



**Fifth Report of
KSV Restructuring Inc.
as Receiver and Manager of
Xela Enterprises Ltd.**

February 28, 2022

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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

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

FIFTH REPORT OF KSV RESTRUCTURING INC.

FEBRUARY 28, 2022

1.0 Introduction

1.1 Background

1. On January 18, 2011, Margarita Castillo ("**Margarita**") commenced an application in the Ontario Superior Court of Justice (the "**Court**") seeking, among other things, relief against Xela Enterprises Ltd. ("**Xela**"), her now-deceased father, Juan Arturo Gutierrez ("**Juan Arturo**"), and her brother, Juan Guillermo Gutierrez ("**Juan Guillermo**").
2. Pursuant to a judgement issued by the Court on October 28, 2015 (the "**Judgement**"), Xela, Juan Guillermo and Juan Arturo became jointly obligated to pay Margarita approximately \$5 million, plus interest and costs (the "**Judgement Debt**").
3. On January 15, 2019, Margarita made an application to the Court for, among other things, the appointment of KSV Restructuring Inc.¹ ("**KSV**") as receiver and manager of Xela (the "**Receiver**") pursuant to Section 101 of the *Court of Justices Act*, R.S.O. 1990, c. C.43 (the "**Appointment Order**").²

¹ KSV Kofman Inc. changed its name to KSV Restructuring Inc. on August 30, 2020.

² Appointment Order, Brief of Orders and Endorsements ("**Orders Brief**"), Tab 3

4. Further details regarding the background of these proceedings are provided in the Receiver's First Report to the Court dated October 17, 2019 (the "**First Report**"), the Second Report dated February 18, 2020 (the "**Second Report**"), the Supplement to the Second Report dated March 17, 2020 (the "**Supplement to the Second Report**"), the Second Supplement to the Second Report dated March 23, 2020 (the "**Second Supplement to the Second Report**"), the Third Report dated July 24, 2020 (the "**Third Report**"), the Fourth Report dated January 18, 2021 (the "**Fourth Report**"), the Supplement to the Fourth Report dated February 1, 2021 (the "**Supplement to the Fourth Report**"), the Second Supplement to the Fourth Report dated February 8, 2021 (the "**Second Supplement to the Fourth Report**"), and the Third Supplement to the Fourth Report dated March 1, 2021 (the "**Third Supplement to the Fourth Report**").³

1.2 Purposes of this Report

1. The purposes of this Fifth Report are to:
 - a. provide an update to the Court since the Third Supplement to the Fourth Report concerning:
 - i. the status of compliance with Court orders issued in these proceedings;
 - ii. the criminal proceedings commenced in Panama against representatives of Hatstone, the Receiver's Panamanian legal counsel;
 - iii. the status of the Receiver's investigation into the Reviewable Transactions (as defined in s. 4.1 below); and
 - iv. the promised funding from Taras Volgemut, which is intended to satisfy the Judgement Debt and potentially lead to the termination of the receivership and the discharge of the Receiver;
 - b. apprise the Court of relevant considerations in assessing Juan Guillermo's motion to terminate the receivership;
 - c. provide the Receiver's recommendations about the future of the receivership; and
 - d. seek approval for the fees and disbursements of the Receiver and its legal counsel, Lenczner Slaght LLP ("**Lenczner Slaght**").
2. Documents referred to in this Fifth Report will be filed as part of a separate brief.

³ First Report, Brief of Reports of the Receiver ("**Reports Brief**"), Tab 1; Second Report, Reports Brief, Tab 2; Supplement to the Second Report, Reports Brief, Tab 3; Second Supplement to the Second Report, Reports Brief, Tab 4; Third Report, Brief, Tab 5; Fourth Report, Tab 6; Supplement to the Fourth Report, Tab 7; Second Supplement to the Fourth Report, Tab 8; and Third Supplement to the Fourth Report, Tab 9

1.3 Overview

1. Juan Guillermo has represented to this Court for more than five months that at least \$5 million would be advanced by an investor to the benefit of the receivership and that a motion to terminate the receivership would be brought. It has also been represented that these funds would be paid into the trust account of Cambridge LLP (“**Cambridge**”), Juan Guillermo’s legal counsel, pending payment into Court.
2. As of the writing of this report, Cambridge has not yet received the promised funds.
3. Even if the funding arrives, there are several issues that the Court will likely be required to consider in assessing Juan Guillermo’s request for a motion to terminate the receivership, including:
 - a. the promised funding is insufficient to satisfy the Judgement Debt, which is required pursuant to paragraph 25 of the Appointment Order;
 - b. Xela’s creditor list reflects obligations of approximately \$77.5 million. The Receiver has not conducted a claims process and has not had the opportunity to determine and quantify all provable claims against Xela. The Judgement Debt ranks *pari passu* with other unsecured creditors, who would be permitted to appear at the requisite distribution motion and argue their entitlement to their pro-rata share of any available funds;
 - c. the Receiver’s Panamanian counsel, Hatstone, continues to face criminal jeopardy from a criminal complaint in Panama related to actions that this Court expressly authorized. The sole evidence upon which the criminal complaint is based is a sworn statement provided by Juan Guillermo. The Receiver has an outstanding contempt motion against Juan Guillermo. The Receiver is not prepared to recommend that the receivership be terminated until the criminal proceedings against Hatstone are fully resolved;
 - d. Margarita is owed \$14 million in Xela preference shares. Xela’s remaining securityholders and stakeholders will have no recourse to recover from Xela any amounts to which they are entitled as all of its business and assets have been transferred to entities owned directly or indirectly by Juan Guillermo’s family pursuant to the Reviewable Transactions, which the Receiver is attempting to investigate;
 - e. the terms on which Mr. Volgemut has promised funding have not been disclosed to the Receiver or this Court. Based on Mr. Volgemut’s sworn evidence, it appears that one of Xela’s (purportedly former) indirect subsidiaries provided a charge on Xela’s rights, in favour of Mr. Volgemut, to recover monies it is owed from the Avicola Litigation (defined in s. 2.0.9 below). It is possible that the terms of Mr. Volgemut’s funding could prejudice the Receiver’s efforts to collect any monies that might be owed to Xela from any of its subsidiaries, if its investigation of the Reviewable Transactions continues; and

- f. the Receiver has not completed its investigation of the Reviewable Transactions. Juan Guillermo and Arturo's Technical Services Ltd. ("**ATS**") have not complied with Court Orders issued in these proceedings requiring them to produce documents and files in their possession.
4. The Receiver recommends that:
 - a. the Court direct Juan Guillermo and ATS to comply with the March 25, 2021 Order and award full indemnity costs against Juan Guillermo and ATS for non-compliance;
 - b. in the event Cambridge receives funding from Mr. Volgemut and the Court agrees to hear Juan Guillermo's motion to terminate the receivership, an expedited timetable be set;
 - c. if (b) above is the next step in the proceedings, the Receiver will require direction from the Court about whether the Receiver's investigation should be stayed. Although the funding is significant, it is insufficient to pay the Judgement Debt, and, therefore, a motion to terminate the receivership appears to be prohibited by paragraph 25 of the Appointment Order;
 - d. absent receipt of funding from Mr. Volgemut, the Receiver continue to review the Reviewable Transactions;
 - e. the Court schedule the contempt motion against Juan Guillermo; and
 - f. the Court approve the fees of the Receiver and its counsel, Lenczner Slaght.

1.4 Currency

1. All references to currency in this Fifth Report are in Canadian dollars unless otherwise stated.

1.5 Restrictions

1. In preparing this Fifth Report, the Receiver has relied upon Xela's unaudited financial information, Xela's books and records, materials filed in the Avicola Litigation, discussions with representatives of Xela, Hatstone, Juan Guillermo and his Canadian and foreign legal counsel, and the correspondence and interviews referred to in this Report.
2. The Receiver has not audited, or otherwise attempted to verify the accuracy or completeness of the financial information relied upon in preparing this Report in a manner that complies with Canadian Auditing Standards ("**CAS**") pursuant to the *Chartered Professional Accountants of Canada Handbook* and, accordingly, the Receiver expresses no opinion or other form of assurance contemplated under the CAS in respect of such information. Any party wishing to place reliance on the financial information in this Report should perform its own diligence.

1.6 Receivership Materials

1. Materials filed in these receivership proceedings are available on the Receiver's website at: <https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd>.

2.0 Status regarding Compliance with Court Orders and Funding

1. On August 28, 2020, the Court heard a motion that was made on notice to ATS, wherein Juan Guillermo consented to an Order requiring Juan Guillermo, ATS and others to provide the Receiver with all Xela documents, items, devices, computers, servers, iPads, tablets, magnetic tapes or discs, DVDs, CDs, USB devices, cell phones, or any other electronic storage or media device, including cloud-based storage (the "**Company Documents**" or "**Company Devices**").⁴ The August 28, 2020 Order prohibited Juan Guillermo from asserting privilege with respect to any Company Documents and Company Devices.
2. On October 27, 2020, ATS consented to an Order to image servers in ATS's possession on which were stored Company Documents.⁵ On the same date, Juan Guillermo consented to an Order to image his iPad and iPhone on which were stored Company Documents. Juan Guillermo's October 27, 2020 Order provided a protocol by which Juan Guillermo could challenge production of certain files to the Receiver.⁶
3. On November 5, 2020, ATS allowed the Receiver's representative to image the servers in its possession.
4. On January 5, 2021, Juan Guillermo allowed the Receiver's representative to image an iPad and iPhone, but he did so on the condition that it be downloaded to a password protected hard-drive that the Receiver could not access (the "**JG Hard-Drive**").
5. On March 25, 2021, this Court made an order,⁷ requiring, among other things:
 - a. Juan Guillermo to immediately provide the Receiver with all encryption codes, keys, passwords, or any other such information or knowledge necessary to unlock and access the data on the JG Hard-Drive; and
 - b. ATS to, within 14 days, provide the Receiver with an electronic copy of all emails sent or received by Juan Guillermo at any email address maintained on the ATS servers to the date of the Order, along with any encryption codes, keys, or passwords used to secure the emails;

⁴ Court Order dated August 28, 2020, Orders Brief, Tab 7

⁵ Court Order re ATS dated October 27, 2020, Orders Brief, Tab 8

⁶ Court Order re Juan Guillermo dated October 27, 2020, Orders Brief, Tab 9

⁷ Court Order re Investigative Powers and Fees dated March 25, 2021, Orders Brief, Tab 13

6. Juan Guillermo and ATS sought leave to appeal this Court's March 25, 2021 Order. One of the alleged grounds for seeking leave to appeal was a claim of privilege by Juan Guillermo over his emails on the ATS servers. The motion for leave to appeal was dismissed on July 9, 2021 with costs awarded against them in the amount of \$5,000 (which were paid on July 29, 2021).
7. On July 21, 2021, the Receiver wrote to ATS's counsel to request Juan Guillermo's emails on their servers. On the same day, the Receiver wrote to Cambridge and asked for the passwords to the JG Hard-Drive.
 - a. On July 23, 2021, ATS's counsel responded and advised that ATS was in the process of collecting Juan Guillermo's emails and requested additional time; and
 - b. On July 27, 2021, Cambridge wrote to assert privilege over Juan Guillermo's emails on ATS's servers and sought a new order about a protocol for review.
8. On August 3, 2021, the Receiver requested a case conference to address compliance with the March 25, 2021 Order. The case conference was scheduled for September 17, 2021.
9. On September 16, 2021, the day before the case conference, Cambridge provided an affidavit sworn by Mr. Volgemut ("**Mr. Volgemut's Sept. 2021 Affidavit**")⁸ in which Mr. Volgemut gave evidence that:
 - a. when he met Juan Guillermo in March 2021, he "learned of an opportunity to invest in litigation for the benefit of BDT Investments Inc. ("**BDT**") relating to the recovery of...unpaid dividends...owed to Lisa, S.A. ("**LISA**") by Villamorey S.A. ("**Villamorey**")"⁹;
 - b. he was prepared to fund "BDT's global litigation efforts", and as part of that "investment", he was "also prepared to pay the unsatisfied portion of the judgment [*sic*] on which this receivership is based, as well as the approved costs of the receivership";
 - c. he was aware of "certain concerns regarding potential unauthorized disclosure of documents sought by the receiver"; and
 - d. he was "in the process of making arrangements for the liquidity of the necessary funds to satisfy the judgment [*sic*] and pay the costs of the receivership". He anticipated that he would need approximately "60 days" to make those arrangements.

⁸ Mr. Volgemut's Sept. 2021 Affidavit, Brief of Documents re Fifth Report of the Receiver ("**Brief**"), Tab 1

⁹ As the Receiver has previously reported, LISA's litigation with Villamorey is part of the broader litigation related to LISA's claim for approximately \$400 million against the Avicola Group (the "**Avicola Litigation**"). LISA is a wholly-owned, indirect subsidiary of Xela. The Avicola Litigation is ultimately for the benefit of Xela. The assertion that the Avicola Litigation is "for the benefit of BDT" appears to be an assertion that is based on the Reviewable Transactions, including a purported transaction that occurred during the pendency of the receivership that had the effect of eliminating all of Xela's remaining value. The Receiver refers to this transaction as the "LISA Transfer", which is defined below in s. 4.1 of this Report along with the other Reviewable Transactions).

10. On September 17, 2021, the parties attended at the case conference. Cambridge and ATS's counsel relied on Mr. Volgemut's Sept. 2021 Affidavit to suggest that funding to terminate the receivership was imminent. A further case conference was scheduled for December 2021.
11. On September 24, 2021, ATS's counsel advised that ATS had collected Juan Guillermo's emails on its servers but that it would not release them because Juan Guillermo was asserting privilege over them. ATS's counsel advised it would not release Juan Guillermo's emails without another Court Order requiring it to do so.
12. On December 1, 2021, Cambridge provided a second affidavit sworn by Mr. Volgemut ("**Mr. Volgemut's Dec. 2021 Affidavit**")¹⁰ in which Mr. Volgemut gave evidence that:
 - a. he remained committed to "pay the unsatisfied portion of the judgment [sic] on which the ... receivership is based, together with approved costs";
 - b. he had "completed the requisite arrangements, and that funding is now in place" (emphasis added);
 - c. while funds to satisfy the judgement were "now available", he claimed that Margarita had already received US\$4,350,000 from unpaid dividends owed by Villamorey to LISA which "satisfied" her Judgement Debt;
 - d. he remained "willing to cause one of the corporations that I control to provide security in the form of a cash payment to the Court", which would require approximately a further 60 days; and
 - e. his affidavit was sworn "in support of a suspension and ultimate termination of the receivership".
13. On December 2, 2021, the parties attended at a case conference. Cambridge and ATS's counsel sought, among other things, an order allowing any person to pay security into court and preventing any further steps to be taken in the receivership. No such order was made. Instead, the Court ordered a further case conference returnable on January 24, 2022 to give Mr. Volgemut time to transfer the funds to Cambridge's trust account.
 - a. On January 21, 2022, Cambridge emailed the Receiver to advise that Mr. Volgemut had tested positive for COVID-19 and noted that "the quarantine period is 10 days in Dubai."¹¹ The Receiver understood and was advised, during conversations with Cambridge, that the funds were being sent from Dubai.
 - b. On January 24, 2022, the parties attended at a case conference. Cambridge had not received Mr. Volgemut's promised funding. A further case conference was scheduled for February 7, 2022.

¹⁰ Mr. Volgemut's Dec. 2021 Affidavit, Brief, Tab 2

¹¹ Email from Cambridge to Lenczner Slaght dated January 21, 2022, Brief, Tab 3

- c. On February 7, 2022, the parties attended at a case conference. Cambridge had not received Mr. Volgemut's funding. A further case conference was scheduled for February 17, 2022.
 - d. On February 15, 2022, Cambridge sent the Receiver what was stated to be a SWIFT code receipt from a bank in Botswana in the amount of US\$4,240,000.¹²
 - e. On February 17, 2022, the parties attended at a case conference. Cambridge was still not in receipt of the money that Mr. Volgemut was said to have transferred. The Court asked the parties to update it on the status of the transfer during the week of February 21, 2022 but reserved March 2, 2022 for the parties to appear in Court.
14. There have been five case conferences at which Cambridge has advised that they expect to imminently receive money from Mr. Volgemut (September 17 and December 2, 2021 and January 24, February 7 and 17, 2022). As of the date of this Fifth Report, the Receiver has not received confirmation from Cambridge that they are in receipt of the funding from Mr. Volgemut.
 15. As of the date of this Fifth Report, despite repeated requests since July 2021, Juan Guillermo has not provided the Receiver with the passwords needed to access the images on the JG Hard-Drive, and ATS has not provided the Receiver with Juan Guillermo's emails on ATS's servers.

2.1 Payment of Cost Order

1. On July 28, 2021, this Court ordered costs payable within 60 days to the Receiver related to the March 25, 2021 Order, as follows:
 - a. \$80,000, plus HST, by Juan Guillermo;
 - b. \$45,000, plus HST, by ATS;
 - c. \$30,000, plus HST, by Juan Guillermo and ATS, jointly and severally; and
 - d. \$13,964.93 in disbursements, with Juan Guillermo paying 67% and ATS paying 33%.¹³
2. Neither ATS nor Juan Guillermo paid the cost Order when it was due on September 27, 2021.
3. On October 27, 2021, the Receiver served each of ATS and Juan Guillermo with a notice of examination in aid of execution, requiring them to attend on November 9, 2021 to be examined.¹⁴

¹² Email from Cambridge to Lenczner Slaght dated February 15, 2022 with attachment, Brief, Tab 4

¹³ Court Order re Costs, Orders Brief, Tab 16

¹⁴ Emails from Lenczner Slaght to Cambridge, Brian Greenspan, and WeirFoulds LLP with attached Notices of Examination, Brief, Tab 5

4. Both ATS and Juan Guillermo refused to attend at their respective examinations.¹⁵
5. In Mr. Volgemut's December 1, 2021 Affidavit, Mr. Volgemut swore that he had directed his bank to transfer funds to satisfy the July 28, 2021 cost Order.¹⁶
6. On December 2, 2021, Cambridge provided the Receiver with a copy of a wire transfer from a financial institution named Emirates NDB, to Cambridge's trust account, in an amount sufficient to satisfy the cost Order.¹⁷
7. The cost Order was paid to the Receiver on December 6, 2021.

3.0 Contempt Motion and Criminal Proceedings against the Receiver's Panamanian Counsel

3.1 Background

1. As set out in the Second Supplement to the Receiver's Fourth Report, the Receiver's Panamanian counsel, Hatstone, has been subject to criminal allegations in Panama arising from changes to the Board of Directors (the "**Board**") of Xela's direct subsidiary, Gabinvest S.A. ("**Gabinvest**"), despite this Court's express authorization of those Board changes by its March 24, 2020 Order.¹⁸
2. As a result of Juan Guillermo's involvement in and support for the criminal proceedings against Hatstone, on February 8, 2021, the Receiver made a motion to declare Juan Guillermo in contempt of Court. A summary of the background to the criminal proceedings and the Receiver's contempt motion (which is contained in the Receiver's Fourth Report, at s. 8.2,¹⁹ and the Second Supplement to the Receiver's Fourth Report, at ss. 3 and 4²⁰) is as follows:
 - a. the Receiver was authorized to exercise Xela's shareholder rights to the exclusion of all other Persons, pursuant to the Appointment Order;
 - b. Xela owns all the shares of Gabinvest. As such, on January 16, 2020, the Receiver passed a resolution replacing the directors of Gabinvest with three members of Hatstone's law firm. The Receiver advised the Court of these changes in its Second Report.²¹ The Receiver passed another resolution on April 27, 2020 permitting Xela's director and shareholder meetings to be held by telephone and confirming the appointment of three members of Hatstone's law firm to the Board;

¹⁵ Letter from Brian Greenspan to Lenczner Slaght dated November 4, 2021, Brief, Tab 6; Email from Cambridge to Lenczner Slaght dated November 5, 2021, Brief, Tab 7; Email from WeirFoulds to Lenczner Slaght dated November 5, 2021, Brief, Tab 8

¹⁶ Mr. Volgemut Dec. 1, 2021 Affidavit, Brief, Tab 2

¹⁷ Email from Cambridge to Lenczner Slaght with attachment dated December 2, 2021, Brief, Tab 9

¹⁸ Court Order re Approval of Receiver's Actions dated March 24, 2020, Orders Brief, Tab 6

¹⁹ Fourth Report of the Receiver, Reports Brief, Tab 6

²⁰ Second Supplement to Fourth Report of the Receiver, Reports Brief, Tab 8

²¹ Second Report of the Receiver, Reports Brief, Tab 2

- c. on March 22, 2020, Juan Guillermo complained about the Board changes. He swore an affidavit in which he said that Hatstone “did not follow the required steps to make those changes, nor did they notify me of their plans”;²²
- d. on March 24, 2020, this Court ordered that the replacement of the Board at the Receiver’s direction “was a proper exercise of the Receiver’s exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise [Xela’s] shareholder rights”;²³
- e. as set out above, in August and October 2020, the Receiver sought orders requiring production of Xela’s Company Documents, which orders were granted. Juan Guillermo and ATS were required to give the Receiver all Company Documents. ATS’s servers and Juan Guillermo’s devices were to be imaged;²⁴
- f. on October 18, 2020, approximately one week prior to obtaining the October 27, 2020 Orders respecting the imaging of servers and devices, Juan Guillermo’s brother-in-law, Harold Johannessen Hals (“**Hals**”), sent an email to Hatstone, attaching a draft criminal complaint against Hatstone for the changes made to the Board;²⁵
- g. on November 17, 2020, during a phone call with the Receiver, Hatstone, and Daniela Vesga (Colombian counsel purporting to represent LISA), Ms. Vesga threatened to file the same criminal complaint against Hatstone that Hals sent a month earlier;
- h. on January 18, 2021, the Receiver served its Fourth Report and a notice of motion, seeking access to Xela’s records on the imaged servers and devices, and expanding the Receiver’s investigative powers (this motion resulted in the March 25, 2021 Order, discussed above, with which neither Juan Guillermo nor ATS have yet complied);²⁶
- i. two days later, on January 20, 2021, the threatened criminal complaint was filed in Panama against Hatstone. The only evidence in support of the criminal complaint was a Declaration sworn by Juan Guillermo in Guatemala on December 3, 2020 (“**Juan Guillermo’s Declaration**”).²⁷ In Juan Guillermo’s Declaration, made in his capacity as director and president of Xela, he:
 - i. purports to act as a representative of Gabinvest’s sole shareholder, Xela²⁸;

²² Affidavit of Juan Guillermo sworn March 22, 2020, at para. 27, Brief, Tab 10

²³ Court Order re Approval of Receiver’s Actions dated March 24, 2020, Orders Brief, Tab 6

²⁴ Court Orders in August and October 2020, Orders Brief, Tabs 7-9

²⁵ Fourth Report of the Receiver, at s. 8.2, Reports Brief, Tab 6

²⁶ Fourth Report of the Receiver, Reports Brief, Tab 6

²⁷ Official Translation of Juan Guillermo’s Declaration, Brief, Tab 11

²⁸ Notwithstanding he does not have the authority to represent Xela pursuant to the terms of the Appointment Order.

- ii. claims Xela was not notified of the meeting at which changes were made to the Board;
 - iii. claims that the new directors of Gabinvest do not have authority to represent Gabinvest; and
 - iv. claims that the replacement of the Board (and changes to LISA's Board) as well as any actions thereafter were the "product of falsehood;"
 - j. each of those statements was and is false. Moreover, as previously reported by the Receiver, it is of note that Juan Guillermo's Declaration in support of the criminal complaint was sworn while Juan Guillermo was purportedly caring for the affairs of his deceased mother-in-law—and during which time he was said to be unable to comply with the October 27, 2020 Order about imaging his devices;²⁹ and
 - k. Juan Guillermo was cross-examined by the Receiver on March 5, 2021. During that cross-examination, Juan Guillermo admitted that his Declaration and the allegations made on December 3, 2020 were present tense statements—meaning that they were not just past-tense descriptions of his belief about the Board changes when he first learned of them in January 2020.
3. On February 10, 2021, this Court ordered, among other things, Juan Guillermo to:
- a. withdraw his Declaration and provide the public prosecutor's office in Panama with the withdrawal of the Juan Guillermo Declaration;
 - b. direct Hals and his Panamanian lawyer to withdraw the criminal complaint; and
 - c. take any and all further steps within his control to effect the withdrawal of the criminal complaint.³⁰
4. On February 11, 2021, Juan Guillermo swore an affidavit in which he said that he withdrew his Declaration.³¹ Juan Guillermo then sent the affidavit, by courier, to the office of the Panamanian prosecutor. Juan Guillermo's cover letter to the Panamanian prosecutor's office did not actually ask the prosecutor or the prosecutor's office to withdraw the criminal complaint.³² In any event, the courier could not deliver the affidavit to the prosecutor's office because the address was deficient. As a result, Hatstone's criminal lawyer, Mr. Juan Antonio Tejada, attended the prosecutor's general office in Panama City and provided the courier with the prosecutor's address to which the affidavit needed to be delivered.
5. Hatstone understands that the prosecutor has received Juan Guillermo's affidavit, but the prosecutor has not made any comment on the case to date.

²⁹ Fourth Report of the Receiver, at s. 6.1, Reports Brief, Tab 8

³⁰ Court Order dated February 10, 2021, Orders Brief, Tab 11

³¹ Affidavit of Juan Guillermo dated February 11, 2021, Brief, Tab 12

³² Letter from Juan Guillermo to the Panamanian prosecutor dated February 11, 2021, Brief, Tab 13

6. Hals and his Panamanian lawyer expressly refused to comply with the February 10, 2021 Order. Hals said that McEwen J. “has overstepped his powers and invades a foreign jurisdiction in a boorish and gross way”.³³

3.2 Hatstone Continues to Face Criminal Jeopardy

1. On April 9, 2021, Hals and his Panamanian lawyer filed a new petition with the Panamanian public prosecutor’s office, affirming its criminal complaint. They alleged that Hatstone did not act with the Receiver’s authorization. They also noted this Court’s February 10, 2021 Order but said, “under no circumstances will we pay any attention to this request.”³⁴
2. On August 16, 2021, the public prosecutor received a request from Hals’ Panamanian lawyer requesting that the prosecutor interview Juan Guillermo to ask him, among other things, whether Juan Guillermo “affirm[s] and ratif[ies]” his Declaration.³⁵ The request said that the interview of Juan Guillermo “was requested by [Juan Guillermo], who has expressed his desire to voluntarily be interviewed to answer the ... questions” (emphasis added).³⁶
3. On December 14, 2021, Juan Guillermo attended for a virtual interview with the Panamanian public prosecutor via the Microsoft Teams’ videoconferencing platform along with Hals’ Panamanian lawyer. The Receiver has obtained an official “narrative account” of the interview, which it has had translated.³⁷ In that official narrative account, Hals’ Panamanian lawyer is identified as “the attorney-in-fact of [Juan Guillermo].” In addition, Juan Guillermo claimed that he was a “judicial hostage” as a result of this Court’s February 10, 2021 Order. Juan Guillermo also reiterated his complaints that he was not present at, or invited to, the meeting at which the Receiver directed Hatstone to change the Board, which was the basis for the criminal complaint, and Juan Guillermo claimed that the receivership is “not related to” Gabinvest, notwithstanding it is a wholly-owned subsidiary of Xela.
4. The criminal complaint against Hatstone continues to be investigated by the Panamanian prosecutor, and Hatstone continues to face criminal jeopardy. As previously reported, police have attended at the home of at least one of the Receiver’s counsel at Hatstone. The Hatstone lawyer was not at home when the police attended, but his young children were present.³⁸

³³ Third Supplement to the Fourth Report of the Receiver, at s. 4.2, Reports Brief, Tab 9

³⁴ Official English Translation of the petition dated April 9, 2021, Brief, Tab 14

³⁵ Official English Translation of the declaration sworn by Hals’ Panamanian lawyer dated August 16, 2021, requesting the interview, Brief, Tab 15

³⁶ Official English Translation of the declaration sworn by Hals’ Panamanian lawyer dated August 16, 2021, requesting the interview, Brief, Tab 15

³⁷ Official English Translation of official narrative account of the interview of Juan Guillermo, Brief, Tab 16

³⁸ Third Supplement to the Fourth Report of the Receiver, at s. 4.1.6, Reports Brief, Tab 9

5. The Receiver understands that the criminal investigation could take many more months or even years to conclude. During that time, the Panamanian prosecutor could call upon the members of Hatstone to provide a sworn statement and could take steps to prevent them from leaving Panama until the matter is concluded. It is presently unknown whether the Panamanian prosecutor will accept Juan Guillermo's testimony, which provides further uncertainty and concern for the Receiver about the possibility that the members of Hatstone may ultimately face criminal jeopardy.
6. Hatstone understands that, in early December 2021, Hals' lawyer submitted a request to the prosecutor asking that it interview the Receiver. On December 22, 2021, the prosecutor denied this request.
7. On January 12, 2022, Hals' lawyer made a request to the prosecutor for a hearing for the purpose of asking the prosecutor to formally charge/accuse the Hatstone members appointed as directors of Gabinvest with falsifying public deeds and thereby having committed a criminal offence under Panama law. On January 18, 2022, the prosecutor rejected this request, as it is still conducting its investigation.

3.3 Contempt Motion

1. The Receiver's contempt motion was originally scheduled to be heard on June 29-30, 2021. At the Court's request, the contempt motion was rescheduled to be heard on October 6-7, 2021.
2. By the summer of 2021, the Receiver was not being funded, and as such, the Receiver adjourned the October 6-7, 2021 contempt motion.
3. No date is currently set for the contempt motion.
4. Juan Guillermo's co-counsel, Brian Greenspan, has requested that, if the Receiver intends to proceed with the contempt motion, it move that matter forward.³⁹ As noted below, the Receiver is prepared to move forward with the contempt motion and, in the face of the ongoing criminal complaint, believes that it is necessary to do so.

4.0 The Future of the Receivership

4.1 The Receiver's Investigations

1. As set out in the Receiver's prior reports, the Receiver identified three transactions (the "**Reviewable Transactions**") that had the effect of transferring directly or indirectly all or substantially all of the business and assets to Xela to Juan Guillermo's family.

³⁹ Letter from Brian Greenspan to Lenczner Slaght dated November 4, 2021, Brief, Tab 6

2. The Reviewable Transactions are:
 - a. the sale, conveyance, or transfer in early 2016 by Empress Arturo International (“**EAI**”—Xela’s wholly-owned subsidiary) of the shares of BDT and Corporacion Arven, Limited (“**Arven**”) to Juan Arturo, and then from Juan Arturo to the ARTCARM Trust in Barbados (the “**EAI Transaction**”). This two-step transfer of BDT and Arven to the ARTCARM Trust (the “**Trust**”) effectively conveyed the “Arturo’s” restaurant chain business in Venezuela to Juan Guillermo’s wife, children, and mother;
 - b. the assignment in January 2018 by LISA of the majority of the proceeds from the Avicola Litigation to BDT (the “**Assignment Transaction**”) for the benefit of Juan Guillermo’s wife, children, and mother; and
 - c. the transfer in February 2020, during the pendency of these receivership proceedings, from LISA to BDT of LISA’s interest in the Avicola Group (the “**LISA Transfer**”) for the benefit of Juan Guillermo’s wife, children, and mother.⁴⁰
3. As set out in the Fourth Report, the investigations raise concerns about the validity of the Reviewable Transactions.⁴¹ As a result of the Reviewable Transactions, Xela has no cash flow and/or assets to satisfy the debts of its creditors and the amounts due to its securityholders.
4. Following the Divisional Court’s dismissal in July 2021 of the motion for leave to appeal this Court’s March 25, 2021 Order, the Receiver planned to commence a review of the documents and files contained on the copy of Xela’s servers as at 2017 (defined in the Fourth Report as the “**Blue Network Servers**”) as part of its investigation into the Reviewable Transactions.⁴² However, by July 2021, the Receiver was no longer being funded, as noted above. As such, the Receiver was not able to continue its investigations into the Reviewable Transactions or to proceed with the contempt motion.
5. As of late 2021, the Receiver had significant unpaid fees and costs, including those of its legal counsel. As such, on December 2, 2021, the Receiver advised that it intended to commence a sales process and obtained a motion date of March 2, 2022 for the purpose of obtaining an order to permit the Receiver to conduct that process.
6. On February 4, 2022, Margarita’s counsel confirmed that they were now in receipt of monies to fund the Receiver. On February 7, 2022, the Receiver advised the parties that it had been funded and accordingly it does not propose to proceed with the sales process at this time.

⁴⁰ Fourth Report of the Receiver at s. 2, Reports Brief, Tab 6

⁴¹ Fourth Report of the Receiver, Reports Brief, Tab 6

⁴² Fourth Report of the Receiver, s. 5.1, Reports Brief, Tab 6

7. The Receiver is prepared to proceed with its investigation, including a review of the Blue Network Servers and Juan Guillermo's emails on ATS's servers, as well as with the protocol for the review of the images on the JG Hard-Drive. Compliance by Juan Guillermo and ATS with the prior Orders issued in these proceedings will be required for the Receiver to do so.

4.2 Potential Issues Related to the Termination of the Receivership

1. Cambridge and ATS's counsel have advised that, upon receipt of funds from Mr. Volgemut, they intend to bring a motion to terminate the receivership.
2. The Receiver expects that the motion to terminate the receivership will be contested. If the motion proceeds, the Receiver believes that it should be on an expedited schedule.
3. Outlined below are the primary issues that the Receiver expects the Court will need to consider in respect of the termination the receivership.

a. Can the receivership be terminated if the Judgement Debt is not paid in full?

- i. The Appointment Order states full satisfaction of the Judgement Debt is required before a motion to terminate the Receiver can be made. Paragraph 25 of the Appointment Order reads:

THIS COURT ORDERS that the Debtor [Xela] may make a motion to this Court for the termination of the receivership upon receipt by Margarita of the Judgment [sic] Debt owing to her by the Debtor, plus receivership fees and expenses, and that upon such motion the burden shall be on Margarita to justify that it remains just and equitable to continue the receivership. [Emphasis added.]

- ii. Pursuant to a request by Cambridge on November 30, 2021, the Receiver provided Cambridge with the amount required to fully repay the Judgement Debt, including all amounts outstanding under the Receiver's borrowing charge and unpaid professional costs (the "**Judgement Debt Costs**"). As of late December 2021, this amount totalled \$6,030,000, pursuant to a summary dated December 23, 2021 that the Receiver provided to Cambridge.⁴³ On February 17, 2022, the Receiver provided Cambridge with an updated summary reflecting that this amount now totals \$6,130,569.⁴⁴
- iii. It has been represented to the Receiver and the Court that Mr. Volgemut recently wired US\$4,240,000 to Cambridge. Based on the US dollar to Canadian dollar exchange rate of 1.27 as of February 23, 2022, this equals \$5,389,485, which is \$741,084 less than the amount required to satisfy the Judgement Debt Costs.

⁴³ Email from Lenczner Slaght to Cambridge dated December 23, 2021 with attachments, Brief, Tab 17

⁴⁴ Email from Lenczner Slaght to Cambridge dated February 17, 2022, Brief, Tab 18

- iv. The amount payable to Margarita in respect of the Judgement Debt is an unsecured debt that ranks on *pari passu* basis with Xela's other unsecured claims. Xela's creditors' list reflects obligations totalling approximately \$77.5 million. While a significant portion of these claims is non-arm's length, the Receiver has not conducted a claims process (as is the practice in a court-supervised proceeding) and without doing so, it is unable to determine the provable claims against Xela. The Receiver has been contacted by at least two law firms to advise of significant unpaid fees owing to them by Xela, including Torys LLP (approximately \$315,000), which acted as Xela's counsel at the outset of these proceedings. Distributions to creditors with proven claims would reduce Margarita's recovery on the Judgement Debt.
- b. Is a claims process required in these proceedings?**
 - i. Without conducting a claims process, the Receiver is unable to determine the other valid claims against Xela. It is the normal practice in a court-supervised proceeding to conduct a claims process prior to making distributions to unsecured creditors.
 - c. Can the Receiver make distributions without notice to other creditors?**
 - i. It is the Receiver's view that it does not have the authority to distribute any assets of Xela without an order of the Court. It is also the Receiver's view that any distribution motion in these proceedings should be on notice to all stakeholders with an economic interest in Xela after a claims process has been conducted.
 - d. Will Margarita have recourse against Xela in respect of her preference shares if Juan Guillermo's motion is successful?**
 - i. In addition to the claims against Xela, on January 11, 2017, Margarita provided Xela and Juan Guillermo with a notice to redeem her Xela preference shares, which have a value of \$14 million. On January 31, 2017, Xela informed Margarita that it would not be able to pay her. As a result of the Reviewable Transactions, Xela does not have the assets available to redeem the preference shares.
 - e. Should disclosure be made regarding the terms of Mr. Volgemut's advances?**
 - i. Disclosure has not been made as to the terms of Mr. Volgemut's promised advances. The Receiver is concerned that BDT, in reliance on the alleged LISA Transfer, has purported to grant Mr. Volgemut a charge on LISA's Avicola Interest. If this is the case, BDT would purportedly have created intervening rights that might be relied upon (particularly in foreign jurisdictions) to counter the Receiver's efforts to unwind the LISA Transfer, if found to be improper.

- ii. As the Court may recall, a similar concern regarding the undisclosed terms of a loan sourced by Hals on behalf of LISA to be used to satisfy the Judgement Debt was raised by the Receiver in December 2019.⁴⁵ Details of that loan were not provided to the Receiver and the loan was never made.
- f. **Should the receivership be terminated prior to the resolution of the Criminal Proceedings?**
 - i. The Receiver is not prepared to recommend that these proceedings be terminated until the criminal process in Panama has been resolved and the three members of Hatstone have been absolved of liability. The Receiver is also of the view that the costs to bring the criminal process to a satisfactory conclusion should be borne by Juan Guillermo.
- g. **Has Margarita already been repaid the Judgement Debt amounts from other sources?**
 - i. Juan Guillermo takes the position that Margarita has already received the amounts owed by the Judgement Debt. Mr. Volgemut also references this in Mr. Volgemut's Dec. 2021 Affidavit.⁴⁶
 - ii. The Receiver has been advised that this issue was raised by Juan Guillermo in 2017 when he sought a stay of enforcement to permit an adjudication of his claims against Margarita. On July 6, 2017, McEwen J. dismissed Juan Guillermo's motion for a stay of enforcement.⁴⁷
- h. **What weight should the Court give to Juan Guillermo's non-compliance with the Orders issued in these proceedings?**
 - i. The Receiver expects that the Court will need to consider Juan Guillermo and ATS's request for the termination motion in the context of their conduct. In the Receiver's opinion, Juan Guillermo and ATS have not complied with Court Orders requiring them to produce documents and files in their possession. In the winter of 2021, the Court refused to allow Juan Guillermo to schedule a new motion until Juan Guillermo complied with the February 10, 2021 Order to withdraw the Juan Guillermo Declaration. The Court may need to assess Juan Guillermo's and ATS's current non-compliance when considering whether to allow Juan Guillermo and ATS to bring a new motion to terminate the receivership.

⁴⁵ See s. 2.2(10) to (22) of the Receiver's Second Report, Reports Brief, Tab 2

⁴⁶ Mr. Volgemut's Dec. 2021 Affidavit, at para. 4, Brief, Tab 2

⁴⁷ Court Order dated July 6, 2017, Orders Brief, Tab 2

5.0 Professional Fees

1. The fees of the Receiver and its counsel, Lenczner Slaght, are summarized in the table below:

(\$)					
Firm	Period	Fees	Disbursements	Total	Average Hourly Rate
KSV	Jan 1/21 – Dec 31/21	163,371.00	0.00	163,371.00	621.23
Lenczner	Dec 1/20 – Nov 30/21	342,432.00	18,551.58	360,983.58	498.37
Total		503,803.00	18,551.58	524,354.58	

2. Detailed invoices for the Receiver and Lenczner Slaght can be found in the affidavits sworn by their representatives in the Brief of Documents that accompanies this Report.⁴⁸ The accounts have been redacted to address matters of confidentiality or privilege. Unredacted accounts can be provided to the Court upon request.
3. The Receiver has incurred time and expense as a result of its motion that led to the March 25, 2021 Order, as well as repeated appearances related to funding from Mr. Volgemut. These proceedings are complex. Xela’s multi-jurisdictional, corporate structure and the vast materials filed in this matter have required extensive resources and time. The Receiver continues to seek compliance with Court Orders and to defend its representatives in Panama from criminal liability. However, the Receiver continues to face significant challenges in these proceedings and in foreign jurisdictions.
4. The Receiver is of the view that the hourly rates charged by Lenczner Slaght are consistent with the rates charged by law firms practicing in the areas of litigation and restructuring in the Toronto market, and that the fees charged are reasonable in the circumstances.

6.0 Recommendations

1. The Receiver recommends that:
 - a. the Court enforce its Orders. The Receiver recommends that the Court award full indemnity costs against Juan Guillermo and ATS for their failure to comply with the March 25, 2021 Order;
 - b. if Cambridge receives funding from Mr. Volgemut, and the Court is prepared to schedule Juan Guillermo’s motion to terminate the receivership, the Court grant an expedited timetable to hear that motion;

⁴⁸ Fee Affidavit of KSV, Brief, Tab 19; Fee Affidavit of Lenczner Slaght, Brief, Tab 20. The KSV and Lenczner Slaght invoices have been redacted for privileged details.

- c. on the basis that (b) above is the next step in these proceedings, the Receiver will require direction from the Court as to whether the Receiver's investigation should be stayed, particularly given that the stated amount of the funding from Mr. Volgemut is insufficient to pay the Judgement Debt and, as such, a motion to terminate the receivership appears to be prohibited by paragraph 25 of the Appointment Order;
- d. absent receipt of funding from Mr. Volgemut, the Receiver continue to investigate the Reviewable Transactions;
- e. the Court schedule a hearing for the Receiver's contempt motion against Juan Guillermo; and
- f. the Court approve the fees of the Receiver and its counsel, Lenczner Slaght.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

**KSV RESTRUCTURING INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF
XELA ENTERPRISES LTD. AND NOT IN ITS PERSONAL
OR CORPORATE CAPACITY**