



**Supplement to the Fourth Report of  
KSV Restructuring Inc.  
as Receiver and Manager of  
Xela Enterprises Ltd.**

**February 1, 2021**

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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.**

**SUPPLEMENT TO THE FOURTH REPORT OF KSV RESTRUCTURING INC.**

**FEBRUARY 1, 2021**

## **1.0 Introduction**

1. This report (the “**Supplemental Report**”) supplements the Fourth Report of the Receiver dated January 18, 2021 (the “**Fourth Report**”).
2. Capitalized terms used have the meaning provided to them in the Fourth Report unless otherwise defined herein.
3. The purposes of the Supplemental Report are to:
  - a. address the conflict of interest allegation made by Juan Guillermo relating to the Receiver’s forensic agent, Duff & Phelps; and
  - b. recommend that the Court replace “Duff & Phelps” with “Epiq Global” as the Receiver’s forensic specialist in connection with the two orders issued by the Court on October 27, 2020 (respecting each of ATS and Juan Guillermo), as discussed in more detail below (the “**October 27<sup>th</sup> Orders**”).<sup>1</sup>

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<sup>1</sup> The Receiver will also provide the Court with a revised draft Investigative Order (which is being sought at the Receiver’s motion, returnable March 22, 2021) which replaces “Duff & Phelps” with “Epiq Global.”

## 1.1 Overview

1. Juan Guillermo alleges that the Receiver's forensic specialist, Duff & Phelps, is in a conflict of interest and should not be conducting the forensic work which is the subject of the October 27<sup>th</sup> Orders.
2. The Receiver has reviewed the alleged conflict of interest and has concluded that there is no merit to the allegations. Nevertheless, to address Juan Guillermo's suggestion that there is a conflict, the Receiver proposes that Epiq Global replace Duff & Phelps in the October 27<sup>th</sup> Orders.

## 1.2 Restrictions

1. This Supplemental Report is subject to the restrictions in the Fourth Report.

## 1.3 Receivership Materials

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

## 2.0 Alleged Conflict of Interest

### 2.1 The Allegation

1. In a draft proposed cross motion dated January 18, 2021 Juan Guillermo alleges that the Receiver's forensic specialist, Duff & Phelps, is in a conflict of interest. The alleged conflict is that Duff & Phelps' subsidiary, Kroll, Inc. ("**Kroll**"), has historically<sup>2</sup> been retained to conduct surveillance work adverse to Juan Guillermo and further that the Receiver failed to disclose the conflict.

### 2.2 Duff & Phelps' Background

1. Duff & Phelps is a multinational financial consultancy firm with approximately 4,000 employees and offices around the world. Duff & Phelps has several divisions, including Valuation, Mergers & Acquisitions, Tax Services and Consulting, among many others. Each division is further broken down into smaller teams.
2. In March 2018, Duff & Phelps acquired Kroll, an investigations and risk-consulting firm. The acquisition was publicly announced.

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<sup>2</sup> Juan Guillermo also alleges, without any evidence, that Kroll may continue to work for the Cousins.

3. In August 2020, Duff & Phelps performed a conflict check for the Receiver with respect to the Company and advised that there were no conflicts. In October 2020, the Receiver retained members of Duff & Phelps' Cyber Risk Division to assist it in imaging the devices in accordance with the October 27<sup>th</sup> Orders (the "**Receiver's Mandate**").
4. Although the Duff & Phelps Cyber Risk Division employees have @kroll.com email addresses, both groups are Duff & Phelps' employees.

### **2.3 No Allegations until the Receiver Sought Compliance with Orders**

1. One of the October 27<sup>th</sup> Orders deals with the Servers under ATS's control and the other deals with Juan Guillermo's devices:
  - a. the ATS Order:
    - i. authorized Duff & Phelps to make a single disk image of certain servers located at Cogent;
    - ii. required ATS to provide Duff & Phelps with possession of three non-operational servers; and
    - iii. required Duff & Phelps to maintain the images and servers—but not analyze or review the images or data—without further Court order or the written consent of ATS.
  - b. the Juan Guillermo Order:
    - i. authorized Duff & Phelps to "make a single forensic image" of Juan Guillermo's devices;
    - ii. required Duff & Phelps to "make no additional copies or images" of those devices;
    - iii. authorized Duff & Phelps to conduct deletion analyses of the images of those devices;
    - iv. authorized Duff & Phelps to upload the data on the Relativity document review platform; and
    - v. established a protocol to address Juan Guillermo's objections to disclosure to the Receiver of any documents based on privilege, personal information or any other reasonable basis.
2. On October 27, 2020, Cambridge consented to the October 27, 2020 Order respecting Juan Guillermo.
3. On October 27, 2020, WeirFoulds consented to the October 27, 2020 Order respecting the Servers in ATS' control.

4. In the weeks that followed, Cambridge sent and received numerous emails to the Duff & Phelps' employees working on this matter at their @kroll.com email addresses, and WeirFoulds sent and received numerous emails to one Duff & Phelps' employee at his @kroll.com email address.
5. Two Duff & Phelps' employees imaged the Servers from November 5 to 7, 2020. One Duff & Phelps' employee imaged Juan Guillermo's devices on January 5, 2021.
6. On January 10, 2021, when the Receiver requested compliance with the protocol established in the October 27, 2020 Order (respecting Juan Guillermo's devices) and insisted on obtaining the passwords to unlock the images of Juan Guillermo's devices, Cambridge, on behalf of Juan Guillermo, alleged that Duff & Phelps has a conflict of interest.
7. Duff & Phelps has not analyzed or reviewed any of the images subject to the October 27<sup>th</sup> Orders. The images are in the possession of Duff & Phelps in accordance with the Orders.

#### **2.4 No Conflict of Interest**

1. The Receiver made an inquiry of Duff & Phelps, following the allegation of a conflict of interest.
2. The Receiver was advised that the only work conducted by Kroll's Business Intelligence and Investigations team for parties adverse to Juan Guillermo was closed in 2017 ("**Closed File**"), prior to Duff & Phelps' acquisition of Kroll.
3. Neither the Receiver nor the Duff & Phelps' Cyber Risk Division assigned to the Receiver's Mandate was aware of the Closed File until the further conflict inquiry was made in January 2021.
4. No present or former Kroll employee who was assigned to the Closed File is involved in the Receiver's Mandate.
5. The images are maintained by the Cyber Risk Division in a secured laboratory in Toronto which is accessible only by members of the Cyber Risk Division. No present or former Kroll employee from the Business Intelligence and Investigations team assigned to the Closed File is a member of the Cyber Risk Division which has access to the images.
6. In all of the circumstances, the Receiver is of the view that there is no actual or apparent conflict of interest.

## 2.5 No Prejudice

1. The imaged Servers and the images of Juan Guillermo's devices are locked in Duff & Phelps' Cyber Risk Division secure laboratory.
2. Duff & Phelps has not reviewed the images of the Servers or uploaded them to the Relativity document review platform. Images of Juan Guillermo's devices are password protected, and the images cannot be accessed by anyone else at Duff & Phelps. As such, Duff & Phelps has neither performed the deletion analyses nor uploaded the data from Juan Guillermo's devices onto the Relativity document review platform.

## 2.6 Epiq Global

1. Epiq Global is a worldwide provider of eDiscovery solutions and has expertise in restructuring and bankruptcy matters.
2. Epiq Global has performed an extensive and global conflicts check and advises that it has no real or perceived conflicts.
3. Epiq Global advises that it is willing and able to perform the work set out in the Court's October 27<sup>th</sup> Orders and the Order being sought by the Receiver in its motion returnable March 22, 2021.
4. Duff & Phelps will deliver a chain of custody to Epiq Global, which will be preserved and updated by Epiq Global.

## 3.0 Conclusions and Recommendation

1. Based on the foregoing, the Receiver recommends that the Court make an order granting the relief detailed in Section 1.0(3)(b) of this Supplemental Report.

\* \* \*

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**