be)

N. JOAN KASOZI

(LSO# 70332Q)

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REPÚBLICA DE PANAMÁ
ÓRGANO JUDICIAL

JUZGADO UNDECIMO DEL CIRCUITO DE LO CIVIL DEL PRIMER CIRCUITO JUDICIAL DE PANAMA. Panamá, cinco (05) de diciembre de dos mil dieciocho (2018).

AUTO N°. 2277-2018

VISTOS:

En la demanda de reconvención con acción de secuestro propuesta por VILLAMOREY, S.A., contra LISA, S.A., que cursó todo su trámite legal dentro del proceso ordinario de mayor cuantía con acción de secuestro interpuesto por LISA, S.A., contra VILLAMOREY S.A., este Tribunal mediante Sentencia N°.42-08 de 11 de julio de 2008, modificada por el Primer Tribunal Superior de Justicia mediante Sentencia de 28 de agosto de 2012, declaró probada la pretensión ejercida en reconvención por VILLAMOREY, S.A., contra LISA, S.A., donde esta última resultó finalmente condenada al pago de la suma de **DOSCIENTOS MIL BALBOAS con oo/100 (B/200,000.00) de capital demandado en reconvención, más SEISCIENTOS SESENTA Y NUEVE MIL DOSCIENTOS BALBOAS** (B/669,200.00) en concepto de costas por negada la pretensión que ejerció contra VILLAMOREY, S.A., y gastos por la suma de **CIENTO DIECIOCHO BALBOAS con 00/100,** (B/118.00),generando un monto ejecutable que por petición de la favorecida con la sentencia modificada (Villamorey, S.A.) se dictó ejecución mediante Auto N°. 1723-16 de 7 de septiembre de 2016, (ver fojas 2561-2563 Tomo VII) por razón de la Sentencia condenatoria de primera instancia tal como quedó modificada, (Ver fs. 1954-1974 VII) que para el caso de la condena con relación a la demanda de reconvención se ejecuta a LISA, S.A. al pago de la suma liquida de la suma de **OCHOCIENTOS NOVENTA Y CUATRO MIL SETECIENTOS DIECIOCHO BALBOAS (B/.894.718.00),** elevándose a la categoría de embargo el secuestro previo decretado mediante Auto N°.1624-08 de 27 de octubre de 2008, que garantizaba en primer orden de prelación, las resultas de la demanda de reconvención sobre bienes muebles de Lisa, S.A. para ser ejecutados en el caso de no honrar el pago de la sentencia

modificada a la que hemos hecho alusión.

Bajo el monto ejecutable antes citado y con motivo de la ejecución de sentencia modificada, VILLAMOREY, S.A., formula petición pendiente de pronunciamiento, que reposa a foja 2883-2893, donde solicita el remate de las acciones pertenecientes a Lisa, S.A., en las distintas sociedades enlistadas en la resolución que elevó el secuestro a la categoría de embargo en la demanda de reconvención.

La ejecutada en reconvención LISA, S.A., en memorial que reposa a foja 2861-2863, memorial que reitera a foja 2910, nos solicita que para el pago de la ejecución de la sentencia, dictada en su contra en reconvención, que VILLAMOREY, S.A., se cobre el monto ejecutable del embargo que pesa sobre los dividendos que debe percibir y que fue secuestrado previamente para satisfacer en primer orden de prelación que el ejecutante satisfaga su crédito, y de esta manera finalizar con los trámites del proceso de ejecución de sentencia con motivo de la pretensión reconocida en la demanda de reconvención.

Ahora bien, la suscrita Juzgadora al ponderar las encontradas posiciones de las partes dentro de la ejecución de la sentencia que se surte con motivo de la demanda de reconvención a la que se hace deferencia en este proceso ordinario de mayor cuantía, toma en cuenta que en el expediente pesan anotaciones con relación a los bienes de la ejecutada, provenientes del proceso ejecutivo promovido por la sociedad BDT INVESTMENT INC., contra LISA, S.A., que cursa trámite en el Juzgado Duodécimo Civil del Primer Circuito Judicial Panamá, donde nos informaron sobre embargo decretado hasta la concurrencia de la suma de DIECINUEVE MILLONES CIENTO OCHENTA Y CUATRO MIL SEISCIENTOS OCHENTA BALBOAS CON 00/100 (B/.19,184,680,00) que al parecer tornan en inútil las peticiones de las partes en esta fase de ejecución del proceso que cursa por su fase final en este proceso.

Bajo esta óptica, no podemos perder de vista que independientemente que Lisa, S.A., le haya sido negada su pretensión primigenia contra Villamorey, S.A.,

quien salió favorecida con decisión de fondo, por razón de la demanda de reconvención, ésta mantiene retenidos en deposito desde el 27 de octubre de 2008, dividendos de Lisa, S.A., con motivo del secuestro decretado como propietaria del 33.3% del capital social de Villamorey, S.A., dividendos que a la fecha de su depósito según las constancias en autos, superan en demasía el monto de la pretensión en reconvención, y la ejecución de la sentencia, monto que puede compensar Villamorey, S.A., para dar por finalizado este proceso, sin que tengamos la necesidad de rematar las acciones que pertenecen a LISA. S.A., en las sociedades guatemaltecas enlistadas en el auto que elevó el secuestro a la categoría de embargo, sumas que según nota de Villamorey, S.A., que reposa a foja 2163 del Tomo VII, están a disposición de este Tribunal desde del 25 de noviembre de 2008.

Desde otro punto de vista, que sin duda favorece la petición de LISA, S.A., para que con sus dividendos que retiene VILLAMOREY, S.A, en Guatemala, se pague en primer orden de prelación la ejecución de la sentencia en este juzgado no impide la ejecución que otra persona jurídica adelanta contra LISA, S.A en sede del Juzgado Duodécimo del Circuito de Panamá, puesto que VILLAMOREY, S.A., tiene prelación en cobrarse en primer lugar con el producto de las resultas de este proceso ordinario, que es anterior al proceso ejecutivo que se surte contra Lisa, S.A., en el referido Tribunal de Circuito, puesto que aseguró mucho antes las resultas en este proceso ordinario en reconvención, para garantizar el trámite de ejecución de sentencia en este Tribunal en primer lugar, sumado a ello, el embargo decretado en el proceso ejecutivo del Juzgado Duodécimo propuesto por la sociedad BDT INVESTMENT INC., contra LISA, S.A., su cuantía es muy superior al crédito de VILLAMOREY, S.A., por lo que, teniendo prelación Villamorey, S.A., frente a BDT INVESTMENT INC., persona jurídica que demanda a LISA, S.A., sus derechos no se ven afectados con la prelación que tiene VILLAMOREY, S.A., contra LISA, S.A., teniendo la suscrita que comunicar al Juzgado Duodécimo del Circuito de lo Civil, la modificación que tiene que efectuar el Juez en aquel Tribunal para la satisfacción del millonario crédito para satisfacer obligaciones contra LISA, S.A.

Lo anterior conduce a ésta juzgadora, a ordenar a VILLAMOREY, S.A., que de las sumas que retiene secuestrado en cualquier parte del mundo con. los dividendos que pertenecen a LISA, S.A., se cobre el monto de la ejecución como pago de su pretensión en reconvención al igual que debemos emitir, las ordenes correspondientes para finalizar con el tramite de ejecución de sentencia, y se proceda el archivo del expediente.

En consecuencia, la que suscribe JUEZ UNDÉCIMA DEL CIRCUITO DE LO CIVIL DEL PRIMER CIRC UITO JUDICIAL DE PANAMÁ, administrando justicia en nombre de la República y por autoridad de la Ley, en el trámite de ejecución de la Sentencia N°.42 de 11 de julio de 2008, modificada por el Primer Tribunal Superior de Justicia del Distrito de Panamá, mediante Sentencia de 28 de agosto de 2012, que cursa por su tramite de ejecución dentro de la demanda de reconvención promovida por **VILLAMOREY contra LISA. S.A., Niega la solicitud de remate,** formulada por la firma forense GALINDO, ARIAS & LOPEZ, apoderados judiciales de la parte ejecutante en reconvención, para la ejecución de los Certificados de Acciones de las sociedades enlistadas en la actuación dictada mediante Auto N°.1723-16 de 7 de septiembre de 2016.

Ordena, que de los dividendos de las acciones pertenecientes a LISA. S.A., y que retiene VILLAMOREY, S.A., en Guatemala o en cualquier parte del mundo, Lisa, S.A., y genere activos líquidos por su participación accionaria, sea **cancelado** el pago de la ejecución de sentencia, dictada mediante Auto N°.1723-16 de 7 de septiembre de 2016, cuyo monto asciende a **OCHOCIENTOS NOVENTA Y CUATRO MIL SETECIENTOS DIECIOCHO BALBOAS (B/.894.718.00),** producto del reconocimiento de la demanda de reconvención.

Ordena, comunicar al JUZGADO DUODÉCIMO DEL PRIMER CIRCUIYO JUDICIAL DE PANAMÁ, que en este proceso de ejecución no reporta saldo insoluto que deba ser puesto a su disposición dentro del proceso ejecutivo propuesto por BDT INVESTMENT INC., contra LISA, S.A.

Téngase a la firma **QUIROZ GOVEA ABOGADOS** como nuevos

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apoderados judiciales de la sociedad LISA. S.A., en los términos del poder conferido.

Fundamento Legal: Artículo 17 y 32 de la Constitución; Articulo 1° del Código de Comercio; Artículos: 1043, 1662 y demás concordantes del del Código Civil; Artículo 1259 del Código Judicial.

Notifíquese, Comuníquese y Archívese

La Juez,

LICDA. MARIA LETICIA CEDEÑO SUIRA

LICDA. RAQUEL GUZMAN FERNANDEZ

Secretaria Judicial

REPUBLICA DE PANAMA JUZGADO 11° RAMO CIVIL PANAMA ORGANO JUDICIAL

CERTIFICO: que para notificar a las partes la resolución que precede, se ha Fijado Edicto en lugar público de la Secretaría, 1975

Hoy 06 de 12 de 20 18

a las 10:00 de la Mañana

El Secretario(a)

TJ 10-12-2018

En la Ciudad de Panamá, a las 11:00 de la Mañana

del día seis (6) de diciembre de 20 18

Notifiqué al Señor(a) Duque Zapata (Jairon Duque)

El Secretario(a)

CERTIFICO: Que es fiel copia de su original. 6 de diciembre 2018

El Secretario(a)

REPÚBLICA DE PANAMÁ
ÓRGANO JUDICIAL

La Suscrita Secretaria General de la Corte Suprema de Justicia, en uso de sus facultades legales

CERTIFICA:

Que la firma que antecede expresiva del nombre de la Licenciada RAQUEL GUZMÁN, quien actúa en calidad de Secretaria Judicial del Juzgado Undécimo de Circuito Civil del Primer Circuito Judicial de Panamá, es auténtica.

Panamá, 7 de diciembre de 2018.

LICDA. YANIXSA Y. YUEN.
Secretaria General
Corte Suprema de Justicia de Panamá. -

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

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