



**Second Supplement to the
Second Report of
KSV Kofman Inc.,
as Receiver and Manager of
Xela Enterprises Ltd.**

March 23, 2020

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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.

SECOND SUPPLEMENT TO THE SECOND REPORT OF KSV KOFMAN INC.

MARCH 23, 2020

1.0 Introduction

1. This report (the “Second Supplemental Report”) is the second supplement to the Second Report of the Receiver dated February 18, 2020 (the “Second Report”).
2. Capitalized terms in this Second Supplemental Report have the meaning provided to them in the Second Report and the First Supplemental Report dated March 17, 2020 (the “First Supplemental Report”).
3. This Report is subject to the restrictions provided in the Second Report.

2.0 Update to the Court since the First Supplemental Report

1. As set out in the Second Report, on January 16, 2020, the Receiver passed a resolution replacing the Board of Directors of Gabinvest.
2. As set out in the Second Report, on January 27, 2020, Gabinvest appointed three directors to the Board of Lisa (the “New Lisa Directors”). Lisa has six Directors, including the New Lisa Directors and the Board members who were appointed prior to the commencement of the receivership (the “Existing Board Members”).

3. At 9:45 pm, on March 22, 2020, Cambridge served a responding motion record containing an affidavit of Juan Guillermo sworn March 22, 2020 (the "Guillermo Affidavit") and an affidavit of Harald Johannessen Hals (the "Johannessen Affidavit"), both sworn in Toronto. The Receiver understands that Mr. Johannessen is the brother-in-law of Juan Guillermo.
4. The Receiver understands that many of the issues raised by the affiants in each of the Guillermo Affidavit and the Johannessen Affidavit have already been adjudicated by this Court in 2017, as set out in Endorsement of Justice McEwen dated July 6, 2017. A copy of the Endorsement is attached hereto as Appendix "A".

3.0 Unlawful Transfer of Remaining Assets

1. The Guillermo Affidavit states at paragraph 30 that Lisa transferred its one-third interest in Avicola to BDT in full satisfaction of its indebtedness to BDT, including its interest in unclaimed dividends (the "Lisa Transfer"). The date of this transaction is not provided in the Guillermo Affidavit. BDT is owned by the Trust, the beneficiaries of which are Juan Guillermo's children.
2. As previously noted by the Receiver in its reports filed with the Court to date, the underlying debt purportedly owed by Lisa to BDT, and the terms related thereto, is currently the subject of the Receiver's review and the Disclosure Order.
3. The Johannessen Affidavit states at paragraph 21 that the Lisa Transfer occurred in February 2020. The specific date is not provided. The Lisa Transfer transaction documents are not provided.
4. The Lisa Transfer happened at the time that the changes to the Gabinvest and Lisa boards were being frustrated by Juan Guillermo, the prior Board of Gabinvest and the Existing Lisa Directors.
5. As set out in the First Supplemental Report, there has been a dialogue between Hatstone, Juan Guillermo and some or all of the Existing Lisa Directors for several weeks. None of these individuals disclosed the Lisa Transfer to Hatstone during their extensive discussions and communications.
6. The Receiver understands from Hatstone that the disposal of assets by a corporation requires shareholder approval under Panamanian law and is not simply a board decision. Lisa's shareholder is Gabinvest and approval of such decision has not been granted by the Receiver or the Gabinvest board.
7. The Lisa Transfer is the main asset in the receivership. The Lisa Transfer renders the receivership meaningless, if permitted.

* * *

All of which is respectfully submitted,



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

Appendix “A”

FILE/DIRECTION/ORDER

BEFORE JUDGE McEwen ACTION # CU-11-91062-00CL

Castillo

Plaintiff(s)

-v-

Xela Enterprises Ltd. et al

Defendant(s)

CASE MANAGEMENT: YES [] NO []

COUNSEL: Leon/Woycheshyn - PHONE NO. _____
Applicant PHONE NO. _____
Richard/Mendelzon - PHONE NO. _____
Respondents

ORDER [] DIRECTION FOR REGISTRAR

[] REPORTED SETTLED ADJOURNED TO TRIAL SCHEDULING COURT _____

[] NO ONE APPEARED ADJOURNED TO TO BE SPOKEN TO COURT _____

The moving respondents (Xela, Juan Guillermo and Arturo) bring this motion seeking an order to stay the execution of the Divisional Court Order dated Dec 30/16 which affirmed the decision of Justice Newbould dated Oct 28/15.

6 July 17
DATE

McEwen
JUDGE'S SIGNATURE

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

In his decision Justice Newbould held that the Applicant had been oppressed¹ and ordered that the moving respondents purchase her 100 Common Shares in Tropic for the amount of \$4,250,000.00

The moving respondents and others have commenced another action against the Applicant and others (CO11-9177001) claiming \$400 million from all the defendants and specific relief against the Applicant. That action is currently bogged down in jurisdictional disputes.

It also bears noting that Newbould J. severed the Tropic claim from the Applicant's claim against Kela and decided the issue (which was upheld).

The moving respondents now submit that the execution of the

1. within the meaning of s. 243 of the OBCA -

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Judges Endorsment Continued

Divisional Court order be stayed until there has been a determination of the Applicant's liability in the aforementioned action ("the Action")

I disagree and for the reasons below dismiss the motion.

Insofar as the governing law is concerned, the parties agreed that the test for exercising discretion to award a stay under s. 106 of the CTA is set out by the Div. Ct in [24-7902 Ont] In re US Carlisle 2003 Carswell Ont 6433. In Carlisle, the court generally held that the bar for a stay is a high one and ought to be used only in very rare circumstances. It added that it should only be granted where the court seeks to avoid an oppressive or vexatious result, but also

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Judges Endorsment Continued

in Circumstances where it would not
cause an injustice to the plaintiff.

The moving respondents submit that
more recent Caselaw of this court
have applied a "broader test" that
simply looks at the equities. Having
reviewed the caselaw I disagree and
even if I am wrong, in my view,
the equities favour the Applicant.
In any event, as I have noted,
Carlisle is the binding authority.

The main thrusts of the moving
respondents' submissions are that the
Applicant is one of the key defrs
in the Action; this proceeding and
the Action are intricately linked and
that the Applicant was involved in a
conspiracy against the moving
respondents that involved her, amongst
other things, stealing corporate

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Judges Endorsement Continued

documents and now facing criminal charges. Accordingly, they submit that it would be inconsistent with the interests of justice to allow the Applicant to collect the money awarded by Justice Newbould at this time.

While the moving ~~of~~th respondents have made serious allegations against the Applicant I do not believe that I should exercise my discretion in their favour and stay the execution of the Div. Cert order for the following reasons:

- Justice Newbould and, later, the Div. Cert allowed the Applicant's claim regarding Tropic to proceed separately for the reasons set out. Chief amongst those reasons is the fact that the ~~Action~~ does not include the Tropic

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Judges Endorsment Continued

issues.

- While these reasons are not binding upon me, they are highly persuasive. The reasons set out a number of reasons as to why the Tropic issue had little to do with the Xela issue and the Action In Mine regard Justice Newbould characterized the moving respondents' accusations of a conspiracy ~~as~~ ^{as} "speculative at best." Little has changed since then.
- The moving respondents could have brought a motion to join the two proceedings. They did initiate such a motion, but it was later abandoned.
- Justice Newbould's decision set out numerous examples of aggressive and inappropriate conduct by the moving respondents against the Applicant.
- A stay of the execution could result in real prejudice to the

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Judges Endorsment Continued

Applicant as the moving respondents could take further steps to diminish her shareholding in Tropic.

As set out by Justice Newbould the moving respondents past actions made it clear that the Applicant cannot expect to be properly treated.

• It also cannot be said that the Applicant may have received money that some day may be shown to be inappropriate. As a result of Justice Newbould's order the moving respondents will pay the money in exchange for the Applicant's Tropic shares.

• It also bears noting that much of Tropic's supporting affidavit contains unconfirmed hearsay and investigations with respect to critical issues concerning the alleged conspiracy

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Judges Endorsment Continued

This ^{part} of course is inadmissible.

• With respect to the allegation of stolen documents, we must question how this can be said to be an accurate assertion against a Director and shareholder, but in any event, the moving respondents have done little to show what it is that the Applicant should not have disclosed in those documents.

In all of the above circumstances I find that the moving respondents have failed to satisfy the test in Carlisle or even establish that the equities favour a stay. Indeed the moving respondents have continued to take steps prejudicial to the Applicant when Thopre sold Fresh Quest in Oct/15 in/around the time Justice Newbold released his

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Judges Endorsment Continued

decision.

Overall, given Justice Newbould's clear findings of oppression in the specific Trade claim, I cannot conclude that it would be oppressive or vexatious, or an abuse of process to enter the settlement now or, as noted, that the equities favour the moving respondents. In fact, based on the above, given the actions of the moving respondents and the glacial pace of the Action any further delay would likely cause an injustice to the Applicant.

Last, I should reiterate that the claims of wrongdoing against the Applicant were largely before Justice Newbould. The later criminal complaint, initiated by ~~the~~ Juan, is also essentially based on information that

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Judges Endorsment Continued

was before Justice Newbould as well.

The motion is dismissed. The Applicant shall have her costs on a partial indemnity basis in the amount of \$15,000.00 for fees plus HST and disbursements of \$291.29.

At the hearing the Applicant sought an order to compel the respondents to attend at an examination in aid of execution. Since no motion was brought by the Applicant, I decline this relief sought.

McE...