



**Third Report of
KSV Kofman Inc.
as Receiver and Manager of
Xela Enterprises Ltd.**

July 24, 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.

THIRD REPORT OF KSV KOFMAN INC.

JULY 24, 2020

1.0 Introduction

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 her now-deceased father, Juan Arturo Gutierrez ("Juan Arturo"), and her brother, Juan Guillermo Gutierrez ("Juan Guillermo").
2. Margarita's application was commenced in her capacity as a director of Tropic International Limited, a wholly-owned subsidiary of Xela Enterprises Ltd. (the "Company").
3. Margarita's application was successful. Pursuant to a judgement issued by the Court on October 28, 2015, the Company, Juan Guillermo and Juan Arturo became jointly obligated to pay Margarita approximately \$5 million, plus interest and costs (the "Judgment Debt"). The Receiver understands that the present balance owing under the Judgment Debt is approximately \$4.4 million, plus interest and costs which continue to accrue. Margarita, through an Alberta company, also owns preference shares in the Company in the face amount of approximately \$14 million.

4. On January 15, 2019, Margarita made an application to the Court for, among other things, the appointment of KSV Kofman Inc. (“KSV”) as receiver and manager of the Company (the “Receiver”) pursuant to Section 101 of the *Court of Justices Act* (Ontario). The Receiver was ultimately appointed on July 5, 2019. A copy of the receivership order is attached as Appendix “A” (the “Receivership Order”).
5. Pursuant to the terms of the Receivership Order, the Receiver was empowered to deal with all matters related to the Company; however, the Receiver’s authority to deal with the Avicola Litigation (as defined below) did not become effective until January 1, 2020 in order to provide Juan Guillermo with a fixed period of time within which to satisfy the Judgement Debt.
6. As Juan Guillermo did not satisfy the Judgement Debt by that date, the Receiver is empowered and authorized to manage and deal with the property and assets of the Company, including the Avicola Litigation, and where the Receiver does so, the Receivership Order prohibits any other party from dealing with those matters.
7. As discussed in greater detail in this Report, the Receiver has requested on several occasions that Juan Guillermo provide information regarding the Company. These information requests remain, for the most part, outstanding. Juan Guillermo has not provided effective cooperation to the Receiver since the commencement of these proceedings. Parties with connections to Juan Guillermo have also refused to provide information requested by the Receiver. Certain of these outstanding information requests are discussed in this Report.
8. As discussed in this Report, the Receiver has become aware of Company records currently in the possession of third parties. Access to these records will be of assistance to the Receiver to manage and deal with the assets of the Company.
9. Further details regarding the background of these proceedings are set out in the Receiver’s First Report to Court dated October 17, 2019 (the “First Report”). A copy of the First Report is attached as Appendix “B”, without appendices.

1.1 Purposes of this Report

1. The purposes of this Report are to:
 - a) provide background information concerning these proceedings;
 - b) provide an update on the activities of the Receiver since the Second Report; and
 - c) recommend that the Court grant an order:
 - i. authorizing the Receiver to obtain from Arturo’s Technical Services (“ATS”) any of the Company’s property or documents in the possession of ATS (the “ATS Documents”) and directing ATS to provide the ATS Documents to the Receiver;

- ii. requiring Juan Guillermo to disclose the location of the Company's current server (the "Server"), including assisting the Receiver to access, locate, decode, and decrypt any and all information on the Server;
- iii. directing that Juan Guillermo, or any other person purportedly acting on behalf of the Company, cannot assert privilege against the Receiver in respect of any documentation related to the Company that may be in the possession of ATS, located on the Server or in the possession of Cambridge LLP ("Cambridge"), counsel retained by Juan Guillermo to purportedly act for the Company in these proceedings;
- iv. requiring any person who intends to assert privilege with respect to the ATS Documents, the Server, or elsewhere deliver an affidavit attesting under oath as to the nature of such privilege, the documents to which it extends, and the basis for such assertion; and
- v. requiring Cambridge or any counsel acting or purporting to act for the Company to deliver up access to their files in these proceedings for inspection by the Receiver.

1.2 Currency

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

1.3 Restrictions

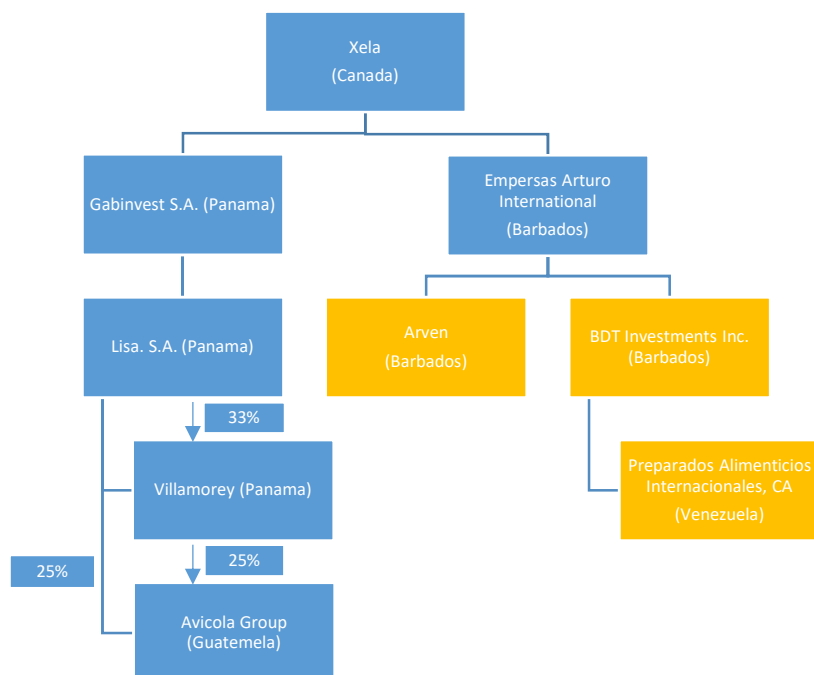
1. In preparing this Report, the Receiver has relied upon the Company's unaudited financial information, the Company's books and records, materials filed in the Avicola Litigation, discussions with representatives of the Company, Hatstone Abogados ("Hatstone"), the Receiver's Panamanian legal counsel, and discussions with Margarita and Juan Guillermo.
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 should perform its own diligence.

1.4 Receivership Materials

1. All 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 Background

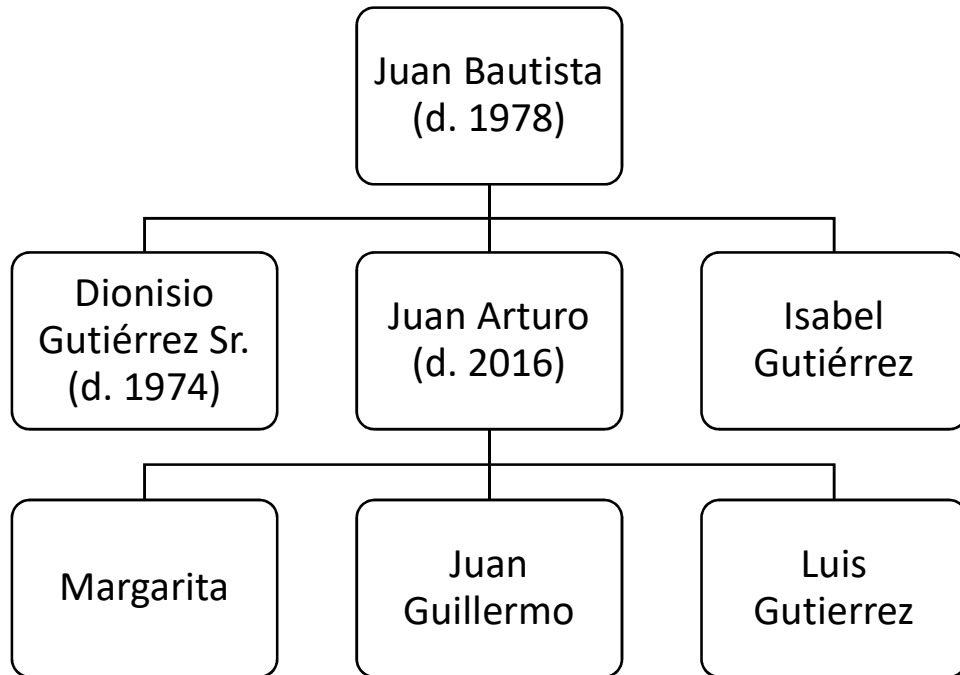
1. The Company is the parent of more than two dozen direct or indirect subsidiaries located predominantly in Central America that carry on, or carried on, businesses in the food and agricultural sectors.
2. Most of the Company's subsidiaries are no longer operating. To the extent that they continue to operate, they were conveyed to the ARTCARM Trust (the "Trust"), a Barbados domiciled trust. Juan Guillermo's children are the beneficiaries of the Trust.
3. A condensed Company organizational chart prior to April 2016 is presented below (entities shaded in yellow were transferred to the Trust in April 2016).



4. Attached as Appendix "C" is the Company's full corporate organizational chart prior to April 2016.
5. The Company's most significant asset is believed to be its indirect one-third interest in a group of purportedly successful, family-owned, and vertically-integrated poultry businesses operating in Central America known as the "Avicola Group". As reflected by the corporate chart, the Company's interest in the Avicola Group is believed to be held as follows (the "Avicola Interest"):
 - a) 25% through its wholly owned indirect subsidiary, Lisa, S.A. ("Lisa"), a Panamanian holding company. Gabinvest S.A. ("Gabinvest") is believed to be the sole shareholder of Lisa; and
 - b) 8.3% through Villamory S.A. ("Villamory"), a Panamanian holding company¹.

¹ Villamory owns 25% of the Avicola Group, of which the Company has an indirect one-third ownership interest.

6. Dionisio Gutierrez Sr., Isabel Gutierrez de Bosch and their children (collectively, the “Cousins”) are believed to own the remaining two-thirds of the Avicola Group through entities they own, including the remaining two-thirds of Villamorey.
7. Juan Bautista Gutierrez (“Juan Bautista”) was the patriarch of the Gutierrez family and the founder of the Avicola Group. A condensed family tree is provided below:



8. Margarita, Juan Guillermo and the Cousins have been litigating for decades, primarily related to shareholder disputes involving the Avicola Group (the “Avicola Litigation”).

2.1 EAI Transaction and Assignment Transaction

1. The First Report details the “Reviewable Transactions”, as follows:
 - a) the sale, conveyance or transfer in early 2016 by Empress Arturo International (“EAI”) of the shares of BDT Investments Ltd. (“BDT”) and Corporacion Arven, Limited (“Arven”) to Juan Arturo, and then from Juan Arturo to the Trust (the “EAI Transaction”); and
 - b) the assignment in January 2018 by Lisa of the proceeds from the Avicola Litigation to BDT (the “Assignment Transaction”).

2.2 EAI Transaction

1. Prior to April 2016, EAI, a wholly owned subsidiary of the Company, owned and operated the “Arturos” restaurant business in Venezuela through its wholly-owned subsidiaries, BDT and Arven.

- Juan Guillermo has advised the Receiver that the Arturos restaurant chain has a history of profitability. The entities that carry on the Arturo's business, being BDT, Arven and Arven's subsidiary, Preparados Alimenticios Internacionales, CA ("PAICA"), are purported to have advanced approximately \$43 million to the Company and approximately US\$57 million to Lisa to fund the Avicola Litigation, which amounts are purported to still be owing (the "Intercompany Receivables"). A summary of the purported Intercompany Receivables is provided below.

| (unaudited; \$000s) | Owing from the Company (CAD) (as at May 31, 2018) | Owing from Lisa (USD) (as at June 30, 2018) |
|---------------------|---------------------------------------------------------|---------------------------------------------------|
| Owed to: | | |
| BDT | 24,194 | 47,076 |
| Arven | 6,508 | 12,727 |
| PAICA | 11,835 | (2,913) |
| | 42,537 | 56,890 |

- In 2012, a judgment was issued by the Panamanian Court in favour of BDT against Lisa in the amount of approximately \$25,323,772 (the "BDT Judgement"). At the time of the BDT Judgement, Lisa and BDT were both indirectly owned by the Company.
- In April 2016, EAI transferred the shares of BDT and Arven to Juan Arturo for US\$6.5 million in partial satisfaction of a purported debt then owing to Juan Arturo by EAI. Juan Arturo subsequently transferred the shares of BDT and Arven to the Trust.
- On its face, it appears that EAI received inadequate consideration for the shares of BDT and Arven. In this regard, it is unclear to the Receiver what value, if any, was ascribed to the Intercompany Receivables. The Receiver does not know the exact value of the Intercompany Receivables at the time of the EAI Transaction³, but according to the Lisa's books and records, the amounts owing by Lisa to BDT, Arven and PAICA were approximately US\$57 million as at June 30, 2018.
- The Receiver has made numerous requests for evidence of the advances made by BDT and Arven to each of Lisa and the Company. These requests have been made to Juan Guillermo, representatives of BDT, Arven and PAICA and to Lisa's board of directors. None of these parties has provided any support for the advances.

2.3 Assignment Transaction

- The Receiver was advised by Juan Guillermo that in January 2018, BDT agreed to fund Lisa's costs in the Avicola Litigation, provided Lisa assign its interest in the Avicola Litigation to BDT.
- At the time of the Assignment Transaction, Juan Guillermo was the President of the Company and held preference shares in the Company.

² The BDT Judgement was issued in the amount of \$19,184,680 Balboas, being the currency in Panama. The exchange rate as at January 31, 2020 for Balboas into Canadian currency was C\$1.32/B\$1.

³ This is part of the Receiver's investigation.

3. The Receiver understands from Bennett Jones LLP, counsel to Margarita, that the Company's common shares are owned by a trust, the beneficiaries of which are Juan Guillermo's children. Juan Guillermo or his family members were therefore on both sides of the Assignment Transaction.
4. The Receiver has not uncovered any commercially reasonable basis for the Assignment Transaction other than to benefit Juan Guillermo and his family.
5. The Company's creditors and Margarita were, and are, prejudiced by this transaction.
6. Pursuant to the terms of the Assignment Transaction, BDT agreed to pay Lisa 30% of the net litigation proceeds, after deducting costs and the repayment by Lisa of any amounts it then owed to BDT. A copy of the Assignment Transaction agreement is attached as Appendix "D". As reflected in the table above in paragraph 2.2.2 above, at the time of the Assignment Transaction, Lisa allegedly owed BDT approximately US\$47 million.
7. As a result of the Reviewable Transactions, the value of the Avicola Interest (which is indirectly held through Lisa) has been transferred outside of the Company to the Trust, the beneficiaries of which are Juan Guillermo's children.
8. The Reviewable Transactions and the BDT Judgment occurred at a time when Juan Guillermo was litigating with Margarita.
9. The Receiver has previously advised the Court that it required further information in order to come to final conclusions concerning the Reviewable Transactions; however, despite repeated efforts by the Receiver to obtain the information it requires to investigate these transactions (including from Juan Guillermo, BDT, Arven, PAICA and the Lisa board of directors), the information has not been provided.

2.4 Board Changes

1. The Company is the sole shareholder of Gabinvest, which in turn owns the shares of Lisa. Juan Guillermo has sworn an affidavit in these proceedings confirming this. Both Gabinvest and Lisa are incorporated under the laws of Panama.
2. The Receivership Order empowers and authorizes the Receiver to exercise the Company's shareholder rights, including the authority to change the Gabinvest board of directors.
3. On January 16, 2020, the Receiver passed a resolution replacing the directors of Gabinvest with three lawyers from the Receiver's Panamanian counsel, Hatstone (the "Gabinvest Resolution").
4. On January 22 and 27, 2020, at the direction of the Receiver, the new Gabinvest board caused Gabinvest to resolve, by way of shareholder meetings, to increase the maximum number of directors of Lisa from five to six and then to appoint the three Hatstone lawyers appointed to the Gabinvest board as new directors of Lisa, while leaving the existing three directors in place (collectively, the "Lisa Resolutions").
5. The Receiver further directed Gabinvest's new board to try to work cooperatively with Lisa's existing board members. As a sign of good faith and in the hoped-for spirit of cooperation, the Receiver preferred that Gabinvest not replace the entire Lisa board.

6. A purpose of the Gabinvest Resolution and the Lisa Resolutions was to provide the Receiver with access to the books and records of Lisa so that it could determine the extent of any advances received by Lisa from BDT, Arven and PAICA.
7. Lisa's non-Hatstone directors have refused to provide any corporate records in respect of either Lisa or Gabinvest or to instruct the recently resigned Panamanian registered corporate agent, Alfaro, Ferrer & Ramirez ("AFRA") to release any such documents. The Receiver understands that in Panama a registered agent maintains, or has access to, various key documents regarding a company, including the registers, minutes books, minutes of board of director meetings and certain financial information.
8. Among other things, Lisa's non-Hatstone directors have threatened to commence criminal and civil proceedings against the Hatstone board members and have filed competing minutes and resolutions with AFRA in order to remove the new Hatstone Board members from the boards of Lisa and Gabinvest. AFRA recently resigned as the registered corporate agent of Lisa and Gabinvest due to the issues discussed herein.

2.5 Lisa Transfer

1. On March 22, 2020, Juan Guillermo swore an affidavit (the "March 22 Guillermo Affidavit") in his capacity as the President of the Company, purporting to act on behalf of the Company, in opposition to the Motion of the Receiver seeking approval of the Receiver's Second Report.
2. The March 22 Guillermo Affidavit alleged, *inter alia*, that "BDT has extinguished its debt to Lisa in exchange for Lisa's full 1/3 stake in the Avicola Group" (the "Lisa Transfer"). A copy of the March 2020 Guillermo Affidavit is provided in Appendix "E".
3. The March 22 Guillermo Affidavit does not state how Juan Guillermo became aware of this information, when the transaction took place or who authorized the transaction.
4. The Lisa Transfer is of concern to the Receiver as:
 - a) the Avicola Interest is the only asset of value owned by the Company and the only source of recovery for the Judgment Debt;
 - b) the Receiver is attempting to investigate the Reviewable Transactions (as defined below), which directly relate to the entitlement in the Avicola Interest; and
 - c) the Receiver had made changes to the board of directors of Gabinvest, and Gabinvest made changes to the board of directors of Lisa, a main purpose of which was to obtain the information required to investigate the Reviewable Transactions.

5. The Lisa Transfer allegedly occurred in February 2020,⁴ during the pendency of these receivership proceedings, and at a time when the Receiver was trying to change the composition of the board of directors of Gabinvest, which in turn was trying to make changes to the board of directors of Lisa.
6. The Receiver understands from Hatstone that according to Panamanian law, in the absence of express powers in favour of the directors in the articles of a Panama corporation, the disposal of assets by a corporation requires shareholder approval under Article 68 of the Law 32 (Panama's Company Law) and Article 275 of the Panama's Commercial Code. The articles of Lisa do not include express powers in favour of the directors and, accordingly, Gabinvest's approval was required for the Lisa Transaction; however, Lisa never sought such approval from the directors of Gabinvest, which are Hatstone employees.
7. In the Receiver's view, the transfer of the Avicola Interest **during the receivership** is a breach of the Receivership Order and interferes with and defeats the purposes of the receivership.
8. The Receiver intends to investigate whether and how the Avicola Interest was transferred, including who authorized such transfer. The Receiver is concerned that Juan Guillermo authorized or directed such transfer in violation of the Orders of this Court.

2.6 Contempt Motion

1. Throughout these proceedings, the Receiver has made numerous information requests of Juan Guillermo and others apparently connected to him. Substantially all these information requests remain outstanding or the answers provided have been non-responsive.
2. As a result of the Receiver's inability to obtain information, on October 29, 2019, the Receiver brought a motion for an order requiring Lisa, BDT, Arven, the Trust and ATC to deliver information to the Receiver concerning the Reviewable Transactions.
3. On October 29, 2019, the Court issued an order requiring the disclosure sought by the Receiver (the "Disclosure Order"). A copy of the Disclosure Order is attached as Appendix "F".
4. The Disclosure Order requires EAI, Arven, the Trust, BDT and Lisa, and all of their respective current and former directors, trustees, officers, employees and shareholders to produce documents, records and information about the EAI and Assignment Transaction.
5. Juan Guillermo, BDT, Arven, Lisa and the Trust have failed and/or refused to provide the information required by the Receiver pursuant to the Disclosure Order.

⁴ Affidavit of Harald Hals, President of Lisa, sworn March 22, 2020

6. On February 18, 2020, the Receiver brought a motion to, among other things, find Juan Guillermo in contempt of this Court by (i) failing to provide the information required under the various Court orders issued in these proceedings, including the Disclosure Order, and (ii) interfering with the Receiver's administration of the receivership proceedings.
7. On March 31, 2020, Juan Guillermo swore another affidavit in response to the contempt motion (the "Second March 2020 Guillermo Affidavit"). The Second Guillermo March 2020 Affidavit can be found at: <https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd>.
8. In the Second Guillermo Affidavit, Juan Guillermo claims he has complied with all information requests. The Receiver's experience is to the contrary.
9. Juan Guillermo has repeatedly stated that he does not have the facts available to him to respond and/or that he has no control or influence over the entities and individuals that do, including the Lisa board, BDT and Arven.
10. In the view of the Receiver, it is not credible that Juan Guillermo does not have the information given his relationship with the entities in question, including his role as President of the Company and his (or his family's) ownership interests in the Company.
11. There are multiple other statements in the Second Guillermo Affidavit with which the Receiver does not agree, including allegations that the Receiver is biased in favour of Margarita.
12. The Receiver was appointed by the Court, pursuant to a receivership order issued for the purpose of recovering the Judgment Debt. The Receiver has been and will continue to act as an officer of the Court in the best interests of the Company and its creditors.
13. In accordance with its mandate, the Receiver is prepared to pursue all sources of recovery for the Judgment Debt. If Juan Guillermo has information which is relevant to the Receiver's mandate, the Receiver respectfully requests that the information be provided rather than making bald and unsupported allegations in an affidavit.
14. On April 9, 2020, on agreement of the parties, the Court adjourned the contempt motion *sine die*.
15. To the extent it may be necessary to pursue recovery of the Judgment Debt, the Receiver will return to Court to address the contempt motion.

3.0 March 24 Endorsement

1. On March 26, 2020, the Court issued a consent endorsement (dated March 24, 2020) requiring Juan Guillermo to cause certain information relating to the Reviewable Transactions and other matters to be delivered to the Receiver to the extent the documentation and information is in his power, possession, and/or control (the "March 24 Endorsement").

2. The March 24 Endorsement also required that Mr. Hals, Lester Hess Jr., and Mr. Shields, as members of the Board of directors and officers of Lisa to deliver certain materials within 14 calendar days of the endorsement. A copy of the March 24 Endorsement is attached as Appendix “G”.

3.1 Response by Juan Guillermo

1. On April 7, 2020, Cambridge provided a response to questions ordered to be answered pursuant to the March 24, 2020 Endorsement. The following response from Juan Guillermo is repeated throughout the letter:

“I am not an officer or director of BDT or LISA. Although I own Xela⁵ and as a consequence am generally informed and aware of LISA’s activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.”

2. A copy of Cambridge’s letter is attached as Appendix “H”.

3.2 Response by Former Directors

1. On March 31, 2020, the Receiver served a copy of the March 24 Endorsement by email to Mr. Hals, Mr. Hess Jr., and Mr. Shields requesting a response by April 7, 2020. A copy of the email sent by the Receiver is attached as Appendix “I”.
2. On April 15, 2020, the Receiver received a copy of a letter from Juan Guillermo to Mr. Hals requesting that Lisa comply with the March 24, 2020 endorsement.
3. On April 27, 2020, Mr. Hals sent a letter to Juan Guillermo (but not to the Receiver). By his letter, Mr. Hals:
 - a) refuses to recognize the Receiver’s authority;
 - b) misrepresents a meeting that took place in Colombia between representatives of Hatsone, Lisa and Juan Guillermo, including the authority of Hatstone to participate in that meeting;
 - c) refuses to acknowledge the changes to Lisa’s board of directors made by Gabinvest;
 - d) makes unsupported allegations against one of Hatstone’s lawyers representing the Receiver;
 - e) states that the Covid-19 pandemic is impairing Lisa’s ability to respond to information requests;

⁵ The Receiver understands that Juan Guillermo owns preference shares in the Company and that a trust owns the common shares in the Company, of which his children are beneficiaries.

- f) raises allegations without evidence about monies purportedly paid to Margarita from Villamorey; and
- g) makes an offer to resolve the Receiver's request and this Court's March 24 Endorsement by agreeing to a "bilateral legal team" (English translation) for the purpose of recovering funds from unpaid dividends by Villamorey.

4.0 Server and Other Information

1. The Receiver was appointed as receiver of all of the assets, undertakings and properties of the Company (the "Property"). Paragraph 3 of the Receivership Order authorizes and empowers the Receiver "to take possession of and exercise control over the Property" and "to receive, preserve, and protect the Property".
2. Paragraph 6 of the Receivership Order requires all persons to "forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto to advise the Receiver of any property (including books and records) in their possession or control".
3. The Receiver understands that ATS has in its possession the Company's server and other documents owned by the Company. Attached as Appendix "J" is a corporate profile search of ATS which reflects that the directors of ATS are Thomas Gutierrez and Juan Andres Gutierrez, which are Juan Guillermo's children. On April 2, 2020, the Receiver wrote to ATS requesting production of any property or documents of the Company in ATS' possession. A copy of the letter to ATS is attached as Appendix "K".
4. On April 15, 2020, ATS agreed to cooperate with the Receiver and confirmed it is in possession of:
 - a) eight wall-sized cabinets of documents belonging to the Company, "which can be made available"; and
 - b) four decommissioned servers belonging to the Company in the possession of a third-party vendor.
5. As set out above, ATS has advised that the Company's servers were decommissioned; however, Juan Guillermo is on the service list in these proceedings at a "xela.com" email address. The e-mail address appears to be active as correspondence has been sent to Juan Guillermo at that address during these proceedings, including, for example, an email dated March 31, 2020 from the Receiver's counsel, a copy of which is attached as Appendix "L". This email appears to have been received as it was not returned as "undelivered".

6. On April 21, 2020, Aird & Berlis LLP, co-counsel to the Receiver, wrote to Greenspan Humphrey Weinstein LLP, counsel for Juan Guillermo, requesting the name of the present email host and the location of the Company's e-mail server. The Receiver also requested that Juan Guillermo provide: (i) information regarding the location of the Gabinvest share register and share certificates; (ii) and copies of all records of advances made by BDT to the Company.
7. On May 4, 2020, Cambridge responded in writing to the Receiver, purportedly on behalf of the Company and Juan Guillermo. The Cambridge letter:
 - a) includes a response from Lisa that is non-responsive to the Receiver's requests;
 - b) confirms and acknowledges that:
 - i. ATS has documents and severs in its possession;
 - ii. the Company has documents at ATS' office in Toronto; and
 - iii. ATS controls four decommissioned servers belonging to the Company at a datacenter in North York;
 - c) confirms that documents relevant to the Receiver's inquiries are likely among the records;
 - d) purports to claim privilege over the Company's documents;
 - e) indicates that, in order to provide documents evidencing BDT's litigation funding to Lisa, the Company will ask Lisa's counsel in the Villamorey garnishment cases to provide the Receiver with documents in the garnishment case, subject to a suitable non-disclosure agreement; and
 - f) requests that the Receiver provide the Company with a "complete record of [the Receiver's] funding sources for the receivership" and communication by the Receiver with various parties.

A copy of the May 4th letter is attached as Appendix "M".

8. As noted above, Cambridge purports to act on behalf of both the Company and Juan Guillermo⁶. That Cambridge believes it is acting for Company appears to be the basis for which it is asserting privilege. Cambridge asserts that:

The documents in all three of those locations are peppered with attorney/client communications and other confidential and protectable information, which must be reviewed under some satisfactory protocol before they can be delivered to the Receiver.

9. The Receiver is expressly empowered to take possession of the Property and to manage the business of the Company and to retain counsel.

⁶ Cambridge writes "we emphasize that Xela and Mr. Gutierrez intend to continue cooperating with the Receiver."

10. At no time has the Receiver authorized Cambridge to act for the Company. Cambridge has no authority to do so.
11. If Cambridge has previously acted for the Company, third parties, including expressly “legal counsel” are required by the Receivership Order to cooperate with the Receiver and to grant immediate and continued access to the Property. Cambridge has not done so.
12. In the Receiver’s view, it is entitled to gain access to all of the Company’s records including any privileged documents for the purposes of carrying out its mandate.
13. The Receiver is concerned that Cambridge’s purported claim of privilege is a tactic by Juan Guillermo intended to prevent the Receiver from getting access to the information necessary to advance the Receiver’s mandate.

5.0 Conclusion

1. Based on the foregoing, the Receiver respectfully recommends that this Court make an Order granting the relief detailed in Section 1.1(1)(c) of this Report.

* * *

All of which is respectfully submitted,

A handwritten signature in blue ink that reads "KSV Kofman Inc".

**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”

THIS IS TO CERTIFY THAT THIS DOCUMENT, EACH PAGE OF WHICH IS STAMPED WITH THE SEAL OF THE SUPERIOR COURT OF JUSTICE AT TORONTO, IS A TRUE COPY OF THE DOCUMENT ON FILE IN THIS OFFICE

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DATED AT TORONTO THIS 6th DAY OF February 20
FAIT À TORONTO LE 6th JOUR DE Février 20

C. Irwin
Registrar
Greffier

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE

JUSTICE MCEWEN

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FRIDAY, THE 5th

DAY OF July, 2019



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

ORDER
(appointing Receiver)

THIS MOTION made by the Applicant for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing KSV Kofman Inc. as receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of Xela Enterprises Ltd. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Margarita Castillo sworn January 14, 2019 and the Exhibits thereto and on hearing the submissions of counsel for Margarita Castillo and Xela Enterprises Ltd., and on reading the consent of KSV Kofman Inc. to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 101 of the CJA, KSV Kofman Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

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- (c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

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- (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$250,000, provided that the aggregate consideration for all such transactions does not exceed \$1,000,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

- (l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and

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on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

- (p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (q) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

4. THIS COURT ORDERS that, notwithstanding any other provision in this Order, the Receiver shall not take any steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between the Debtor and its subsidiaries and/or affiliates and any third party, including the litigation involving or related to the Avicola companies (as defined and further set out in the affidavit of Juan Guillermo Gutierrez ("Juan"), sworn June 17, 2019). Such steps shall include but not be limited to:

- a) selling or publicly marketing the shares of Lisa S.A., Gabinvest S.A., or any shares owned by these entities;
- b) publicly disclosing any information about the above-mentioned litigation and/or the Receiver's conclusions or intentions, provided that the Receiver may disclose such information to Juan and Margarita Castillo ("Margarita") and their counsel upon Juan and Margarita each executing a non-disclosure agreement in a form reasonably acceptable to the Receiver, and if the Receiver does disclose such information, conclusions or intentions, the Receiver shall disclose equally to Juan and Margarita;

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- c) replacing counsel in the above mentioned litigations; and
- d) engaging in settlement negotiations or contacting opposing parties in the above-mentioned litigation.

This paragraph applies only until December 31, 2019 or such other date as this Court may order.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

5. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request. The Receiver shall treat as confidential all information received relating to litigation involving or related to the Avicola companies.

6. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

7. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service

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provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

8. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

9. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Receiver are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as

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FAIT À TORONTO LE 2^e JOUR DE Février 2000

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amended (the "BIA"), and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be

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FAIT A TORONTO LE 16 JOUR DE Février 2020

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opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or

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collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory

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or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The amount of such borrowing shall not, subject to further order of this Court, exceed \$500,000 before December 31, 2019. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

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23. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

24. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

TERMINATION OF RECEIVERSHIP

25. THIS COURT ORDERS that the Debtor may make a motion to this Court for the termination of the receivership upon receipt by Margarita of the judgment 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.

SERVICE AND NOTICE

26. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'http://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises'.

27. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as

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last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

28. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama, Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. THIS COURT ORDERS that the Applicant shall have its costs of this motion, up to and including entry and service of this Order, in the amount of \$40,000, all inclusive, to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

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33. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



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6th

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February 20 20

C. Irwin

REGISTRAR

Registrar GREFFIER

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that KSV Kofman Inc., the receiver (the "Receiver") of the assets, undertakings and properties Xela Enterprises Ltd. acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of ____, 20__ (the "Order") made in an action having Court file number CV-11-9062-00CL, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$_____, being part of the total principal sum of \$_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

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FAIT À TORONTO LE 6th JOUR DE février 2020

G. H. H. H.
Registrar

REGISTRAR

CLERK

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

KSV Kofman Inc., solely in its capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____

Name:

Title:

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Registrar

REGISTRAR

GREFFIER

MARGARITA CASTILLO
Moving Party

-and-

XELA ENTERPRISES LTD. et al.
Respondents
Superior Court File No.: CV-11-9062-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceeding commenced at Toronto

ORDER

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Lawyers for the moving party, Margarita Castillo

Appendix “B”



**First Report of
KSV Kofman Inc.
as Receiver and Manager of Xela Enterprises Ltd.**

October 17, 2019

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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.
FIRST REPORT OF KSV KOFMAN INC.**

OCTOBER 17, 2019

1.0 Introduction

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 her now-deceased father, Juan Arturo Gutierrez ("Juan Arturo"), and her brother, Juan Guillermo Gutierrez ("Juan Guillermo"), in her capacity as a director of Tropic International Limited ("Tropic"), a wholly-owned subsidiary of Xela Enterprises Ltd. (the "Company").
2. Pursuant to a judgement issued by the Court on October 28, 2015, the Company, Juan Guillermo and Juan Arturo, became jointly obligated to pay Margarita approximately \$5 million, plus interest and costs (the "Judgment Debt").
3. Margarita, through an Alberta company, also owns preference shares in the Company with a face amount of approximately \$14 million. The Alberta company continues to own these shares.
4. On January 15, 2019, Margarita made an application to the Court for, among other things, the appointment of KSV Kofman Inc. ("KSV") as receiver and manager of the Company (the "Receiver") pursuant to Section 101 of the *Court of Justices Act* (Ontario). The Receiver understands that the present balance owing under the Judgment Debt is approximately \$4.1 million, plus interest and costs which continue to accrue.

5. In response to Margarita's application, the Company filed an application for protection under the *Companies' Creditors Arrangement Act* ("CCAA") on June 17, 2019.
6. On July 5, 2019, the Court dismissed the CCAA application and appointed KSV as Receiver. A copy of the receivership order is attached as Appendix "A" (the "Receivership Order").
7. The Company is the parent company of more than two dozen subsidiaries, located predominantly in Central America, that carry or carried on business in the food and agricultural sectors. Most of these businesses have been discontinued, are no longer operating or, as discussed in this report ("Report"), were conveyed to the ARTCARM Trust (the "Trust"), a Barbados domiciled trust, the beneficiaries of which are Juan Guillermo's children. The Trustee of the Trust is Alexandria Trust Corporation ("ATC").
8. Presently, the Company's most significant asset is its indirect one-third interest in a group of successful family-owned vertically integrated poultry businesses operating in Central America referred to as the "Avicola Group". The Company's interest in the Avicola Group is held as follows:
 - a) 25% through its wholly owned indirect subsidiary, Lisa, S.A. ("Lisa"), a Panamanian holding company; and
 - b) 8.3% through Villamorey S.A. ("Villamorey"), a Panamanian holding company¹.

Attached as Appendix "B" is the Company's present corporate organizational chart.²

9. Dionisio Gutierrez Sr., Isabel Gutierrez de Bosch and their children (collectively, the "Cousins") are believed to own the remaining two-thirds of the Avicola Group through entities they own, including the remaining two-thirds of Villamorey.
10. Margarita, Juan Guillermo and the Cousins have been litigating for decades, primarily related to shareholder disputes involving the Avicola Group (the "Avicola Litigation").
11. As of mid-2018, the Company and Lisa had received approximately \$43 million and US\$57 million, respectively, from BDT, Arven and a subsidiary of Arven, Preparados Alimenticios Internacionales, CA ("PAICA"), to assist them to fund the Avicola Litigation.
12. The Receiver understands that prior to April 2016, Empress Arturo International ("EAI"), a Barbados company and a wholly owned subsidiary of the Company, directly and indirectly owned and operated the "Arturos" restaurant business in Venezuela through BDT and Arven. The Receiver has been advised by Juan Guillermo that the Arturos restaurant chain is still operating and that BDT and Arven are now owned by the Trust.

¹ Villamorey owns 25% of the Avicola Group, of which the Company has an indirect one-third ownership interest.

² The Company's corporate organizational chart does not show the Villamorey interest in the Avicola Group; however, the Receiver understands based on court pleadings and its conversations with Juan Guillermo that Villamorey owns a 25% interest in the Avicola Group.

13. The effect of the transactions discussed in this Report (the transactions are defined below as the EAI Transaction and the Assignment Transaction) was to transfer from the Company to the Trust all or the majority of the potential value of the Avicola Litigation and the Arturo business (owned by BDT and Arven) to Juan Guillermo's children as beneficiaries of the Trust.

1.1 Purposes of this Report

1. The purposes of the Report are to:
 - a) provide background information concerning the Company;
 - b) discuss the Receiver's concerns regarding:
 - i. the sale, conveyance or transfer in early 2016 by EAI of the shares of BDT and Arven to Juan Arturo, and then from Juan Arturo to the Trust (the "EAI Transaction"); and
 - ii. the assignment in January 2018 by Lisa of the proceeds from the Avicola Litigation to BDT (the "Assignment Transaction");
 - c) recommend that the Court issue an order:
 - i. requiring each of BDT, Arven, the Trust and ATC, the directors of EAI and any other person with information concerning the EAI Transaction, to deliver such information to the Receiver, including any and all documentation related to the EAI Transaction;
 - ii. requiring each of Lisa, BDT, the Trust and ATC and any other person with information concerning the Assignment Transaction to deliver such information to the Receiver, including any and all documentation related to the Assignment Transaction;
 - iii. sealing Confidential Appendices "1" and "2" pending the issuance of a further order of the Court unsealing the Confidential Appendices;
 - iv. approving the fees and disbursements of the Receiver and its legal counsel, Aird & Berlis LLP ("A&B"), arising for the periods referenced in the attached fee affidavits; and
 - v. approving this Report and the Receiver's activities, as described herein.

1.2 Currency

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

1.3 Restrictions

1. In preparing this Report, the Receiver has relied upon unaudited financial information of the Company, the books and records of the Company, materials filed in the Avicola Litigation, discussions with representatives of the Company and discussions with Margarita. The Receiver has also relied upon answers to questions it submitted to Juan Guillermo and on the information provided by Juan Guillermo during meetings between him and the Receiver and their respective legal counsel.
2. The Receiver has also relied upon the Examination of Juan Guillermo held on June 26, 2019 (the “Examination”) and the related Answers to Undertakings, Advisements and Refusals from the Examination (the “Examination Undertakings”). Copies of the Examination and Examination Undertakings are attached hereto as Appendices “C” and “D”, respectively.
3. The Receiver has not audited, or otherwise attempted to verify the accuracy or completeness of the financial information relied on to prepare 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.
4. This Report provides an update relating to these receivership proceedings and support for the relief to be sought by the Receiver at its motion returnable October 29, 2019. This Report should not be relied upon for any other purpose. The Receiver expresses no opinion or other form of assurance with respect to the financial and other information presented in this Report or relied upon by the Receiver in preparing this Report. Any party wishing to place reliance on the financial information should perform its own diligence.

1.4 Receivership Materials

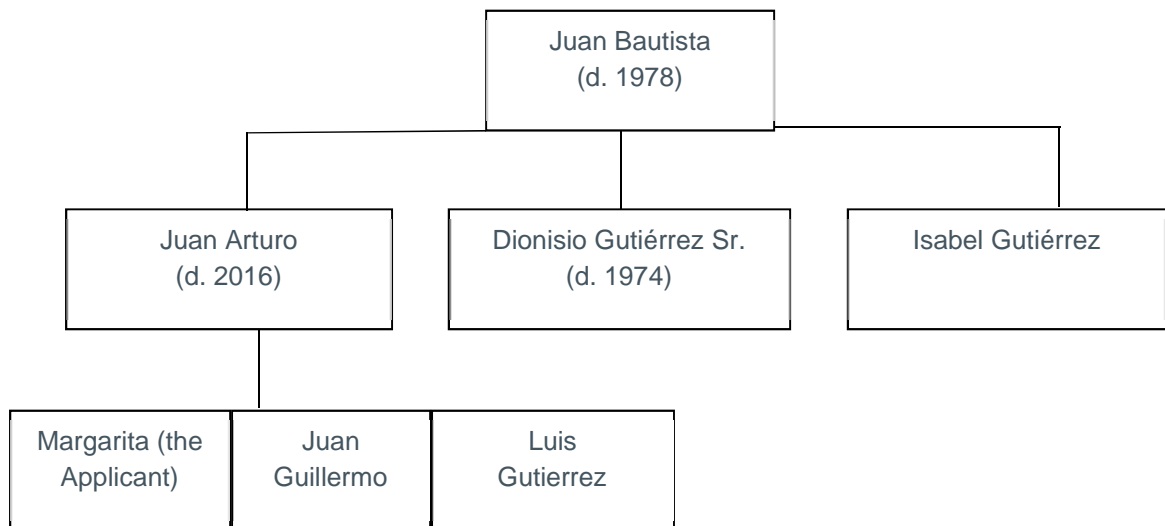
1. All materials filed in the receivership proceedings are available on the Receiver’s website at: <https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd>.

2.0 Executive Summary

1. As a result of the EAI Transaction (i.e. the sale, transfer or conveyance of the shares of each of BDT and Arven to the Trust) and the Assignment Transaction, the majority of the economic interest in the Company has been transferred from the Company to the Trust, the beneficiaries of which are Juan Guillermo's children. The EAI Transaction and the Assignment Transaction were completed at a time when Juan Guillermo was litigating with Margarita. While the Receiver has not completed its review of the EAI Transaction and the Assignment Transaction because several information requests made of Juan Guillermo and others remain outstanding, it is apparent that Juan Guillermo had (and has) several conflicts of interest related to these transactions, including that his children will benefit from them if there is a recovery by Lisa on the Avicola Litigation. Juan Guillermo appears to be leading the Avicola Litigation on behalf of Lisa, notwithstanding he is not an officer or director of that company.
2. As the Receiver is continuing to review the EAI Transaction, the Assignment Transaction and other matters related to these proceedings, the Receiver is of the view that any settlement of the Avicola Litigation and/or the sale of the Company's interests in Avicola Group should require consultation with the Receiver and approval of the Court.

3.0 Background

1. Juan Bautista Gutierrez ("Juan Bautista") was the patriarch of the Gutierrez family and the founder of the Avicola Group. A condensed family tree is provided below:



2. The Avicola Group is based in Guatemala. The Avicola Group carries on a large and successful poultry business in Central America.
3. The Receiver understands that in 1978, Juan Bautista conveyed his interest in the Avicola Group equally to his three children, Juan Arturo, Dionisio Gutierrez Sr. and Isabel Gutierrez. Juan Arturo's interest in the Avicola Group was indirectly held by the Company through Lisa.
4. A dispute arose in 1998 as to whether the Cousins were concealing the Avicola Group's financial results from Lisa. The Avicola Group has not paid dividends to Lisa since that time. The Receiver understands that Lisa is presently involved in over 100 lawsuits with the Cousins in multiple jurisdictions, including Canada, the State of Florida, Panama and Guatemala with respect to, among other things, dividends totalling approximately US\$360 million³ owing to Lisa and Villamorey from the Avicola Group.

3.1 The Company

1. The Company is a holding company incorporated in Canada. The Company's major shareholders include members of Juan Arturo's family.⁴ Juan Guillermo is a director and the President of the Company.
2. The Company has six wholly owned subsidiaries, as detailed below.

| Subsidiary | Jurisdiction | Status |
|------------------------------|--------------|---------------------------------------------------|
| Gabinvest, S.A. | Panama | Owns Lisa, which holds the Avicola Group Interest |
| Xela International Inc. | Canada | Inactive |
| Tropic International Ltd. | Canada | Inactive |
| Empress Arturo International | Barbados | See Section 4 |
| Xela Global Resources | Canada | Inactive |
| Boucheron Universal Corp. | Panama | Inactive |

³ Paragraph 121 of the Examination.

⁴ As reflected in the Affidavit of Juan Guillermo sworn June 17, 2019 in support of the CCAA application (the "Guillermo Affidavit").

3. The Company's most recent financial statements were prepared as of May 31, 2018. A summary of the Company's unaudited and unconsolidated⁵ balance sheet as of that date is provided below⁶:

| | |
|------------------------------------------------|----------|
| (unaudited; \$000s) | |
| Assets | |
| Investments | 270 |
| Advances to related parties | 22,485 |
| Total assets | 22,755 |
| Liabilities | |
| Accounts payable and other current liabilities | 9,459 |
| Due to shareholders | 671 |
| Due to related parties | 72,944 |
| Total liabilities | 83,075 |
| Equity | (60,319) |
| Total liabilities and equity | 22,755 |

4. As reflected above, as at May 31, 2018, the Company had significant liabilities owing to related parties. A summary of these balances as at May 31, 2018 is provided below:

| (unaudited; \$000s) | Amount | Status |
|-----------------------|--------|---------------------|
| BDT | 24,194 | See Section 4 below |
| Badatop Holdings Inc. | 21,884 | Inactive |
| PAICA | 11,835 | See Section 4 below |
| Arven | 6,508 | See Section 4 below |
| Other | 8,523 | Inactive |
| Total due | 72,944 | |

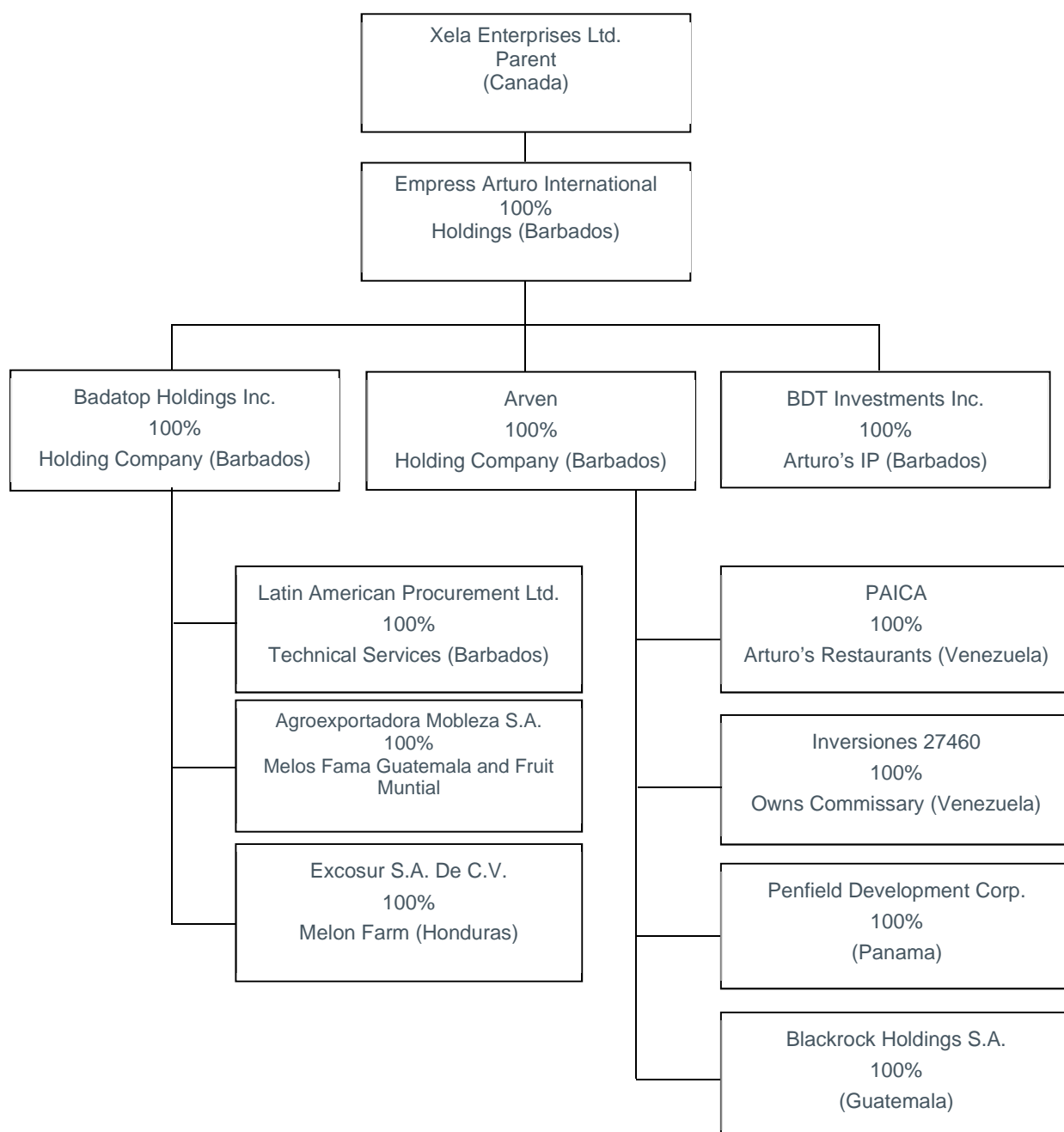
⁵ The Company has not provided consolidated financial statements.

⁶ The Company's financial statements exclude the debt owing to Margarita.

4.0 EAI Transaction and Assignment Transaction

4.1 EAI Transaction

1. The Company is the sole shareholder of EAI. At the time of the EAI Transaction, Juan Guillermo was a Director of EAI and its President.
2. BDT and Arven were subsidiaries of EAI prior to April 2016. The corporate chart for EAI prior to the EAI Transaction is reflected below.



3. The Receiver understands that BDT owns the intellectual property used by “Arturos”, a chain of 90 fast food chicken restaurants operating in Venezuela. The Arturos restaurants are owned by PAICA, a Venezuelan entity which is wholly owned by Arven. PAICA pays royalties and service fees to BDT.
4. The Receiver understands that BDT, Arven and PAICA have a history of profitability. Juan Guillermo has advised that the Arturos business has suffered in recent years due to the political and economic situation in Venezuela. The Receiver understands that BDT, Arven and PAICA have collectively advanced a total of approximately USD\$57 million to Lisa and \$43 million to the Company to fund the Avicola Litigation as of the dates reflected in the table below.

| | Company (CAD) (unaudited; \$000s) (as at May 31, 2018) | Lisa (USD) (as at June 30, 2018) | Total |
|-------|--------------------------------------------------------------|-------------------------------------|--------|
| BDT | 24,194 | 47,076 | 71,270 |
| Arven | 6,508 | 12,727 | 19,235 |
| PAICA | 11,835 | (2,913) | 8,922 |
| | 42,537 | 56,890 | 99,427 |

5. According to information provided to the Receiver by Juan Guillermo, at the time of the EAI transaction (around April 2016), EAI owed Juan Arturo approximately US\$9 million on account of loans purportedly advanced by Juan Arturo to EAI. To date, the Receiver has not been provided with any evidence of advances by Juan Arturo to EAI despite the Receiver’s requests for this evidence.
6. The Receiver has been advised by Juan Guillermo that EAI was unable to repay the amounts owing to Juan Arturo and, as a result, EAI conveyed the shares of BDT and Arven to Juan Arturo for US\$6.5 million⁷ in partial satisfaction of EAI’s obligation to him. The Receiver understands from Juan Guillermo that the balance of the debt remains outstanding.
7. The Receiver has been further advised by Juan Guillermo that Juan Arturo subsequently transferred the BDT and Arven shares he acquired from EAI to the Trust. The effect of the EAI Transaction was to remove the shares of BDT and Arven from the Company’s organization and to transfer them to the Trust. The Receiver is concerned that the consideration paid by Arturo for the shares of BDT and Arven may not have reflected the value of the Arturos’ business, nor that sufficient value was attributed to the receivables owing by Lisa and the Company to BDT, Arven and PAICA.
8. Juan Arturo died in June 2016. Juan Guillermo advises that: (a) he only learned of the sale, transfer or conveyance of the shares in BDT and Arven to the Trust from his father just prior to father’s death; (b) he has no information concerning the Trust or the details of the EAI Transaction; and (c) he is not presently involved in the business and operations of either of BDT and/or Arven.

⁷ Comprised of US\$3.75 million for the shares of BDT and US\$2.75 million for the shares of Arven.

9. Juan Guillermo provided the Receiver with valuations of BDT and PAICA⁸ (the “Valuations”) in the context of the EAI Transaction. Copies of the Valuations are attached hereto as Confidential Appendix “1”. The Receiver’s concerns with the Valuations are provided in Confidential Appendix “2”.
10. The Receiver has the following additional concerns with respect to the EAI Transaction:
 - a) BDT, Arven and PAICA have advanced tens of millions of dollars to Lisa to fund its costs (and the Receiver understands that they continue to fund, or are prepared to continue to fund, Lisa’s litigation); however, it is unclear to the Receiver why EAI decided not to use the cash flow generated by these entities to repay the amounts EAI owed to Juan Arturo. This could have been done through payment of a dividend from some or all EAI’s subsidiaries to EAI; and
 - b) it is unclear how the Boards of Directors of each of the Company and EAI satisfied themselves as to the value of BDT and Arven, including the receivables owing from Lisa. It is also unclear whether the Boards of the Company and EAI had separate legal counsel when completing the EAI Transaction, and the extent of Juan Guillermo’s participation in the EAI Transaction.
11. Based on the foregoing, the Receiver requires additional information from each of BDT, Arven, and ATC to further investigate the EAI Transaction⁹. The Receiver recommends that the Court issue an order requiring these and any other party with information concerning the EAI Transaction to provide all such information to the Receiver forthwith, so that the Receiver can complete its review of the transaction.
12. In the interim, as EAI is incorporated in Barbados, the Receiver has engaged local counsel in Barbados.

4.2 Assignment Transaction

1. In January 2018, BDT sought additional consideration from Lisa for amounts advanced, or to be advanced, by BDT to Lisa to fund the Avicola Litigation. Pursuant to the Assignment Agreement, BDT agreed to fund Lisa’s costs in the Avicola Litigation, provided Lisa assign its interest in the Avicola Litigation to BDT. BDT agreed to pay Lisa 30% of the net litigation proceeds, after deducting costs and the repayment by Lisa of any amounts owing to BDT. A copy of the Assignment Agreement is attached as Appendix “E”.

⁸ The BDT valuation was prepared by Deloitte LLP. The PAICA valuation was prepared by Lara Marambio & Asociados, which is a subsidiary of or related to Deloitte LLP.

⁹ The Receiver has requested details regarding the Trust, including a copy of the Trust Agreement and the names of the law firms that represent the Trust. Juan Guillermo has advised the Receiver that ATC will not provide any information concerning the Trust.

2. The effect of the Assignment Transaction is to transfer further recoveries from the Avicola Litigation to BDT. At the time of the Assignment Transaction, Lisa owed BDT approximately \$47 million. The Receiver understands that the amounts advanced from BDT to Lisa since the date of the Assignment Agreement are insignificant¹⁰. Accordingly, it is unclear whether Lisa received any consideration for entering into the Assignment Agreement. If the litigation is settled in the near term, BDT will receive a windfall despite making no material additional advances to Lisa to fund the Avicola Litigation since the date of the Assignment Agreement.
3. The Receiver is concerned, again, that Juan Guillermo is conflicted as President of the Company, a director of the Company and the father of the beneficiaries of the Trust (who stand to benefit from the Assignment Transaction).

4.3 Confidential Appendices

1. Torys LLP ("Torys"), which is acting as counsel to the Company (but not to the Receiver) required that the Receiver sign a Non-Disclosure Agreement in order to be provided with a copy of the Valuations. Accordingly, the Receiver respectfully requests that the Valuations be filed with the Court on a confidential basis and be sealed as the documents contain confidential information and are currently subject to confidentiality restrictions as ordered by the Court under the Receivership Order. In the circumstances, the Receiver is of the view its concerns with the Valuations should also be subject to the confidentiality provisions as they reference the Valuations. The Receiver is not aware of any party that will be prejudiced if the information in the Confidential Appendices is sealed. Accordingly, the Receiver believes the proposed Sealing Order is appropriate in the circumstances.

5.0 Receivership Order – Clarification re Paragraph 4

1. Pursuant to paragraph 4 of the Receivership Order, the Receiver is not permitted to, among other things, take steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between the Company and its subsidiaries and/or affiliates and any third party until December 31, 2019 or such other date as the Court may order.
2. The Avicola Group presently represents substantially all the Company's value and currently is the only potential source of recoveries for the Company's stakeholders. In the circumstances, the Receiver is of the view that it should be consulted with respect to any settlement or transaction negotiated by Juan Guillermo, and that any such settlement or transaction must be approved by the Court given Juan Guillermo's conflicts of interest. The Receiver also believes that Court approval of any settlement or transaction involving the Avicola Group is required until the Receiver can fully investigate the transactions discussed in this Report. The Receiver is of the view that this requirement is not inconsistent with paragraph 4 of the Receivership Order.

¹⁰ According to answer 15 to the undertakings at the Examination, the debt owing by Lisa to BDT is less than \$50 million. An exact amount was not provided in the answers.

3. The Receiver has been advised by Juan Guillermo that he disagrees with the Receiver's position that Court approval is required of any settlement. Despite efforts to bridge the gap between the parties, and to avoid involving the Court, the parties were required to attend before Justice McEwen to request advice and direction in this regard. The Court requested that the Receiver, Margarita and Juan Guillermo provide written submissions by no later than October 25, 2019 outlining their respective interpretations of paragraph 4 of the Receivership Order. This matter is to be determined by the Court at a case conference on October 29, 2019, following the Receiver's motion.

6.0 Professional Fees

1. The fees of the Receiver and A&B are summarized in the table below:

| (\$) | | | | | Average Hourly Rate |
|-------|------------------------|-----------|---------------|-----------|---------------------------|
| Firm | Period | Fees | Disbursements | Total | |
| KSV | Jan 7/19 – Aug 31/19 | 36,763.75 | 65.92 | 36,829.67 | 620.49 |
| A&B | Jan 10/19 – Sept 11/19 | 42,636.50 | 852.15 | 43,488.65 | 549.44 |
| Total | | 79,400.25 | 918.07 | 80,318.32 | |

2. Detailed invoices for the Receiver and A&B can be found in the affidavits sworn by their representatives in Appendices "F" and "G", respectively.
3. The Receiver is of the view that the hourly rates charged by A&B are consistent with the rates charged by law firms practicing in the area of insolvency and restructuring in the Toronto market, and that the fees charged are reasonable in the circumstances.
4. Funding for these proceedings has been provided by Margarita pursuant to Receiver Certificates. There is presently no source of liquidity in the Company to fund the costs of these proceedings.

7.0 Overview of Receiver's Activities

1. The Receiver's activities in respect of these proceedings include the following:
 - a) familiarizing itself with the status and history of the litigation involving the Company;
 - b) corresponding with A&B concerning all matters in connection with the receivership proceedings;
 - c) preparing the Notice and Statement of the Receiver pursuant to subsections 245(1) and 246(1) of the *Bankruptcy and Insolvency Act*;
 - d) attending two meetings with Margarita and Bennett Jones;
 - e) attending two meetings with Torys and Juan Guillermo;
 - f) preparing questions for Juan Guillermo, reviewing his responses and sending follow-up questions;

- g) reviewing financial information concerning the Company;
- h) reviewing the EAI Transaction and the Assignment Transaction;
- i) dealing with Torys regarding various matters in these proceedings, including several information requests and the dispute as to whether Court approval is required of any settlement of the Avicola Litigation;
- j) engaging with Barbados and Panamanian counsel to assist the Receiver with a review of the subsidiaries, the Avicola Litigation and the EAI Transaction;
- k) reviewing, commenting and executing a confidentiality agreement between the Receiver and Juan Guillermo; and
- l) corresponding with Stikeman Elliot LLP, Canadian counsel to the Cousins.

8.0 Conclusion and Recommendation

1. As a result of the transactions discussed in this Report, the Receiver is concerned that EAI may have received inadequate consideration when it sold, conveyed or transferred the shares of BDT and Arven to Juan Arturo. In addition to further investigating the EAI Transaction and the Assignment Transaction, further investigation is required into the Valuations of BDT, Arven and PAICA to assess the reasonableness of the consideration paid by Juan Arturo to EAI for the shares of BDT and Arven.
2. Based on the foregoing, the Receiver respectfully recommends that this Court make an Order granting the relief detailed in Section 1.1(1)(c) of this Report.

* * *

All of which is respectfully submitted,



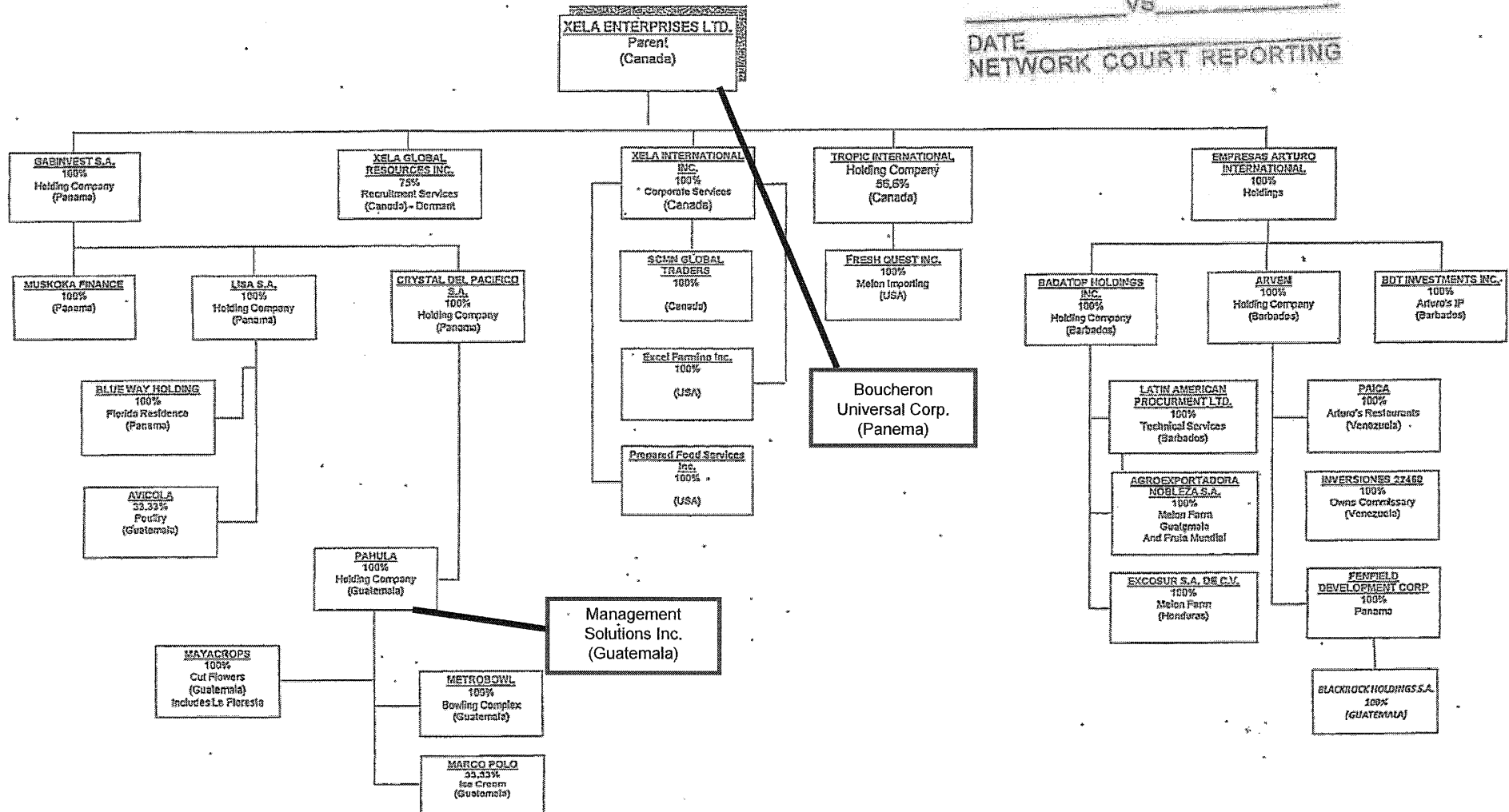
**KSV KOFMAN INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF
XELA ENTERPRISES LTD. AND
NOT IN ITS PERSONAL OR CORPORATE CAPACITY**

Appendix “C”

EXHIBIT No. 2
EXAMINATION OF

VS

DATE
NETWORK COURT REPORTING



Appendix “D”

January 24, 2018

ASSIGNMENT OF CAUSATIVE ACTION

This Agreement is between the parties: BDT Investments LTD., domiciled in Barbados, referred to as (BDT) and Lisa S.A., referred to as (LISA), Xela Enterprises and Lisa S.A. are related parties.

BDT has monies outstanding from LISA of \$46,786,171 and from Xela Enterprises Ltd. of \$18,507,140.

Due to financial circumstances, BDT is concerned that LISA and Xela Enterprises Ltd. do not have the wherewithal to repay BDT amounts owed unless litigation involving the AVICOLA holdings, owned by LISA, is continued and funded.

As a result of negotiations between the parties, BDT agrees to fund the litigation going forward which could result in millions of dollars of expenses. In return, LISA will assign all causative actions of all current and future lawsuits involving the AVICOLA holdings.

Furthermore, BDT agrees to pay LISA 30% net of expenses of any settlement and/or collection of funds directly or indirectly relating to any related litigation. Expenses shall be comprised of all current monies owed by LISA, plus any statutory withholding taxes, plus any related contingency fees, bonuses, and commissions if applicable.

LISA agrees to fully co-operate with BDT on a reasonable basis.

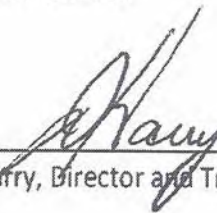
For further clarity, BDT shall be reimbursed for past debts from both LISA and XELA and related future debts plus 70% of the net proceeds arising from an AVICOLA settlement or judgement that is successfully collected.

The parties are in agreement as evidenced below:

This Agreement is dated January 24, 2018.



Patrick Doig, President
BDT Investment Inc.



David Harry, Director and Treasurer
Lisa S.A.



Calvin K. Shields, Director
Xela Enterprises Ltd.

Appendix “E”

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;⁸and
- i. That the members, officers and directors of the various Avicola Group companies

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.

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

Appendix “F”

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR

)

TUESDAY, THE 29th

JUSTICE MCEWEN

)

DAY OF OCTOBER, 2019

)



BETWEEN:

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

ORDER

THIS MOTION, made by KSV Kofman Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property (collectively, the “**Property**”) of Xela Enterprises Ltd. (the “**Debtor**”), for an Order, *inter alia*, (i) approving the first report of the Receiver dated October 17, 2019 (the “**First Report**”) and the activities of the Receiver set out therein; (ii) approving the fees and disbursements of the Receiver and its legal counsel; (iii) ordering and directing that any party with information and/or documentation in its possession or control in relation to, and evidencing, the sale, conveyance or transfer of the shares and/or assets of each Corporacion Arven, Limited

(“**Arven**”) and BTD Investments Inc. (“**BDT**”) to Juan Arturo Gutierrez (“**Juan Arturo**”), as purchaser or transferee, and Empresas Arturo International (“**EAI**”), as vendor or transferor, which were ultimately sold, conveyed or transferred by Juan Arturo to The ARTCARM Trust, in and around early 2016 (the “**EAI Transaction**”) deliver all such information and/or documentation to the Receiver; (iv) ordering and directing that any party with information and/or documentation in its possession or control in relation to, and evidencing, the assignment by Lisa S.A. (“**Lisa**”) of the proceeds from the Avicola Litigation to BDT in January 2018 (the “**Assignment Transaction**”) deliver all such information and/or documentation to the Receiver; and (v) sealing the Confidential Appendices 1 and 2 of the First Report, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Receiver, including the First Report and the appendices thereto, the fee affidavit of Steven Graff sworn October 10, 2019 and the fee affidavit of Noah Goldstein sworn October 17, 2019, and on hearing the submissions of counsel for the Receiver and such other counsel as were present and listed on the Counsel Slip, no one else appearing for any other party named on the service list, although served as evidenced by the affidavit of Kyle Plunkett sworn October 18, 2019, and the affidavit of Michael Anderson Beckles sworn October 25, 2019, filed.

SERVICE

1. **THIS COURT ORDERS AND DECLARES** that the time for service of this Motion and the Motion Record herein are properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF THE FIRST REPORT

2. **THIS COURT ORDERS** that First Report and the conduct and activities of the Receiver described therein be and are hereby approved; provided, however, that only the Receiver, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

APPROVAL OF FEES AND DISBURSEMENTS

3. **THIS COURT ORDERS** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$36,763.75 (excluding HST) as set out in Appendix "F" to the First Report, are hereby approved.

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver's legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$43,520.07 plus HST of \$6,393.10, totalling \$49,177.68 as set out in Appendix "G" to the First Report, are hereby approved.

PRODUCTION OF RECORDS RE EAI TRANSACTION AND ASSIGNMENT TRANSACTION

5. **THIS COURT ORDERS** that (i) EAI and (ii) all of its current and former directors and officers, employees, agents, accountants and all other persons acting on their instructions or behalf, be and are hereby directed to produce forthwith to the Receiver any and all information and records, including its minute books and any board resolutions, in their possession or control of in relation to the EAI Transaction.

6. **THIS COURT ORDERS** that (i) The ARTCARM Trust and (ii) all of its current and former trustees, including Alexandria Trust Corporation, and employees, agents, accountants and beneficiaries, and all other persons acting on their instructions or behalf, be and is hereby directed to produce forthwith to the Receiver any and all information to their knowledge and any documentation and records in their possession or control in relation to the EAI Transaction and the Assignment Transaction.

7. **THIS COURT ORDERS** that (i) Arven and (ii) all of its current and former directors, officers, employees, agents, accountants and shareholders, and all other persons acting on their instructions or behalf, be and is hereby directed to produce forthwith to the Receiver any and all information to their knowledge and any documentation and records in their possession or control in relation to the EAI Transaction.

8. **THIS COURT ORDERS** that (i) BDT and (ii) all of its current and former directors, officers, employees, agents, accountants and shareholders, and all other persons acting on their instructions or behalf, be and is hereby directed to produce forthwith to the Receiver any and all information to their knowledge and any documentation and records in their possession or control in relation to the EAI Transaction and the Assignment Transaction.

9. **THIS COURT ORDERS** that (i) Lisa and (ii) all of its current and former directors, officers, employees, agents, accountants and shareholders, and all other persons acting on their instructions or behalf, be and is hereby directed to produce forthwith to the Receiver any and all information to their knowledge and any documentation and records in their possession or control in relation to the Assignment Transaction.

10. **THIS COURT ORDERS** that any party having notice of this Order be and is hereby directed to produce forthwith to the Receiver any and all information and records in their possession or control of in relation to the EAI Transaction and the Assignment Transaction.

SEALING OF CONFIDENTIAL INFORMATION

11. **THIS COURT ORDERS** that the Confidential Appendices 1 and 2 of the First Report be and are hereby sealed until further Order of this Court.

RECOGNITION BY FOREIGN JURISDICTIONS

12. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States of America, Republic of Panama, Republic of Guatemala, Barbados or Bolivarian Republic of Venezuela to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

OCT 29 2019

PER / PAR:




MARGARITA CASTILLO

Applicant

-and-

XELA ENTERPRISES LTD. *et al.*

Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

ORDER

AIRD & BERLIS LLP

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*Lawyers for KSV Kofman Inc., in its capacity as the court-appointed
Receiver of Xela Enterprises Ltd.*

Appendix “G”

Court File Number: CV-11-9062-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo Plaintiff(s)
AND
Xela Enterprises et al Defendant(s)

Case Management ☒ Yes ☐ No by Judge: McEwen

| Counsel | Telephone No: | Facsimile No: |
|------------------------------|---------------|---------------|
| <u>(as per counsel slip)</u> | | |
| | | |

- ☒ Order ☐ Direction for Registrar (No formal order need be taken out)
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- ☐ Adjourned to: _____
☐ Time Table approved (as follows): _____

Upon the agreement of counsel the attached endorsement, marked as Schedule One, shall go along with the attached schedules A-C.

Insofar as the draft order at schedule B is concerned, it shall go as per the copy I have signed and also attached to this endorsement. The Order is effective from today's date, regardless of whether or not it is entered in.

26 March 20 Date

McEwen Judge's Signature

☐ Additional Pages _____

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

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

Endorsement

McEwen, J.
March 24, 2020

This case conference was held by teleconference on March 23, 2020 and March 24, 2020 in accordance with the changes to the Commercial List operations in light of the COVID-19 crisis, and the Chief Justice's notice to the profession dated March 15, 2020.

1. The Receiver's motion, solely as it relates to the request for an Order declaring that the respondent, Juan Guillermo Gutierrez, pursuant to Rule 60.11 of the Ontario Rules of Civil Procedure, in contempt of each of (i) my Order dated July 5, 2019 (the "**Appointment Order**") and (ii) my Order dated October 29, 2019 (the "**Disclosure Order**"), is adjourned to May 14, 2020, subject to the attached litigation timetable at Schedule C. Counsel to Juan Guillermo Gutierrez has accepted service of the Receiver's Motion Record dated March 3, 2020, the Supplementary Motion Record dated March 17, 2020 and the Factum

and Brief of Authorities of the Receiver each dated March 19, 2020. Each of Greenspan Humphrey Weinstein LLP and Cambridge LLP hereby agree to waive any requirement for personal service on Mr. Gutierrez and agree to accept service on his behalf by way of email.

2. By the deadlines set out below, Juan Guillermo Gutierrez, to the extent the documentation and information is in his power, possession and/or control, will deliver, or cause to be delivered, to the Receiver, the items listed below:
 - a. within 14 calendar days of this Endorsement, any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between Mr. Gutierrez and the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
 - b. within 14 calendar days of this Endorsement, any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT to Lisa and to Xela; and
 - c. within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa's interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020. Without limiting the generality of this request, the questions attached hereto as Schedule A shall be answered.

3. By the deadlines set out below, Harald Johannessen Hals, Lester Hess Jr. and Calvin Kenneth Shield, as members of the board of directors and officers of Lisa, S.A. (“**Lisa**”) will deliver, or cause to be delivered, to the Receiver, the items listed below:

- d. within 14 calendar days of this Endorsement, any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
- e. within 14 calendar days of this Endorsement, any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT to Lisa and to Xela and copies of bank statements evidencing such advances, as previously requested by the Receiver; and
- f. within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa’s interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020. Without limiting the generality of this request, the questions attached hereto as Schedule A shall be answered.

4. An Order is also made, in the form attached hereto at Schedule B, approving the fees and disbursements of the Receiver and its legal counsel as set out in Second Report of the

Receiver dated February 18, 2020 (the “**Second Report**”), approving and ratifying the Gabinvest Resolution (as defined in the Second Report) and authorizing the parties to effect service on Mr. Harald Johannessen Hals by way of email at harald.johannessen1951@gmail.com in accordance with the E-Service Protocol approved in these proceedings.

5. The Receiver or the Debtor’s estate shall not be responsible for any costs relating to any legal counsel retained to act as counsel to the directors of the Debtor in these proceedings, or in any foreign legal proceedings or otherwise, unless otherwise approved by the Receiver in writing, and the Debtor’s directors shall be solely responsible for the fees and disbursements incurred by such counsel.
6. I am exercising my discretion under this endorsement to waive the time period suspensions prescribed under Ontario Regulation 73/20 made under the *Emergency Management and Civil Protection Act*.

A handwritten signature in black ink, appearing to read 'McEwen', is written over a horizontal line.

Justice McEwen

SCHEDULE A**List of Additional Questions**

1. Please provide proof of advances from BDT to Lisa totalling US\$47.0 million as of June 30, 2018, including any cancelled cheques payable to Lisa, wire transfers from BDT to Lisa and bank statements.
2. Please provide a detailed summary of the amounts advanced by BDT to Lisa since the date of the Assignment Transaction (as defined in the Disclosure Order), with supporting documentary evidence (copies of all cheques, wire transfers or other evidence of Lisa's use of such funds).
3. What specific date did BDT propose to satisfy LISA's debt?
4. Who on behalf of BDT made that communication?
5. Who on behalf of LISA received that communication and in what was the form of communication? Produce copies.
6. Was the BDT proposal or any similar offer reduced to writing? Produce copies.
7. When did LISA's board meet to consider the BDT proposal? Was the meeting in person or through technology?
8. Who attended the board meeting?
9. What documents or records did the Board review in considering the BDT proposal. Produce copies.
10. Produce minutes and/or notes of board meeting.
11. Produce board resolution approving the transaction.

12. What documents were signed once the board approved the BDT proposal. Produce copies.
13. Why did LISA's directors not consult with Gabinvest?
14. Why did LISA's directors not consult with Xela and/or the Receiver?
15. What was the form of assurance provided by BDT as referenced in paragraph 22 of Harald's affidavit? Produce any written assurance.
16. When did Juan learn of this February 2020 transaction?
17. Who advised him of it? Produce a copy of any written communication.
18. Produce any written communication regarding the transaction as between any of BDT, LISA, Gabinvest, Xela and all respective directors and officers

SCHEDULE B

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR

)

TUESDAY, THE 24TH

JUSTICE MCEWEN

)

DAY OF MARCH, 2020

)

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

ORDER

THIS MOTION, made by KSV Kofman Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property (collectively, the “**Property**”) of Xela Enterprises Ltd. (the “**Debtor**”), for an Order, *inter alia*, (i) approving the fees and disbursements of the Receiver and its legal

counsel as set out in second report of the Receiver dated February 14, 2020 (the “**Second Report**”), and (ii) certain additional ancillary relief contained herein, was heard this day by teleconference.

ON READING the Motion Record of the Receiver, including the Second Report and the appendices thereto, the fee affidavit of Steven Graff sworn February 14, 2020, and the fee affidavit of Noah Goldstein sworn February 18, 2020, and on hearing the submissions of counsel for the Receiver and such other counsel as were present and listed on the Counsel Slip, no one else appearing for any other party named on the service list, although served as evidenced by each of the affidavit of Sam Babe sworn March 4, 2020 and the affidavit of Kyle Plunkett sworn March 17, 2020, filed.

SERVICE

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated and that this motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Persons shall be authorized and permitted to serve Mr. Harald Johannessen Hals with copies of all court materials or documents filed in these proceedings by emailing a copy to harald.johannessen1951@gmail.com in accordance with the Protocol (as defined in the Order made in these proceedings on July 5, 2019 by which the Receiver was appointed (the “**Appointment Order**”)).

APPROVAL OF GABINVEST RESOLUTION

3. **THIS COURT ORDERS AND DECLARES** that the resolution of the shareholder of Gabinvest S.A., dated January 16, 2020, replacing the directors of Gabinvest S.A., as described in Section 3.0 of the Second Report (the “**Gabinvest Resolution**”), was a proper exercise of the Receiver’s exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise the Debtor’s shareholder rights.

APPROVAL OF FEES AND DISBURSEMENTS

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$107,626.81 (excluding HST) as set out in Appendix “CC” to the Second Report, are hereby approved.
 5. **THIS COURT ORDERS** that the fees and disbursements of the Receiver’s legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$108,783.09 (excluding HST) as set out in Appendix “DD” to the Second Report, are hereby approved.
 6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama, Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.
-

ARGARITA
Applicant

CASTILLO -and-

XELA ENTERPRISES LTD. et al.

Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

ORDER

AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, 181 Bay Street
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Sam Babe (LSO # 49498B)

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Fax: (416) 863-1515

Email: sbabe@airdberlis.com

*Lawyers for KSV Kofman Inc., in its capacity as the court-
appointed Receiver of Xela Enterprises Ltd.*

SCHEDULE C

Litigation Timetable re Contempt Motion

| Step to be taken | Delivered by: |
|-------------------------------------------------------------------------------------------------------------|-------------------------------------|
| 1. Motion Record of the Receiver, Supplemental Motion Record and Second Supplemental Report of the Receiver | Complete |
| 2. Responding Motion Record of J. Gutierrez et al. | March 31, 2020 |
| 3. Delivery by the Receiver of Sworn Affidavit appending the Receiver's Reports | March 31, 2020 |
| 4. Delivery by the Receiver of any Reply Materials | April 10, 2020 |
| 5. Cross-Examination of a representative of the Receiver | Week of April 20 th 2020 |
| 6. Cross-Examination of the Respondent's affiants | Week of April 20 th 2020 |
| 7. Delivery of Factum of the Receiver | May 5, 2020 |
| 8. Delivery of Responding Factum of the Respondent | May 8, 2020 |
| 9. Delivery of Reply Factum of the Receiver | May 12, 2020 |
| 10. Hearing Date: | May 14, 2020 |

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR

)

TUESDAY, THE 24TH

JUSTICE MCEWEN

)

DAY OF MARCH, 2020

)

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

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TM

counsel as set out in second report of the Receiver dated February 14, 2020 (the “**Second Report**”), and (ii) certain additional ancillary relief contained herein, was heard this day by teleconference.

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SERVICE

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated and that this motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Persons shall be authorized and permitted to serve Mr. Harald Johannessen Hals with copies of all court materials or documents filed in these proceedings by emailing a copy to harald.johannessen1951@gmail.com in accordance with the Protocol (as defined in the Order made in these proceedings on July 5, 2019 by which the Receiver was appointed (the “**Appointment Order**”)).

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\$ 7m

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6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama, Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.



MARGARITA
Applicant

CASTILLO -and-

XELA ENTERPRISES LTD. et al.
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

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Lawyers for KSV Kofman Inc., in its capacity as the court-appointed Receiver of Xela Enterprises Ltd.

Appendix “H”

April 7, 2020

SENT VIA EMAIL TO KPLUNKETT@AIRDBERLIS.COM; SBABE@AIRDBERLIS.COM; SGRAFF@AIRDBERLIS.COM

Chris Macleod
416.477.7007 ext. 303
cmacleod@cambridgellp.com

Mr. Kyle Plunkett
Mr. Steve Graff
Mr. Sam Babe
AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Dear Mr. Plunkett:

Re: MARGARITA CASTILLO and XELA ENTERPRISES LTD. et al.

In fulfillment of the Endorsement of Justice McEwen dated March 24, 2020, please see below, the responses to the questions found at Schedule A of the Endorsement.

1. Please provide of advances from BDT to Lisa Totalling US 47.0 million as of June 30, 2018, including any canceled cheques payable to Lisa, wire transfers from BDT to Lisa and bank statements.

Response to Question No. 1: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond.

2. Please provide a detailed summary of the amounts advanced by BDT to Lisa since the date of the Assignment Transaction (as defined in the Disclosure Order), with

supporting documentary evidence (copies of all cheques, wire transfers or other evidence of Lisa's use of such funds).

Response to Question No. 2: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond.

3. What specific date did BDT propose to satisfy LISA's debt?

Response to Question No. 3: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond.

4. Who on behalf of BDT made that communication?

Response to Question No. 4: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond.

5. Who on behalf of LISA received that communication and in what was the form of communication? Produce copies.

Response to Question No. 5: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

6. Was the BDT proposal or any similar offer reduced to writing? Produce copies.

Response to Question No. 6: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

7. When did LISA's board meet to consider the BDT proposal? Was the meeting in person or through technology?

Response to Question No. 7: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

8. Who attended the board meeting?

Response to Question No. 8: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

9. What documents or records did the Board review in considering the BDT proposal.
Produce copies.

Response to Question No. 9: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

10. Produce minutes and/or notes of board meeting.

Response to Question No. 10: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

11. Produce board resolution approving the transaction.

Response to Question No. 11: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was

not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

12. What documents were signed once the board approved the BDT proposal. Produce copies.

Response to Question No. 12: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

13. Why did LISA's directors not consult with Gabinvest?

Response to Question No. 13: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, a I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

14. Why did LISA's directors not consult with Xela and/or the Receiver?

Response to Question No. 14: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

15. What was the form of assurance provided by BDT as referenced in paragraph 22 of Harald's affidavit? Produce any written assurance.

Response to Question No. 15: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

16. When did Juan learn of this February 2020 transaction?

Response to Question No. 16: In one of my recent affidavits, I described a meeting in Bogota on February 21, 2020, attended by LISA, its counsel, and the Receiver's Panamanian

lawyers. I was also in attendance, flying to Colombia a few days earlier. Shortly after I arrived, Harald Johannessen Hals, the President of LISA, reported to me that LISA had satisfied its debt to BDT. I believe therefore that I learned about the transaction sometime between February 19 and February 20, 2020.

17. Who advised him of it? Produce a copy of any written communication.

Response to Question No. 17: Mr. Johannessen informed me orally about the transaction, and neither he nor I took notes. I have searched my records for any written communications informing me of the transaction, but I have not located any.

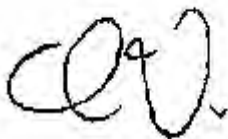
18. Produce any written communication regarding the transaction as between any of BDT, LISA, Gabinvest, Xela and all respective directors and officers

Response to Question No. 18: I am not an officer or director of BDT or LISA. Although I own Xela and as a consequence am generally informed and aware of LISA's activities, my knowledge is limited. I have no personal knowledge regarding this specific question, as I was not personally involved. Consequently, I lack information sufficient to respond. Neither do I have any documents in my possession, custody or control responsive to this request.

Yours very truly,

CAMBRIDGE LLP

Per:



CHRIS MACLEOD

Cc: Brian Greenspan, email: bhg@15bedford.com

Michelle M. Biddulph, email: mmb@15bedford.com

Appendix “I”

From: Kyle Plunkett <kplunkett@airdberlis.com>

Sent: March 31, 2020 9:10 AM

To: 'harald.johannessen1951@gmail.com' <harald.johannessen1951@gmail.com>

Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Noah Goldstein <ngoldstein@ksvadvisory.com>; Steve Graff <sgraff@airdberlis.com>; Sam Babe <sbabe@airdberlis.com>; 'Chris Macleod' <cmacleod@cambridgellp.com>; 'jkasozi@cambridgellp.com' <jkasozi@cambridgellp.com>; 'jgutierrez@xela.com' <jgutierrez@xela.com>; 'jgutierrez@arturos.com' <jgutierrez@arturos.com>; 'carl.oshea@hatstone.com' <carl.oshea@hatstone.com>; 'alvaro.almengor@hatstone.com' <alvaro.almengor@hatstone.com>

Subject: Re: Receivership of Xela Enterprises Ltd. - Court File No. CV-11-9062-00CL

Dear Mr. Hals,

Please find attached hereto a letter of today's date that requires your attention. We would ask that you please forward a copy of this letter to the balance of the addressees. A hardcopy of the attached will follow via courier.

Regards,

Kyle

Kyle Plunkett

T 416.865.3406

F 416.863.1515

E kplunkett@airdberlis.com

Aird & Berlis LLP | Lawyers

Brookfield Place, 181 Bay Street, Suite 1800

Toronto, Canada M5J 2T9 | airdberlis.com



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AIRD BERLIS

Kyle B. Plunkett
Direct: 416.865.3406
Email: kplunkett@airdberlis.com

March 31, 2020

BY EMAIL

Mr. Harald Johannessen Hals

6 Avenida "A" 8-00, Zona 9
Edificio Centro Operativo
Penthouse "B"
Ciudad de Guatemala
Guatemala

Mr. Lester C. Hess Jr.

1234 Deerbrook Drive
Sugar Land
Texas, 77479-4283
United States of America

Mr. Calvin Kenneth Shields

4118 Oakmount Court
Vero Beach
Florida, 32967
United States of America

Attention: Board of Directors of Lisa S.A.

Dear Sirs:

**Re: Receivership of Xela Enterprises Ltd. ("Xela")
(Ontario Court File No. CV-11-9062-00CL)**

And Re: Notice to Board of Directors and Officers of Lisa S.A. ("Lisa")

As you are aware, we are the lawyers for KSV Kofman Inc. ("KSV"), in its capacity as the court-appointed receiver and manager (in such capacity, the "**Receiver**") of Xela. KSV was appointed Receiver pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") issued and entered on July 5, 2019 (the "**Appointment Order**"). A copy of the Appointment Order is attached. All court materials filed in the receivership proceedings can be found on the Receiver's website: <https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd>.

We refer to our letter dated November 5, 2019, wherein you were each notified of your obligations, as officers and/or directors of Lisa, pursuant to an Order of the Ontario Court made October 29, 2019 (the “**Disclosure Order**”), to disclose certain information and/or documentation to the Receiver. We have received no response from any of you to that letter.

On March 26, 2020, Justice McEwen of the Ontario Court made an endorsement on consent of all parties, including Juan Guillermo Gutierrez through his counsel Brian Greenspan and Cambridge LLP (the “**March 24 Endorsement**”). Pursuant to paragraph 3 of Schedule 1 to the March 24 Endorsement, you each are required to deliver, or cause to be delivered, the following to the Receiver by not later than **April 7, 2020**:

- (a) any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
- (b) any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT Investments Ltd. (“**BDT**”) to Lisa and copies of bank statements evidencing such advances, as previously requested by the Receiver; and
- (c) within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa’s interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020 including, without limitation, answers to requests and questions set out on Schedule A to Schedule 1 of the March 24 Endorsement.

A copy of the March 24 Endorsement is enclosed with this letter.

We also enclose a copy of an Order also made by Justice McEwen on March 24, 2019 again on consent of all parties including Mr. Gutierrez through his counsel and Cambridge LLP (the “**March 24 Order**”). We draw your attention to paragraph 3 of the March 24 Order, where it is ordered and declared that the resolution of the shareholder of Gabinvest S.A (“**Gabinvest**”), dated January 16, 2020, replacing the directors of Gabinvest (the “**Gabinvest Resolution**”), was a proper exercise of the Receiver’s exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise the Xela’s shareholder rights. To the extent any of you are former directors of Gabinvest, or purport to remain directors of Gabinvest, we trust that your future conduct in respect of Gabinvest will be informed by, and be consistent with, this March 24 Order and the Gabinvest Resolution and that you will recognize and respect the authority of, and give your full cooperation to, the newly constituted board of Gabinvest.

We look forward to your cooperation and appreciate your immediate attention to this matter. Should you have any questions, please contact the undersigned.

Yours truly,

AIRD & BERLIS LLP

Kyle B. Plunkett

*cc by Email: Juan Guillermo Gutierrez
Christopher Macleod and N. Joan Kasozi, Cambridge LLP
Bobby Kofman and Noah Goldstein, KSV Kofman Inc.
Steven Graff and Sam Babe, Aird & Berlis LLP
Carl O'Shea and Alvaro Almengor, Hatstone Group*

Encls.

39413472.3

Court File Number: CU-11-9062-0001

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)
AND
Xela Enterprises et al
Defendant(s)

Case Management ☒ Yes ☐ No by Judge: McEwen T

| Counsel | Telephone No: | Facsimile No: |
|-----------------------|---------------|---------------|
| (as per counsel slip) | | |
| | | |

- ☒ Order ☐ Direction for Registrar (No formal order need be taken out)
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
☐ Adjourned to: _____
☐ Time Table approved (as follows): _____

Upon the agreement of counsel the attached endorsement, marked as Schedule One, shall go along with the attached schedules A-C.
Insofar as the draft order at schedule B is concerned, it shall go as per the copy I have signed and also attached to this endorsement. The Order is effective from today's date, regardless of whether or not it is entered in

26 March 20
Date

McEwen T
Judge's Signature

☐ Additional Pages _____

TM Schedule One *TM*

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

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

Endorsement

McEwen, J.
March 24, 2020

This case conference was held by teleconference on March 23, 2020 and March 24, 2020 in accordance with the changes to the Commercial List operations in light of the COVID-19 crisis, and the Chief Justice's notice to the profession dated March 15, 2020.

1. The Receiver's motion, solely as it relates to the request for an Order declaring that the respondent, Juan Guillermo Gutierrez, pursuant to Rule 60.11 of the Ontario Rules of Civil Procedure, in contempt of each of (i) my Order dated July 5, 2019 (the "**Appointment Order**") and (ii) my Order dated October 29, 2019 (the "**Disclosure Order**"), is adjourned to May 14, 2020, subject to the attached litigation timetable at Schedule C. Counsel to Juan Guillermo Gutierrez has accepted service of the Receiver's Motion Record dated March 3, 2020, the Supplementary Motion Record dated March 17, 2020 and the Factum

and Brief of Authorities of the Receiver each dated March 19, 2020. Each of Greenspan Humphrey Weinstein LLP and Cambridge LLP hereby agree to waive any requirement for personal service on Mr. Gutierrez and agree to accept service on his behalf by way of email.

2. By the deadlines set out below, Juan Guillermo Gutierrez, to the extent the documentation and information is in his power, possession and/or control, will deliver, or cause to be delivered, to the Receiver, the items listed below:
 - a. within 14 calendar days of this Endorsement, any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between Mr. Gutierrez and the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
 - b. within 14 calendar days of this Endorsement, any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT to Lisa and to Xela; and
 - c. within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa's interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020. Without limiting the generality of this request, the questions attached hereto as Schedule A shall be answered.


3. By the deadlines set out below, Harald Johannessen Hals, Lester Hess Jr. and Calvin Kenneth Shield, as members of the board of directors and officers of Lisa, S.A. ("**Lisa**") will deliver, or cause to be delivered, to the Receiver, the items listed below:

- d. within 14 calendar days of this Endorsement, any and all documentation relating the purported loan arrangement that has been entered by Lisa as described in the Affidavit of Harald Johannessen Hals sworn December 30, 2019, including all correspondence between the Board of Directors of Lisa or any other party (including the prospective lender), other than communications subject to solicitor client privilege, concerning this loan and any and all draft term sheets;
- e. within 14 calendar days of this Endorsement, any and all documentation required by the Disclosure Order including, but not limited to, evidence of all advances from BDT to Lisa and to Xela and copies of bank statements evidencing such advances, as previously requested by the Receiver; and
- f. within 14 calendar days of this Endorsement, any and all documentation and communications, including email communications, relating to the purported transfer, in February 2020, of Lisa's interest in the Avicola Group to BDT Investments Ltd., as described in the Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 and the Affidavit of Harald Johannessen Hals sworn March 22, 2020. Without limiting the generality of this request, the questions attached hereto as Schedule A shall be answered.

4. An Order is also made, in the form attached hereto at Schedule B, approving the fees and disbursements of the Receiver and its legal counsel as set out in Second Report of the

Receiver dated February 18, 2020 (the “**Second Report**”), approving and ratifying the Gabinvest Resolution (as defined in the Second Report) and authorizing the parties to effect service on Mr. Harald Johannessen Hals by way of email at harald.johannessen1951@gmail.com in accordance with the E-Service Protocol approved in these proceedings.

5. The Receiver or the Debtor’s estate shall not be responsible for any costs relating to any legal counsel retained to act as counsel to the directors of the Debtor in these proceedings, or in any foreign legal proceedings or otherwise, unless otherwise approved by the Receiver in writing, and the Debtor’s directors shall be solely responsible for the fees and disbursements incurred by such counsel.
6. I am exercising my discretion under this endorsement to waive the time period suspensions prescribed under Ontario Regulation 73/20 made under the *Emergency Management and Civil Protection Act*.

A handwritten signature in black ink, appearing to read 'McEwen', is written over a horizontal line.

Justice McEwen

SCHEDULE A**List of Additional Questions**

1. Please provide proof of advances from BDT to Lisa totalling US\$47.0 million as of June 30, 2018, including any cancelled cheques payable to Lisa, wire transfers from BDT to Lisa and bank statements.
2. Please provide a detailed summary of the amounts advanced by BDT to Lisa since the date of the Assignment Transaction (as defined in the Disclosure Order), with supporting documentary evidence (copies of all cheques, wire transfers or other evidence of Lisa's use of such funds).
3. What specific date did BDT propose to satisfy LISA's debt?
4. Who on behalf of BDT made that communication?
5. Who on behalf of LISA received that communication and in what was the form of communication? Produce copies.
6. Was the BDT proposal or any similar offer reduced to writing? Produce copies.
7. When did LISA's board meet to consider the BDT proposal? Was the meeting in person or through technology?
8. Who attended the board meeting?
9. What documents or records did the Board review in considering the BDT proposal. Produce copies.
10. Produce minutes and/or notes of board meeting.
11. Produce board resolution approving the transaction.

12. What documents were signed once the board approved the BDT proposal. Produce copies.
13. Why did LISA's directors not consult with Gabinvest?
14. Why did LISA's directors not consult with Xela and/or the Receiver?
15. What was the form of assurance provided by BDT as referenced in paragraph 22 of Harald's affidavit? Produce any written assurance.
16. When did Juan learn of this February 2020 transaction?
17. Who advised him of it? Produce a copy of any written communication.
18. Produce any written communication regarding the transaction as between any of BDT, LISA, Gabinvest, Xela and all respective directors and officers

SCHEDULE B

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR

)

TUESDAY, THE 24TH

JUSTICE MCEWEN

)

DAY OF MARCH, 2020

)

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

ORDER

THIS MOTION, made by KSV Kofman Inc. (“KSV”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of the assets, undertakings and property (collectively, the “**Property**”) of Xela Enterprises Ltd. (the “**Debtor**”), for an Order, *inter alia*, (i) approving the fees and disbursements of the Receiver and its legal

counsel as set out in second report of the Receiver dated February 14, 2020 (the “**Second Report**”), and (ii) certain additional ancillary relief contained herein, was heard this day by teleconference.

ON READING the Motion Record of the Receiver, including the Second Report and the appendices thereto, the fee affidavit of Steven Graff sworn February 14, 2020, and the fee affidavit of Noah Goldstein sworn February 18, 2020, and on hearing the submissions of counsel for the Receiver and such other counsel as were present and listed on the Counsel Slip, no one else appearing for any other party named on the service list, although served as evidenced by each of the affidavit of Sam Babe sworn March 4, 2020 and the affidavit of Kyle Plunkett sworn March 17, 2020, filed.

SERVICE

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated and that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that Persons shall be authorized and permitted to serve Mr. Harald Johannessen Hals with copies of all court materials or documents filed in these proceedings by emailing a copy to harald.johannessen1951@gmail.com in accordance with the Protocol (as defined in the Order made in these proceedings on July 5, 2019 by which the Receiver was appointed (the “**Appointment Order**”)).

APPROVAL OF GABINVEST RESOLUTION

3. **THIS COURT ORDERS AND DECLARES** that the resolution of the shareholder of Gabinvest S.A., dated January 16, 2020, replacing the directors of Gabinvest S.A., as described in Section 3.0 of the Second Report (the “**Gabinvest Resolution**”), was a proper exercise of the Receiver’s exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise the Debtor’s shareholder rights.

APPROVAL OF FEES AND DISBURSEMENTS

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$107,626.81 (excluding HST) as set out in Appendix "CC" to the Second Report, are hereby approved.

5. **THIS COURT ORDERS** that the fees and disbursements of the Receiver's legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$108,783.09 (excluding HST) as set out in Appendix "DD" to the Second Report, are hereby approved.

6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama, Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

ARGARITA
Applicant

CASTILLO -and-

XELA ENTERPRISES LTD. et al.
Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

ORDER

AIRD & BERLIS LLP

Brookfield Place
181 Bay Street, 181 Bay Street
Toronto, ON M5J 2T9

Kyle Plunkett (LSO # 61044N)

Tel: (416) 865-3406

Fax: (416) 863-1515

Email: kplunkett@airdberlis.com

Sam Babe (LSO # 49498B)

Tel: (416) 865-7718

Fax: (416) 863-1515

Email: sbabe@airdberlis.com

*Lawyers for KSV Kofman Inc., in its capacity as the court-
appointed Receiver of Xela Enterprises Ltd.*

SCHEDULE C

Litigation Timetable re Contempt Motion

| Step to be taken | Delivered by: |
|-------------------------------------------------------------------------------------------------------------|-------------------------------------|
| 1. Motion Record of the Receiver, Supplemental Motion Record and Second Supplemental Report of the Receiver | Complete |
| 2. Responding Motion Record of J. Gutierrez et al. | March 31, 2020 |
| 3. Delivery by the Receiver of Sworn Affidavit appending the Receiver's Reports | March 31, 2020 |
| 4. Delivery by the Receiver of any Reply Materials | April 10, 2020 |
| 5. Cross-Examination of a representative of the Receiver | Week of April 20 th 2020 |
| 6. Cross-Examination of the Respondent's affiants | Week of April 20 th 2020 |
| 7. Delivery of Factum of the Receiver | May 5, 2020 |
| 8. Delivery of Responding Factum of the Respondent | May 8, 2020 |
| 9. Delivery of Reply Factum of the Receiver | May 12, 2020 |
| 10. Hearing Date: | May 14, 2020 |

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

| | | |
|-------------------|---|-------------------------------|
| THE HONOURABLE MR |) | TUESDAY, THE 24 TH |
| |) | |
| JUSTICE MCEWEN |) | DAY OF MARCH, 2020 |

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

ORDER

THIS MOTION, made by KSV Kofman Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**"), without security, of the assets, undertakings and property (collectively, the "**Property**") of Xela Enterprises Ltd. (the "**Debtor**"), for an Order, *inter alia*, (i) approving the fees and disbursements of the Receiver and its legal

7m

counsel as set out in second report of the Receiver dated February 14, 2020 (the "**Second Report**"), and (ii) certain additional ancillary relief contained herein, was heard this day by teleconference.

ON READING the Motion Record of the Receiver, including the Second Report and the appendices thereto, the fee affidavit of Steven Graff sworn February 14, 2020, and the fee affidavit of Noah Goldstein sworn February 18, 2020, and on hearing the submissions of counsel for the Receiver and such other counsel as were present and listed on the Counsel Slip, no one else appearing for any other party named on the service list, although served as evidenced by each of the affidavit of Sam Babe sworn March 4, 2020 and the affidavit of Kyle Plunkett sworn March 17, 2020, filed.

SERVICE

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated and that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that Persons shall be authorized and permitted to serve Mr. Harald Johannessen Hals with copies of all court materials or documents filed in these proceedings by emailing a copy to harald.johannessen1951@gmail.com in accordance with the Protocol (as defined in the Order made in these proceedings on July 5, 2019 by which the Receiver was appointed (the "**Appointment Order**")).

APPROVAL OF GABINVEST RESOLUTION

3. **THIS COURT ORDERS AND DECLARES** that the resolution of the shareholder of Gabinvest S.A., dated January 16, 2020, replacing the directors of Gabinvest S.A., as described in Section 3.0 of the Second Report (the "**Gabinvest Resolution**"), was a proper exercise of the Receiver's exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise the Debtor's shareholder rights.

\$ 7m

APPROVAL OF FEES AND DISBURSEMENTS

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver, being fees and disbursements totalling \$107,626.81 (excluding HST) as set out in Appendix "CC" to the Second Report, are hereby approved.

5. **THIS COURT ORDERS** that the fees and disbursements of the Receiver's legal counsel, Aird & Berlis LLP, being fees and disbursements totalling \$108,783.09 (excluding HST) as set out in Appendix "DD" to the Second Report, are hereby approved.

6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama, Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.



ARGARITA
Applicant

CASTILLO -and-

XELA ENTERPRISES LTD. et al.

Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

ORDER

AIRD & BERLIS LLP

Brookfield Place
181 Bay Street, 181 Bay Street
Toronto, ON M5J 2T9

Kyle Plunkett (LSO # 61044N)

Tel: (416) 865-3406

Fax: (416) 863-1515

Email: kplunkett@airdberlis.com

Sam Babic (LSO # 49498B)

Tel: (416) 865-7718

Fax: (416) 863-1515

Email: sbabic@airdberlis.com

*Lawyers for KSV Kofman Inc., in its capacity as the court-
appointed Receiver of Xela Enterprises Ltd.*

Appendix “J”



Government
of Canada

Gouvernement
du Canada

[Home](#) → [Innovation, Science and Economic Development Canada](#) → [Corporations Canada](#)
→ [Search for a Federal Corporation](#)

Federal Corporation Information - 996927-6

[Buy copies of corporate documents](#)

i Note

This information is available to the public in accordance with legislation (see [Public disclosure of corporate information](#)).

Corporation Number

996927-6

Business Number (BN)

744418690RC0001

Corporate Name

Arturo's Technical Services Ltd.

Status

Active

Governing Legislation

Canada Business Corporations Act - 2016-11-01

Registered Office Address

100 Leek Crescent
Unit 3
Richmond Hill ON L4B 3E6
Canada

i Note

Active CBCA corporations are required to update this information within 15 days of any change. A corporation key is required. If you are not authorized to update this information, you can either contact the corporation or contact Corporations Canada. We will inform the corporation of its reporting obligations.

Directors

Minimum 1

Maximum 5

Juan Andres Gutierrez
70 Distillery Lane
Suite 3707
Toronto ON M5A 0E3
Canada

Thomas Gutierrez
120 Bayview Ave.
Suite S1008
Toronto ON M5A 0G4
Canada

Note

Active CBCA corporations are required to update director information (names, addresses, etc.) within 15 days of any change. A corporation key is required. If you are not authorized to update this information, you can either contact the corporation or contact Corporations Canada. We will inform the corporation of its reporting obligations.

Annual Filings

Anniversary Date (MM-DD)

11-01

Date of Last Annual Meeting

2019-03-13

Annual Filing Period (MM-DD)

11-01 to 12-31

Type of Corporation

Non-distributing corporation with 50 or fewer shareholders**Status of Annual Filings**

2020 - Not due

2019 - Filed

2018 - Filed

Corporate History**Corporate Name History**

2016-11-01 to Present

Arturo's Technical Services Ltd.

Certificates and Filings**Certificate of Incorporation**

2016-11-01

[Buy copies of corporate documents](#)[Start New Search](#)[Return to Search Results](#)**Date Modified:**

2020-02-14

Appendix “K”

Kyle B. Plunkett
Direct: 416.865.3406
Email: kplunkett@airdberlis.com

April 2, 2020

BY COURIER

Arturo's Technical Services Ltd.
3-100 Leek Crescent
Richmond Hill, Ontario
L4B 3E6

Dear Sirs,

Re: Receivership of Xela Enterprises Ltd. (Court File No. CV-11-9062-00CL)

We are lawyers for KSV Kofman Inc. ("**KSV**"), in its capacity as the court-appointed receiver and manager (in such capacity, the "**Receiver**") of Xela Enterprises Ltd. ("**Xela**"). KSV was appointed Receiver pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") made on July 5, 2019 (the "**Appointment Order**"). A copy of the Appointment Order is enclosed with this letter. All court materials filed in the receivership proceedings can be found on the Receiver's website: <https://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises-ltd>.

The Receiver has learned that you provide information technology and other services to Xela and have related property of Xela in your possession. Pursuant to paragraph 3 of the Appointment Order, the Receiver is authorized and empowered to take possession and control of any and all assets or property of Xela. Pursuant paragraphs 5 and 6 of the Appointment Order, you are required to immediately advise the Receiver of any Xela property, assets or records in your possession or control and to deliver the same to the Receiver upon the Receiver's request. Paragraph 7 of the Appointment Order specifically requires you, as a service provider, to grant the Receiver immediate and unfettered access to any Xela records stored in or otherwise contained on a computer or other electronic information storage system in your possession and control.

On behalf of the Receiver, we hereby request that Arturo's Technical Services Ltd. immediately:

- (a) advise the Receiver of any assets or property of Xela in its possession or control, including any books or records, whether in electronic form or otherwise;
- (b) deliver all such property of Xela to the Receiver; and

- (c) allow the Receiver continued and unfettered access to such assets, property and records including, without limitation, for the purpose of copying electronic records of Xela.

Without limiting the forgoing, please advise the Receiver of the existence of any computer hard drives, servers or other storage devices or equipment in your possession containing books and records of Xela.

The Receiver's representative, Noah Goldstein, will communicate directly with you in order to make arrangements.

We look forward to your cooperation and appreciate your immediate attention to this matter. Should you have any questions, please contact the undersigned or Mr. Goldstein at telephone number (416) 844-4842 or email ngoldstein@ksvadvisory.com.

Yours truly,

AIRD & BERLIS LLP

Kyle Plunkett

Kyle B. Plunkett

*cc by Email: Bobby Kofman and Noah Goldstein, KSV Kofman Inc.
Steven Graff and Sam Babe, Aird & Berlis LLP*

encl.

39450548.1

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE

)

FRIDAY, THE 5th

JUSTICE MCEWEN

)

DAY OF July, 2019

)



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

ORDER
(appointing Receiver)

THIS MOTION made by the Applicant for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing KSV Kofman Inc. as receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of Xela Enterprises Ltd. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Margarita Castillo sworn January 14, 2019 and the Exhibits thereto and on hearing the submissions of counsel for Margarita Castillo and Xela Enterprises Ltd., and on reading the consent of KSV Kofman Inc. to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 101 of the CJA, KSV Kofman Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$250,000, provided that the aggregate consideration for all such transactions does not exceed \$1,000,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;
- (l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and

on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

- (p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (q) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

4. THIS COURT ORDERS that, notwithstanding any other provision in this Order, the Receiver shall not take any steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between the Debtor and its subsidiaries and/or affiliates and any third party, including the litigation involving or related to the Avicola companies (as defined and further set out in the affidavit of Juan Guillermo Gutierrez ("Juan"), sworn June 17, 2019). Such steps shall include but not be limited to:

- a) selling or publicly marketing the shares of Lisa S.A., Gabinvest S.A., or any shares owned by these entities;
- b) publicly disclosing any information about the above-mentioned litigation and/or the Receiver's conclusions or intentions, provided that the Receiver may disclose such information to Juan and Margarita Castillo ("Margarita") and their counsel upon Juan and Margarita each executing a non-disclosure agreement in a form reasonably acceptable to the Receiver, and if the Receiver does disclose such information, conclusions or intentions, the Receiver shall disclose equally to Juan and Margarita;

- c) replacing counsel in the above mentioned litigations; and
- d) engaging in settlement negotiations or contacting opposing parties in the above-mentioned litigation.

This paragraph applies only until December 31, 2019 or such other date as this Court may order.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

5. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request. The Receiver shall treat as confidential all information received relating to litigation involving or related to the Avicola companies.

6. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

7. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service

provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

8. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

9. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Receiver are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as

amended (the "BIA"), and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be

opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or

collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory

or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The amount of such borrowing shall not, subject to further order of this Court, exceed \$500,000 before December 31, 2019. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

24. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

TERMINATION OF RECEIVERSHIP

25. THIS COURT ORDERS that the Debtor may make a motion to this Court for the termination of the receivership upon receipt by Margarita of the judgment 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.

SERVICE AND NOTICE

26. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'http://www.ksvadvisory.com/insolvency-cases/case/xela-enterprises'.

27. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as

last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

28. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama, Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. THIS COURT ORDERS that the Applicant shall have its costs of this motion, up to and including entry and service of this Order, in the amount of \$40,000, all inclusive, to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

A handwritten signature in black ink, appearing to be 'M. J. T.', written over a horizontal line.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
I.E / DANS LE REGISTRE NO:

JUL 05 2019

PER / PAR: 

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that KSV Kofman Inc., the receiver (the "Receiver") of the assets, undertakings and properties Xela Enterprises Ltd. acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ____ day of _____, 20__ (the "Order") made in an action having Court file number CV-11-9062-00CL, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$_____, being part of the total principal sum of \$_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

KSV Kofman Inc., solely in its capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____

Name:

Title:

MARGARITA CASTILLO
Moving Party

-and-

XELA ENTERPRISES LTD. et al.
Respondents
Superior Court File No.: CV-11-9062-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceeding commenced at Toronto

ORDER

BENNETT JONES LLP

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Telephone: (416) 863-1200

Fax: (416) 863-1716

Lawyers for the moving party, Margarita Castillo

Appendix “L”

From: Kyle Plunkett <kplunkett@airdberlis.com>

Sent: March 31, 2020 9:10 AM

To: 'harald.johannessen1951@gmail.com' <harald.johannessen1951@gmail.com>

Cc: Bobby Kofman <bkofman@ksvadvisory.com>; Noah Goldstein <ngoldstein@ksvadvisory.com>; Steve Graff <sgraff@airdberlis.com>; Sam Babe <sbabe@airdberlis.com>; 'Chris Macleod' <cmacleod@cambridgellp.com>; 'jkasozi@cambridgellp.com' <jkasozi@cambridgellp.com>; 'jgutierrez@xela.com' <jgutierrez@xela.com>; 'jgutierrez@arturos.com' <jgutierrez@arturos.com>; 'carl.oshea@hatstone.com' <carl.oshea@hatstone.com>; 'alvaro.almengor@hatstone.com' <alvaro.almengor@hatstone.com>

Subject: Re: Receivership of Xela Enterprises Ltd. - Court File No. CV-11-9062-00CL

Dear Mr. Hals,

Please find attached hereto a letter of today's date that requires your attention. We would ask that you please forward a copy of this letter to the balance of the addressees. A hardcopy of the attached will follow via courier.

Regards,

Kyle

Kyle Plunkett

T 416.865.3406

F 416.863.1515

E kplunkett@airdberlis.com

Aird & Berlis LLP | Lawyers

Brookfield Place, 181 Bay Street, Suite 1800

Toronto, Canada M5J 2T9 | airdberlis.com



This email is intended only for the individual or entity named in the message. Please let us know if you have received this email in error. If you did receive this email in error, the information in this email may be confidential and must not be disclosed to anyone.

Appendix “M”

May 4, 2020

SENT VIA EMAIL TO KPLUNKETT@AIRDBERLIS.COM

Christopher MacLeod,
647.346.6696 (Direct Line)
cmacleod@cambridgellp.com

Kyle B. Plunkett
Aird & Berlis LLP
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Dear Mr. Plunkett:

**Re: Receivership of Xela Enterprises Ltd. ("Xela")
Ontario Court File No. CV-11-9062-00CL**

In connection with the referenced receivership, and in the spirit of cooperation, we write to address what we understand are the outstanding issues. We appreciate the recent assurances concerning the Receiver's focus, and we trust that we can now advance smoothly toward looking after all of LISA's creditors and, ultimately, protecting the stakeholders.

Collection by Xela

Reports from Panama are promising concerning collection of at least part of LISA's unpaid dividends. To repeat, as you know, LISA has a final judgment in Panama requiring Villamorey to disgorge all unpaid Villamorey dividends of LISA (the "LISA Judgment"). Although the LISA Judgment does not quantify those unpaid dividends, LISA prevailed in 2019 in a Constitutional appeal that required the Court of first instance to make the calculation. Accordingly, LISA submitted the limited Villamorey financial information it had in 2019, which shows more than US\$23 million in unpaid Villamorey dividends, including interest, is due to LISA. No contradicting evidence was submitted by Villamorey.

Naturally, like everywhere else, Panama has been effected by the Coronavirus, and the courts were closed until recently. However, we are optimistic that the Court will issue its final payment order in an amount exceeding US\$23 million in relatively short order.

Separately, we understand that a new action for damages has been commenced in Panama's Court No. 6 against Villamorey, relating to the non-payment of LISA dividends. A copy of the Complaint is attached as Annex A. We hope that the Receiver is amenable to helping develop these claims and assisting in the enforcement of the anticipated LISA Judgement payment order referenced above.

BDT

This, of course, brings up the subject of BDT. As you know, BDT held a Panamanian judgment for US\$19,184,680 against LISA, stemming from an unpaid promissory note from LISA to BDT for litigation financing disbursements during the 2005-2008 timeframe. BDT also held a related judgment lien against all of LISA's assets. In its capacity as creditor, BDT had been willing to subordinate its claim to "the reasonable requirements of the receivership," which we understand signified BDT's willingness to allow the Castillo Judgment and reasonable receivership expenses to be paid out of sums received from enforcement of the LISA Judgment.

While Xela cannot speak for BDT, we understand that BDT has its own interest in satisfying the Castillo Judgment. We might suggest, therefore, as a first course of action, that the Receiver request BDT's future cooperation in connection with the LISA Judgment, as a more efficient, reliable and less costly alternative to challenging the validity of the transfer through some form of adversarial process.

Cooperation by Xela

In any event, we emphasize that Xela and Mr. Gutierrez intend to continue cooperating with the Receiver. In that regard, Mr. Gutierrez wrote to LISA on April 15, 2020, and again on April 22, 2020, formally requesting LISA's assistance with the Receiver's requests. LISA's response is attached as Annex B. Unfortunately, it may not fully address the Receiver's requests, and we are prepared to discuss next steps.¹

¹ As an aside, Annex B contains some disturbing information causing us to question the appropriateness of the Receiver's choice of counsel in Panama. Among other things, we understand that false documents were submitted to the Public Registry in Panama City in an effort to alter the corporate structure of LISA and/or Gabinvest. More recently, one of LISA's lawyers swore out an affidavit claiming that Mr. Almengor – formerly with the Mossack Fonseca law firm that featured so prominently in the Panama Papers – offered him an illicit payment to disregard the instructions of LISA's management and instead assist the Receiver's efforts to take control of LISA. Attached as Annex C is a copy of that affidavit. We are confident that the Receiver had no prior knowledge, but it now seems wholly inappropriate for the Hatstone firm to have any role in either LISA or Gabinvest. Indeed, we understand that a criminal complaint has been filed against Mr. Almengor in Panama as a consequence of these developments.

Separately, we refer to your letter dated April 3, 2020, directed to Arturo's Technical Services Ltd. ("ATS"), requesting production of any property or documents of Xela in ATS' possession. We also refer to your letter dated April 21, 2020, to Mr. Greenspan, asking for the whereabouts of the Gabinvest share register and share certificates. As these requests may be related, we address them together.

In Canada, Xela has one full storage unit of documents at a rental facility in Barrie. Separately, there are documents housed at ATS's offices in Toronto, and ATS also controls four decommissioned servers belonging to Xela at a datacenter in North York. The documents in all three of those locations are peppered with attorney/client communications and other confidential and protectable information, which must be reviewed under some satisfactory protocol before they can be delivered to the Receiver. Mr. Gutierrez does not presently know the location of the Gabinvest shares and certificates, but he believes that they are likely amongst the records in Barrie.

You have also asked for documents evidencing BDT's litigation funding to LISA. That same request was made in the garnishment case by Villamorey, in support of its assertion that BDT's judgment against LISA in Panama was fraudulent. Xela will ask LISA's counsel in the garnishment case to provide the Receiver with a full set of the documents produced in the garnishment case, subject to a suitable non-disclosure agreement. Incidentally, we note that the Court in the garnishment case concluded that, although the financial records were incomplete, Villamorey had not shown that BDT had defrauded the Court by presenting the BDT Judgment.

G&T Bank Loan to Margarita Castillo

We emphasize the importance of resolving whether Ms. Castillo in fact received LISA dividends in the form of a loan from G&T Bank in Guatemala in 2010, with which she funded the oppression action that led to the Castillo Judgment and, ultimately, to this receivership. In this regard, we would ask that the Receiver request from Ms. Castillo a copy of the loan documents, along with copies of all payment records and communications with G&T Bank. This may require Judge McEwen's involvement, and we would request the Receiver's support in that regard. We also request the Receiver's assistance to bring the issue to adjudication in Canada as soon as possible.

Housekeeping

Lastly, as matter of housekeeping, we would request that the Receiver provide Xela with two categories of information. First, we respectfully request that the Receiver produce to us a complete record of his funding sources for this receivership, showing at least the payor names, dates and amounts of payment. Second, we ask that the Receiver identify any and all communications between KSV (including its partners, associates and other personnel) and

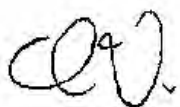
any person acting on behalf of Villamorey and/or the Avicola Group and/or any of their affiliates regarding this receivership, and provide copies of any such communications as are in writing.

Once again, we appreciate and hope to advance the new spirit of cooperation, and we look forward to discussing these issues in the near future.

Yours very truly,

CAMBRIDGE LLP

Per:



CHRISTOPHER MACLEOD

CRM/tr

Signed Electronically on behalf of Mr. Macleod

Encl: Annex A - Complaint

cc: Via Email

Mr. Adam Slavens

Mr. Bobby Kofman

Mr. Noah Goldstein

Mr. Brian Greenspan

EXP. 89620-19

SEÑOR JUEZ SEXTO DE CIRCUITO CIVIL DEL PRIMER DISTRITO JUDICIAL DE PANAMÁ.:

La Firma Forense **Quiroz Govea & Asociados**, sociedad civil debidamente inscrita a la Ficha 27201, de la Sección Mercantil del Registro Público de Panamá, con oficinas ubicadas en Altos de Bethania, Calle Nombre de Dios, Casa No. 44D, correo electrónico quirozgovealegal@gmail.com, teléfonos 6666-4225 y 6676-5382, lugar donde recibimos notificaciones profesionales, representada en este acto por los abogados **JOAO JAVIER QUIRÓZ GOVEA**, varón, panameño, mayor de edad, soltero, con cédula 8-800-1947 e idoneidad 15450 y **JAVIER ALEXIS QUIRÓZ MURILLO**, varón, panameño, mayor de edad, casado, portador de la cédula No. 8-220-986 y la idoneidad 1193, actuando en nuestra calidad de apoderados especiales de **LISA, S.A.**, sociedad anónima, debidamente registrada en la Sección Mercantil del Registro Público de Panamá, al Folio 117512 (S), Ficha 117512, Imagen 186, Rollo 11750, con domicilio en Panamá, Ciudad de Panamá Altos de Bethania, Calle Nombre de Dios, Casa No. 44D, cuyo representante legal es el señor **HARALD JOHANNESSEN HALS**, varón, soltero, mayor de edad, ciudadano guatemalteco, con pasaporte 242086470, quien puede ser ubicado en el mismo domicilio de la empresa **LISA, S.A.** concurrimos ante Usted, con el fin de presentar corrección de demanda ordinaria de mayor cuantía por daños y perjuicios, lucro cesante, daño emergente y daño moral, contra **VILLAMOREY, S.A.**, sociedad anónima, debidamente registrada en la Sección Mercantil del Registro Público de Panamá, al Folio 9146 (S), Tomo 814, Asiento 133501, Rollo 367, Imagen 298, Ficha 9146, con domicilio en Panamá, Ciudad de Panamá, Corregimiento de Bella Vista, Avenida Federico Boyd con calle 51, Scotia Plaza, Piso 11, apto 11, cuyo representante legal es el señor **RAMIRO LOPEZ NIMATUJ**, varón, guatemalteco, mayor de edad, cuyo pasaporte se desconoce, quien puede ser ubicado en el mismo domicilio de la sociedad **VILLAMOREY, S.A.** lugar en donde recibe notificaciones, causados por la retención y no pago de los dividendos correspondientes a mi poderdante, desde el periodo 2010 hasta la fecha, por lo que la cuantía de la presente demanda asciende a un monto de **VEINTITRÉS MILLONES**

NOVECIENTOS CINCUENTA Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE CURSO LEGAL (USD\$23,959,114.00).

Fundamentamos la presente demanda en las siguientes consideraciones de hecho y de derecho:

Primero.- Nuestra mandante, la sociedad **LISA, S.A.**, es legítima accionista de la entidad **VILLAMOREY, S.A.**, toda vez que es poseedora del certificado de acción número uno (1), que certifica que **LISA, S.A.** es propietaria de tres mil trescientas treinta y tres (3,333) acciones de la sociedad aquí demandada, tal como consta en la copia autenticada del certificado de acciones que en su momento aportaremos al proceso en curso y en el hecho primero del Acta de fecha 30 de noviembre de 2018, que también aportamos en la etapa correspondiente.

Segundo.- El informe de los Estados Financieros del año 2017 de la sociedad **VILLAMOREY, S.A.**, mostrado en el Acta de fecha 30 de noviembre de 2018, reflejan claramente que existen dividendos retenidos hasta dicho periodo, por la suma de **TRECE MILLONES QUINIENTOS SETENTA MIL TRESCIENTOS TREINTA Y CUATRO DÓLARES AMERICANOS EN MONEDA DE CURSO LEGAL (USD\$13,570,334.00).**

Tercero.- Se menciona en el *Párrafo de énfasis* contenido en la página 12 del Informe de Auditoría Independiente al 31 de diciembre de 2015 y 2014 de nuestra contraparte, que: *"Villamorey, S.A. es miembro de un grupo de compañías relacionadas y como se menciona en la nota 7 a los estados financieros, su principal relación con estas compañías, es la inversión que tiene en ellas y el pago de los dividendos que se decretan".*

Cuarto.- Según el antedicho informe de auditoría, para el año 2015, **VILLAMOREY, S.A.** tenía una cuenta por pagar a favor de **LISA, S.A.** en concepto de dividendos e intereses acumulados, por la suma de **NOVENTA Y NUEVE MILLONES NOVECIENTOS DOS MIL OCHOCIENTOS QUINCE QUETZALES (Q\$99,902,815.00)**, que equivalen a **TRECE MILLONES DIECIOCHO MIL**

DOSCIENTOS OCHO DÓLARES AMERICANOS CON SETENTA Y CINCO CENTAVOS EN MONEDA DE CURSO LEGAL (USD\$13.018.208,75), aproximadamente; y para el periodo 2014, por el mismo concepto, la suma de CINCUENTA Y CUATRO MILLONES QUINIENTOS OCHENTA Y NUEVE MIL QUETZALES (Q\$54,589,077.00), que equivalen a SIETE MILLONES CIENTO TRECE MIL CUATROCIENTOS VEINTINUEVE DÓLARES AMERICANOS CON CINCUENTA Y OCHO CENTAVOS EN MONEDA DE CURSO LEGAL (USD\$7,113,429.58), aproximadamente.

Quinto.- Por su parte, Informe del Auditor Independiente al 31 de diciembre de 2010 y 2009, de VILLAMOREY, S.A., refleja un saldo de dividendos por pagar a accionistas, por un monto de TREINTA Y TRES MILLONES OCHOCIENTOS SETENTA Y DOS MIL CUATROCIENTOS SETENTA Y OCHO QUETZALES (Q\$33,872,478.00), que equivalen a CUATRO MILLONES CUATROCIENTOS TRECE MIL OCHOCIENTOS OCHENTA DÓLARES AMERICANOS CON TRES CENTAVOS EN MONEDA DE CURSO LEGAL (USD\$4,413,880.03), aproximadamente.

Sexto.- En este orden, es preciso resaltar el contenido del Artículo 37 de nuestra Ley No. 32 de 1927, a saber:

"Artículo 37. A los accionistas podrá pagarse los dividendos de las utilidades netas de la compañía o del exceso de su activo sobre su pasivo, pero no de otra manera. La compañía podrá declarar y pagar dividendos sobre la base de la cantidad actualmente pagada por acciones que han sido parcialmente pagadas."

Séptimo.- Al respecto, el jurista Juan Pablo Fábrega Pollieri en su Tratado sobre la Ley de Sociedades Anónimas Panameñas (2018, pp. 257-269), nos provee el siguiente análisis:

"En la mayoría de las jurisdicciones los dividendos son concebidos como los beneficios económicos declarados a favor de los accionistas, derivados de las utilidades obtenidas por la sociedad durante un ejercicio fiscal o retenidas en periodos fiscales anteriores. Nuestra legislación no define el concepto. El presente artículo establece como fuente de pago de dividendos no solo las

“utilidades netas”, es decir, las ganancias obtenidas tras deducir gastos e impuestos y reservas legales que establezcan las normas que regulen una actividad particular, sino también bienes que formen parte del exceso de sus activos sobre su pasivo.

(...)

Dividendo no es lo mismo que utilidad, aun cuando en nuestro medio se utilizan ambos vocablos como sinónimos, Manuel Osorio define el dividendo como “Cuota que corresponde a cada acción, proporcional a su monto, al dividir sus ganancias una sociedad comercial (cita del autor). En sentido comercial y empresarial, el dividendo es el “Cuociente que en las sociedades resulta de dividir el total de la utilidad líquida obtenida durante el ejercicio societario, por el número de las acciones que integran el capital social. (cita del autor).

El citado Diccionario de Derecho Comercial y de la Empresa define la utilidad, en el contexto contable, como “...el beneficio que arroja el ejercicio empresarial”.

Tratándose de sociedades, ese beneficio, exigible en toda organización empresarial comercial para evitar maniobras perjudiciales al derecho de los socios y al deber de mantener incólume el capital social, es la parte del activo consumible, sin que deteriore la parte de capital necesaria para compensar el pasivo y garantizar la integridad del capital societario.”

Así, la utilidad es la ganancia neta que obtiene la sociedad durante su ejercicio económico, tras deducir gastos e impuestos, y el dividendo es la cuota-parte de esa ganancia que corresponde a cada accionista en atención a la cantidad de acciones de que sea propietario, luego de que el órgano corporativo respectivo declare su pago.

Respecto a los dividendos, Primer Tribunal Superior de Justicia del Primer Distrito Judicial ha comentado:

“La norma citada permite inferir que el pago de dividendos, a quienes hayan invertido en acciones de una sociedad anónima, deriva de la posibilidad de que hayan producido utilidades o exceso de su activo sobre su pasivo. Por lo tanto, no existiendo en el pago social de RADIO SOBERANA, S.A. alguna otra fórmula que admitiera la repartición de dividendos, debía el actor demostrar que la aludida sociedad anónima se ubicaba en alguno de los dos presupuestos que contempla el artículo 37 citado, a efectos de estimar que, en efecto, a dicho actor debió repartírsele dividendos, conforme las utilidades percibidas y el porcentaje accionario que posee.” (Sentencia de 16 de diciembre de 1999)

(...)

Al emplear la norma el verbo auxiliar “podrá”, está haciendo referencia a una potestad y no a un deber, potestad esta que se materializaría efectuándose el pago de la manera que preceptúa el artículo 37. Por ello, el dividendo como tal no se origina sino hasta cuando es declarado, tras la aprobación de los resultados de la sociedad al concluir su año fiscal; de ahí que constituya una mera expectativa de derecho para los accionistas. Mientras no se declare, la utilidad se mantendrá retenida por la sociedad en una cuenta de superávit hasta que se decida su reparto.

(...)

Si la sociedad se debe a los accionistas y la inversión en la compra de acciones persigue una finalidad mercantil, el pago de dividendos constituye la esencia del derecho societario. (...)

Sobra decir que para recibir dividendos se requiere tener la calidad de accionista o, como se vio al tratar la disposición de

las acciones, ser usufructuario o beneficiario de este derecho, conferido por un accionistas en virtud de una relación contractual.

(...)

Una vez declarado el dividendo por el órgano corporativo que corresponda, nace la obligación de pagarlo en la fecha establecida, convirtiéndose los accionistas, en acreedores de la sociedad. Es usual que se apruebe el pago de utilidades en partidas a lo largo del año, en vez de que se haga de un solo contado. Los accionistas contarán con legitimación para demandar a la sociedad en caso de morosidad.

En atención a lo dispuesto en el numeral 2 del artículo 1652 del Código de Comercio, prescribirá en el plazo de tres años el derecho de los accionistas a demandar judicialmente a la sociedad por la mora en el pago de los dividendos que hubieran sido declarados, por tratarse de una pretensión derivada de la relación societaria en lo que se refiere a los derechos y obligaciones de la sociedad para con los socios.

(...)

La recepción del dividendo corresponderá a las personas registradas como propietarias de las acciones, al usufructuario o beneficiario del referido derecho (...), a la fecha en que se declare el pago respectivo. Como los dividendos se pueden pagar en forma diferida, en varias partidas, será necesario que las partes definan en el contrato a quién corresponderá recibir los mismos, de darse la venta o el usufructo de las acciones antes de hacerse el pago de los dividendos declarados."

Octavo.- Sobre el particular Artículo 37 y su interpretación, salta a la vista que los dividendos tienen que ser declarados y su pago autorizado por la sociedad para con sus accionistas, y que el no pago en la fecha determinada es el que genera una falta o mora que tiene consecuencias de índole judicial. Y es que, nuestra apoderada se encuentra en un limbo jurídico respecto a cuantificar el periodo a partir del cual la no recepción de sus dividendos ha entrado en mora, puesto que **VILLAMOREY, S.A.**, no ha otorgado información respecto a saber si durante todos estos años que han pasado ha declarado dividendos y fijado una fecha de pago de los mismos. Los estados financieros, que aquí adjuntamos, no proveen claridad en cuanto a saber en qué cuenta se encuentran los dividendos por pagar, si es en una cuenta de superávit, o si han sido declarados y se encuentran retenidos.

Noveno.- Lo que sí es cierto, es que el patrimonio de nuestra poderdante se ha visto altamente perjudicado por la omisión de **VILLAMOREY, S.A.** en cuanto al pago de los dividendos que corresponden a **LISA, S.A.** Es oportuno manifestarnos frente a la flexibilidad que nuestro régimen societario y comercial otorga a las entidades

205 mercantiles respecto a sus relaciones con los accionistas, en este caso, la
206 declaración y pago de dividendos, y que todavía con ello, incorpora una excepción
207 de prescripción para el reclamo judicial por mora en el pago de los dividendos,
208 cuyo tratamiento ya ha sido *ut supra* explicado. Empero, lo anterior no significa
209 que los dividendos prescriban –es un derecho inalienable e inalterable–, y
210 tampoco es óbice para que nuestro sistema judicial se vea impedido de combatir
211 las arbitrariedades que una sociedad pueda manipular accionariamente en contra
212 de sus inversionistas, más específicamente, sus dueños. Por ende, es preciso, y eso
213 hemos hecho, centrarnos en los daños y perjuicios que tal omisión ha causado en
214 la sociedad demandante.

215
216 **Décimo.-** En este sentido, queremos dejar por sentado que el objeto de la acción aquí
217 interpuesta no es el mero reclamo de los dividendos dejados de percibir desde el
218 año 2010, en perjuicio de nuestra apoderada, sino: a) acreditar el nexo existente
219 entre **LISA, S.A.**, como titular del 33% de las acciones de **VILLAMOREY, S.A.**; b)
220 evidenciar las obligaciones resultantes de la relación contractual y estatutaria que
221 tiene **LISA, S.A.** dentro de su participación en **VILLAMOREY, S.A.**, es decir: recibir
222 dividendos de su capital invertido y pagado; c) probar que como resultado de la
223 falta de pago de los dividendos de **VILLAMOREY, S.A.**, en detrimento de los
224 derechos societarios que **LISA, S.A.** tiene sobre esa otra sociedad, deviene el
225 incumplimiento de una obligación contractual al accionista resultante de su
226 inversión en la entidad demandada; y d) que como tal comportamiento de
227 omisión sistemática data de un periodo de casi 10 años, **LISA, S.A.**, se ha visto
228 lesionada en su patrimonio al tener una cuenta por cobrar que le afecta sus
229 estados financieros, así como la rentabilidad, solvencia y liquidez con la que ha de
230 afrontar sus costos y gastos operativos y como sociedad inversionista que es.

231
232 **Undécimo.-** A tales efectos, el monto tasado al cual ascienden los daños y
233 perjuicios, así como el lucro cesante y daño emergente ocasionado por el no pago
234 de los dividendos a que tiene derecho **LISA, S.A.** dentro de su participación en
235 **VILLAMOREY, S.A.**, es de **VEINTITRÉS MILLONES NOVECIENTOS CINCUENTA**

236 Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE
237 CURSO LEGAL (USD\$23.959.114.00), los cuales se desglosan a continuación:

| | |
|----------------------------------------------------|--------------|
| Daños y perjuicios por dividendos dejados de pagar | \$14,894,472 |
| Intereses | \$8,698,900 |
| Gastos legales | \$365,742 |
| Total | \$23,959,114 |

238
239 **Duodécimo.-** Sobre la consagración normativa de “daños y perjuicios”, el Código
240 Civil dicta lo siguiente:

241 *“Artículo 991. La indemnización de daños y perjuicios*
242 *comprende, no sólo el valor de la pérdida que haya sufrido, sino*
243 *también el de la ganancia que haya dejado de obtener el*
244 *acreedor, salvo las disposiciones contenidas en los artículos*
245 *anteriores.*

246
247 *Artículo 992. Los daños y perjuicios de que responde el deudor*
248 *de buena fe son los previstos o que se hayan podido prever al*
249 *tiempo de constituirse la obligación y que sean consecuencia*
250 *necesaria de su falta de cumplimiento. En caso de dolo,*
251 *responderá el deudor de todos los que conocidamente se deriven*
252 *de la falta de cumplimiento de la obligación.”*

253
254
255 **Decimotercero.-** Es así como los registros contables y estados financieros de **LISA,**
256 **S.A.** arrojan la cantidad de VEINTITRÉS MILLONES NOVECIENTOS CINCUENTA
257 Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE
258 CURSO LEGAL (USD\$23.959.114.00), relacionados directamente al flujo de
259 capital dejado de percibir en cuanto a los montos que le debe **VILLAMOREY, S.A.**
260 en dividendos no pagados.

261
262 **Decimocuarto.-** Nuestra jurisprudencia patria ya se ha manifestado en cuanto a
263 que conductas como la que nos ocupa se transforman en una indemnización por
264 daños y perjuicios:

265 *“El demandante considera que la Autoridad Marítima de*
266 *Panamá, le causo daño y perjuicios económicos, al no haber*
267 *adoptado las medidas administrativas requeridas para que la*
268 *empresa PANAMA PORTS COMPANY, S.A. pagara la suma de DOS*
269 *MILLONES DIECINUEVE MIL SEISCIENTOS TREINTA Y TRES*
270 *BALBOAS CON DIECIOCHO CENTÉSIMOS (B/2,019,633.18), en*
271 *concepto de indemnización por utilidades no percibidas, en el*
272 *término señalado, por lo que a su juicio, la Autoridad Marítima*
273 *de Panamá, está obligada a pagar a K.M.R.G., S.A., la suma de*
274 *TRES MILLONES QUINIENTOS MIL BALBOAS (B/.3,500,000.00),*
275 *en concepto de intereses generados desde que existía la*

obligación del pago de la indemnización por las utilidades no percibidas, más otros perjuicios ocasionados (lucro cesante).

Efectivamente consta en autos que el pago de la indemnización que les correspondía a la empresa K.M.R.G.S.A., producto de la rescisión de los contratos de concesión y arrendamiento que tenía con la Autoridad Portuaria Nacional, que debían hacerse el 15 de septiembre de 1999, no se hizo efectivo hasta noviembre de 2008, o sea nueve (9) años después, lo que implica la existencia de un daño pecuniario a la empresa, por tanto se encuentra el daño probado."

Sentencia de 16 de marzo de 2011. Caso: K.M.R.G., S.A. c/ Autoridad Marítima de Panamá.

Decimoquinto.- Si bien, son esos dividendos dejados de pagar en concepto de dividendos, el daño y perjuicio directo ocasionado a **LISA, S.A.**, tal ausencia ocasiona un vacío en la contabilidad financiera y fiscal de nuestra apoderada, que genera al igual que dicta la jurisprudencia, un daño pecuniario a la compañía, como se desarrolla en los hechos anteriores y se acreditará a través de las pruebas periciales, testimoniales y de informe, que han de ser practicadas en el curso del presente proceso ordinario de mayor cuantía.

Decimosexto.- Como bien se ha expresado al inicio del libelo, la cuantía de la demanda se basa en los daños y perjuicios, así como el lucro cesante, el daño emergente y el daño moral, dimanantes del no pago de tales dividendos, que por sus intereses y tasación, asciende a un monto de **VEINTITRÉS MILLONES NOVECIENTOS CINCUENTA Y NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE CURSO LEGAL (USD\$23,959,114.00).** Al respecto y por su importancia para el caso, procedemos a resaltar el siguiente concepto jurisprudencial:

"La Sala estima necesario citar al jurista Gilberto Martínez Rave, quien describe como daño emergente y el lucro cesante, en su obra "Responsabilidad Civil Extracontractual", estableciendo que estos implican daños patrimoniales o materiales. El autor en mención señala que:

El daño emergente es: "el empobrecimiento directo del patrimonio del perjudicado...lo conforma lo que sale del patrimonio del perjudicado para atender el daño y sus efectos o consecuencias. Por su parte, considera que lucro cesante es "la frustración o privación de un aumento patrimonial. La falta de rendimiento, de productividad, originada por los hechos dañosos. " (Gilberto Martínez Rave, Responsabilidad Civil

319 *Extracontractual, 8ª edición, Biblioteca Jurídica Diké, 1995, págs.*
320 *194 y 195).*"

321
322 Sentencia de 2 de febrero de 2017. Proceso: Indemnización.
323 Caso: Maybeth Coronado c/ Caja de Seguro Social. Magistrado:
324 Abel Augusto Zamorano.

325
326

327 **Decimoséptimo.-** Así las cosas, no cabe ninguna duda sobre la pertinencia y
328 juridicidad que acompañan la pretensión de la demandante, **LISA, S.A.**, sobre la
329 búsqueda judicial de indemnización sobre el daño, perjuicio y lucro sufrido a raíz
330 de las dolosas conductas de **VILLAMOREY, S.A.**, en el manejo de los dividendos y
331 su retención. En cuanto al derecho de resarcimiento, nuestra más alta
332 corporación de justicia se ha manifestado en este sentido:

333 *"En reiteradas ocasiones la Sala ha dejado expuesto que*
334 *tradicionalmente la doctrina y la jurisprudencia conceptúan el*
335 *daño resarcible como el menoscabo que se experimenta en el*
336 *patrimonio de los valores económicos que lo componen (daño*
337 *patrimonial o material) conformado por el daño emergente*
338 *y lucro cesante, y, también la lesión a los sentimientos, al honor*
339 *o las afecciones (daño moral)."*

340

341 Auto de 13 de mayo de 2016. Proceso: indemnización. Caso:
342 Cecilia Sanjur y Paola Patiño c/ Caja de Seguro Social.
343 Magistrado sustanciador: Victor Benavides

344

345 **Decimoctavo.-** Por consiguiente, además de ser un derecho de **LISA, S.A.**, es un
346 deber y obligación de **VILLAMOREY, S.A.**, indemnizarle por los daños y perjuicios,
347 el lucro cesante, daño material y daño moral -tal cual se han detallado en este
348 escrito-, causados por el no pago de los dividendos que en estricta legalidad le
349 corresponden a mi poderdante, desde el año 2010.

350

351 **PRETENSIÓN:**

352 Solicitamos a este Honorable Tribunal, previo al agotamiento de las fases procesales
353 propias de los procesos ordinarios de mayor cuantía, que **VILLAMOREY, S.A.**,
354 sociedad anónima, debidamente registrada en la Sección Mercantil del Registro
355 Público de Panamá, al Folio 9146 (S), Tomo 814, Asiento 133501, Rollo 367, Imagen
356 298, Ficha 9146, con domicilio en la Provincia de Panamá, República de Panamá, sea
357 condenada al pago de **VEINTITRÉS MILLONES NOVECIENTOS CINCUENTA Y**
358 **NUEVE MIL CIENTO CATORCE DÓLARES AMERICANOS EN MONEDA DE CURSO**

359 **LEGAL (USD\$23.959.114.00)**, más intereses, costas y gastos del proceso, en virtud
360 de los daños y perjuicios, lucro cesante, daño emergente y daño moral que ha
361 ocasionado con la retención y no pago de los dividendos correspondientes, desde el
362 periodo 2010 hasta la fecha, a nuestra apoderada, **LISA, S.A.**, sociedad anónima,
363 debidamente registrada en la Sección Mercantil del Registro Público de Panamá, al
364 Folio 117512 (S), Ficha 117512, Imagen 186, Rollo 11750, con domicilio en la
365 Provincia de Panamá, República de Panamá.

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367 **PRUEBAS:**

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369 Las presentadas con la demanda primigenia.

370 Se anuncia la aportación y práctica de otras pruebas dentro del periodo probatorio.

371

372 **FUNDAMENTO DE DERECHO**

373 Código Judicial artículos 1228 - 1280.

374

375 Panamá, a la fecha de su presentación.

376

377 DE LA HONORABLE JUEZ,

378

JAVIER ALEXIS QUIRÓZ MURILLO

JOAO QUIRÓZ GOVEA

Quiroz Govea & Asociados



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