

Translation

**INTERNATIONAL ARBITRATION UNDER THE RULES OF THE INTERNATIONAL
CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (“ICSID”)**

**OMEGA ENGINEERING LLC
AND
MR. OSCAR RIVERA
*CLAIMANTS***

v.

**REPUBLIC OF PANAMA
*RESPONDENT***

SECOND WITNESS STATEMENT OF FRANKIE J. LÓPEZ

Counsel for Claimants

**JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
USA**

**JONES DAY
21 Tudor Street
London EC4Y 0DJ
UK**

**Shook, Hardy & Bacon LLP
Citigroup Center
201 S. Biscayne Blvd., Suite 3200
Miami, FL 33131
United States of America**

17 JANUARY 2020

Translation

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	THE ACTIONS OF THE GOVERNMENT AGENCIES OCCURRED AT THE SAME TIME AND APPEAR TO FORM PART OF A CONCERTED ACTION AGAINST OSCAR AND THE OMEGA COMPANIES.....	2
A.	The Problems with All Agencies Increased and Changed in Nature in the Middle of 2014.....	2
	<i>1. The MINSA CAPSI Projects.....</i>	<i>4</i>
	<i>2. The Ciudad de las Artes Project.....</i>	<i>20</i>
	<i>3. The La Chorrera Project</i>	<i>29</i>
	<i>4. The Municipality of Panama Project.....</i>	<i>35</i>
	<i>5. The Municipality of Colón Project</i>	<i>40</i>
	<i>6. The Public Market of Colón Project.....</i>	<i>44</i>
B.	Various Sources Confirmed that the Actions of All of the Different Governmental Agencies Were Part of a Concerted Action by the Government Against the Omega Consortium	47
III.	STATEMENT OF TRUTH	50

Translation

I. INTRODUCTION

1. I am the same Frankie J. López who made a witness statement on 27 May 2019 (“**López 1**” or “**First Witness Statement**”). I hereby confirm the contents of my First Witness Statement. Unless otherwise indicated, all of the capitalized terms have the same meanings as those provided in López 1.

2. I am presenting this second witness statement to address certain jurisdictional allegations and issues raised by the Government of Panama in its Reply to Objections to Jurisdiction and Rejoinder on the Merits (“**Panama’s Reply**”) dated 18 November 2019, as well as the witness statements and expert reports presented with the Reply. Because I am limiting this Witness Statement to issues concerning Panama’s jurisdictional arguments, if this witness statement does not address certain matters or allegations made by the Republic of Panama, its witness or experts, this does not mean that I agree with those matters or allegations.

3. The facts and other matters explained in this witness statement are a part of my personal knowledge and experience. In those cases where I have no personal knowledge, I have identified the sources of information upon which I have relied.

4. The documents cited in this witness statement refer to Claimant’s exhibits (marked as “C-__”) or Respondent’s exhibits (“R-__”) presented in this arbitration. In the preparation of this witness statement, I was assisted by Jones Day and Shook, Hardy & Bacon LLP, Counsel for Claimants.

Translation

II. THE ACTIONS OF THE GOVERNMENT AGENCIES OCCURRED AT THE SAME TIME AND APPEAR TO FORM PART OF A CONCERTED ACTION AGAINST OSCAR AND THE OMEGA COMPANIES

5. As I explained in my First Witness Statement, with regard to Respondent's arguments that the problems Claimants faced with their contracts were purely commercial, the Omega Contracts in Panama were the subject of multiple attacks from various Panamanian Government Agencies during the administration of Mr. Juan Carlos Varela.¹ In my opinion, what occurred in *all* of our Contracts after President Varela won the 2014 elections was not a series of merely commercial actions, as Panama states. Those actions were *contemporaneous in all Contracts as well as unusual*, when they are compared with what occurred with the Omega Consortium projects during the previous administration.² In this section I will address this jurisdictional argument from Respondent and clarify what really happened with the Omega Consortium Contracts and why the issues we had to face were not really commercial.

A. The Problems with All Agencies Increased and Changed in Nature in the Middle of 2014

6. As I will describe in detail in subsequent sections, and as I described in my First Witness Statement,³ before President Varela won the election, each of the Ministries and Agencies with which we had contracts was willing to work with us for the benefit of the projects. However, once President Varela won, I began to notice that my communications went unanswered, and if they were answered they started to make "excuses," and the Comptroller General's Office effectively stopped approving the change orders or payment requests.

7. It is my understanding that Panama says that the problems that arose abruptly from the

¹ First Witness Statement of Frankie López ("López 1") § VII.

² When I say the "previous administration" I am referring to Mr. Ricardo Martinelli's presidential term between 2009 and 2014.

³ López 1 ¶ 40.

Translation

middle of 2014 were commercial in nature and were not part of any concerted action on the part of the government.⁴ In my experience managing *all* of the projects of the Omega Consortium in Panama I can say that is not true. To begin with, before the change of government, none of the Agencies objected to the work of the Omega Consortium.⁵ As I explained previously, although there were some commercial and contractual disagreements related to the projects, these were resolved without major complications.⁶ This is because before the change of government, we had open communications and a cooperative dynamic with all the Ministries and Agencies. At that time, we worked as a team with the Ministries and each Agency (as the owners of each project), cohesively and with a common goal: to complete the projects in a fully compliant fashion.

8. This changed in the middle of 2014. Communication with the Ministries and Institutions shut down and the Agencies began to complain about the progress of the projects and to look for excuses for refusing to approve changes that had already been discussed and approved, to refuse to approve and endorse payment requests and requests for extensions of time, and to openly and clearly hinder the progress of the projects. For me, as the person who managed *all* of the projects, it was clear that a 180 degree change had occurred in the attitude of the Ministries and Agencies toward the Omega Consortium.

9. We nevertheless continued to try to work and cooperate with each of the Ministries and Agencies with which we had contracts to see if we could find a solution. But in fact, and as I will explain in further detail in this statement, the Ministries and the Agencies put us into a vicious cycle in which, since they refused to endorse extensions of time for the contracts, we were unable to

⁴ Panama's Response to the Tribunal's Jurisdictional Objections and Reply on the Merits ("**Panama's Reply**") ¶¶ 127-128.

⁵ López 1 § IV.

⁶ López 1 ¶ 40.

Translation

collect payment for already completed work, including, on various occasions, additional work that had been requested by the Ministries and Agencies. For this reason, we were left with no option but to suspend physical work on the projects at the end of 2014. However, it is not true, as Panama states, that we abandoned the projects as of 31 October 2014.⁷ As I explained in my prior statement, our key personnel remained in Panama until the middle of 2015 attempting to resolve the problems,⁸ and we kept security personnel at the project sites to protect the physical integrity of the facilities. I want to emphatically clarify that the Omega Consortium did not abandon any of the projects as of 31 October 2014 and did not “flee” Panama. That is false.

1. The MINSA CAPSI Projects

10. I understand that Panama states that MINSA treated the Omega Consortium and our contracts the same way during the previous administration and during the administration of Mr. Varela. This is not accurate. The Varela administration did not treat the MINSA CAPSI projects in the same way. Before the change of administration, MINSA had maintained good communication and predisposition toward the Omega Consortium, but this changed when Mr. Varela won the elections.

11. *First*, with regard to communications with MINSA, before the change of administration, I had open and ongoing communications with MINSA through Nessim Barsallo, who was responsible for the MINSA CAPSI Projects with the Omega Consortium as the Sub-Director of Special Projects Management.⁹ When the Administration changed, Mr. Barsallo was no longer in charge, and Engineer Gabriel Cedeño and Doctor Temístocles Díaz took on that role. It was at that

⁷ Panama’s Counter-Memorial on the Merits and Objections to the Tribunal’s Jurisdiction (“**Panama’s Counter-Memorial**”) ¶ 177.

⁸ López 1 ¶ 157.

⁹ First Witness Statement of Mr. Nessim Barsallo (“**Barsallo 1**”) ¶ 7.

Translation

time that I realized that communications with MINSA had changed. I remained in contact with Mr. Barsallo (more than anything because, in my view, we were friends) but all matters related to official communications with MINSA to resolve problems and ensure the progress of our MINSA CAPSI projects had completely changed.¹⁰

12. It is my understanding that Panama and its witness Mr. Barsallo have said that MINSA held personal meetings with Omega Consortium personnel, and that email communication continued between October 2014 and December 2014.¹¹ Although there may have been sporadic emails during that time period this is of no consequence because none of them assisted in achieving the endorsement of the time extension and cost change orders. I also wish to clarify that there were many difficulties for me to meet with the individuals responsible for our MINSA CAPSI projects after the change of administration. As I mentioned previously, these individuals were Engineer Cedeño and Temístocles Díaz. Engineer Cedeño was responsible for MINSA's special projects and was a facilitator of decisions that Mr. Díaz would take. The decision-making power that both Nessim Barsallo and Karina Mirones had previously possessed disappeared with the change of administration, and it was Mr. Díaz, with the assistance of Mr. Cedeño, who became responsible for making decisions about our projects. However, despite my repeated attempts to meet with Mr. Díaz,¹² he never granted me a meeting. With regard to my personal meetings with Mr. Barsallo, these occurred in a strictly social setting and not a professional one, since Mr. Barsallo did not have any type of decision-making authority on the Omega Consortium projects after the change of

¹⁰ Letter No. MINSA-KY-82 from Omega to MINSA, dated 28 Oct. 2014 (C-0575) (related to a three-phase line proposal indicating that "Omega Engineering, Inc. (OMEGA) has not received any response whether the proposal has been received or not."); Letter MINSA-RS-63 dated 16 Jan. 2015 (R-0096) (MINSA never responded to this letter).

¹¹ Barsallo 2 ¶ 28.

¹² WhatsApp Chat between Frankie López and Nessim Barsallo dated 20 Jan. 2015 (C-0773) (where I noted that "nobody [from MINSA] is answering me" and that the Omega Consortium has been "deprived of air and [was] on the brink of brain death").

Translation

administration. In addition to the refusal to communicate with the Omega Consortium, we noted other changes in the way MINSA dealt with us. For example, one of the employees of Omega Panama, the engineer Leopoldo Vega, commented to me in December 2014 that the technical staff of the the Health Infrastructure Office (“DIS”) was afraid of issuing phase termination certificates for our MINSA CAPSI projects.¹³

13. *Second*, the attitude of MINSA and of the Comptroller General’s Office in relation to the process of approving and endorsing our change orders radically changed when President Varela took office. Although the endorsement of change orders during the previous administration sometimes took time, change orders that adjusted costs due to changes to the projects requested by MINSA were simply not endorsed *at all* during Mr. Varela’s administration.¹⁴

14. To begin, during the previous administration we had negotiated various change orders to the contracts with MINSA so that we would not have problems and so that we could make headway with our projects. That was how we were able to sign and get approval for Change Order Nos. 2 and 3 for the Río Sereno Contract,¹⁵ Change Order No. 2 for the Kuna Yala Contract,¹⁶ and Change Order Nos. 2 and 3 for the Puerto Caimito Contract.¹⁷ At that time there had been no budgetary problems with the Ministry of Economy and Finance. On 7 May 2014, before the change of administration, we were also able to sign with MINSA Change Order No. 4 for the Río Sereno Contract, Change Order

¹³ Email from Salvador del Toro to Frankie López, dated 10 Dec. 2014 (C-0774).

¹⁴ Addendum No. 4 to Contract 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2), Addendum No. 4 to Contract 085 (2011) dated 7 May 2014 (C-0171), Addendum No. 3 to Contract 083 dated 7 May 2014 (2011) (C-0107).

¹⁵ Addendum No. 2 to Contract 077 (2011) dated 21 Feb. 2013 (C-0169), Addendum No. 3 to Contract 077 (2011) dated 13 Aug. 2013 (C-0170).

¹⁶ Addendum No. 3 to Contract 083 (2011) dated 18 Jul. 2013 (C-0263).

¹⁷ Addendum No. 2 to Contract 085 (2011) dated 22 Feb. 2013 (C-0268); Addendum No. 3 to Contract 085 (2011) dated 07 May 2014 (C-0108), Addendum No. 3 to Contract 085 (2011) dated 22 Sep. 2011 (R-0031).

Translation

No. 3 for the Kuna Yala Contract, and Change Order No. 4 for the Puerto Caimito Contract.¹⁸ Unfortunately, the government changed and these Change Orders were never endorsed by the Comptroller General's Office, based on mere pretexts.

15. It is my understanding that Mr. Barsallo says that these three Change Orders were returned to MINSa by the Comptroller General's Office in *July 2014* for a number of valid reasons.¹⁹ I disagree. To begin with, these Change Orders were signed on 7 May 2014 by the Omega Consortium and MINSa. As I see from Mr. Barsallo's second witness statement and Panama's pleading, apparently the Comptroller General's Office returned the Change Orders to MINSa in July 2014,²⁰ after Mr. Varela became president. However, the Comptroller General's stated reasons for returning the Change Orders are mostly related to deficiencies *caused by MINSa* including: (1) failure to indicate the methodology used to calculate financing costs due to the additional term and the financing of 10% of the advance to the Omega Consortium; (2) failure to mention the events that occurred and were considered by MINSa to be justifications or grounds for amendments to the contracts regarding time and price; and (3) comments made by the National Engineering Administration, the National Economic and Financial Advisory Administration and the National Legal Advisory Administration.²¹ In other words, practically none of the observations made by the Comptroller General's Office pertained to responsibilities of the Omega Consortium, as we had submitted all the documentation that was required from us in order to endorse the Change Orders. The alleged deficiencies identified by the Comptroller General's Office should have been cured *by MINSa* at the time of submitting the

¹⁸ Addendum No. 4 to Contract 077 (2011) dated 07 May 2014 (C-0106 resubmitted 2), Addendum No. 4 to Contract 085 (2011) dated 07 May 2014 (C-0171), Addendum No. 3 to Contract 083 (2011) dated 26 Dec. 2014 (C-0107).

¹⁹ Barsallo 2 ¶ 15.

²⁰ Panama's Reply ¶¶ 238 n.444, 245; *See also* Barsallo 2 ¶ 15.

²¹ *See e.g.*, Memorandum No. 1480-2014-DAEF from the Economic Director of the Comptroller General of the Republic to the Legal Director of the Comptroller General of the Republic dated 06 Jun. 2014 (C-0750); Letter No. 3081-2014-DFG-UCEF from the Comptroller General of the Republic to the Ministry of Health dated 10 Jul. 2014 (C-0686).

Translation

necessary documentation.²² Most of these issues occurred after Mr. Varela was elected President. This led me at that time, and leads me today, to the conclusion that MINSA's attitude had begun to change with regard to the Omega Consortium, causing them to submit deficient documentation with respect to our Change Orders. In any event, as Mr. Barsallo has stated, the Change Orders remained in the Comptroller General's Office "for seven months without endorsement."²³

16. As I previously mentioned, the objections to Change Order No. 3 of Kuna Yala pertained to informational documents that had not been delivered *by MINSA*, or that suffered from some defect resulting from *MINSA's* negligence. In particular, in Memorandum No. 4243,²⁴ which concerned Change Order No. 3 to the Kuna Yala Contract, all of the observations made by the Comptroller General's Office arose from actions taken by MINSA and had to be taken care of by them. These included: a comment with respect to the modification of the purpose of the contract, which had to be taken care of by MINSA's legal department, the identification of the necessary budget item, and the absence of MINSA's signature from certain documents.²⁵ The same situation with the unidentified budget items arose with Memorandum No. 3427-2014, which also concerned Change Order No. 3 to the Kuna Yala Contract.²⁶ It must be noted that we could not address the issues raised by the Comptroller-General since these were *MINSA's responsibility*. In letter No. 3340-2014 sent to the Ministry of Health, addressing the same Change Order, the Comptroller General's comments also

²² The Omega Consortium also presented documentation necessary to endorse the addenda. In addition to the bonds, endorsements, and certificates of good standing, there were other documents included. For example, in the case of Addendum No. 5 to the Río Sereno Contract (C-0249), the Omega Consortium presented measurement plans, a chronology of events, financing costs, calculation of the contractual balance, and the breakdown of costs. *See* Measurement and Survey Plans, undated (C-0775); Chronology of Events, undated (C-0776); Financing Costs, undated (C-0777); Calculation of Contractual Balance, undated (C-0778); Breakdown of Costs, dated June 2013 (C-0779).

²³ Barsallo 2 ¶ 6.

²⁴ Memorandum No. 4243-LEG-F.J.PREV from the Legal Division of the Comptroller General of the Republic to the Director of General Audits of the Comptroller General of the Republic dated 26 Jun. 2014 (C-0737).

²⁵ *Id.*

²⁶ Memorandum No. 3247/2014-DMYSC-R.P. from the Accounting Director of the Comptroller General of the Republic to the Economic Director of the Comptroller General dated 05 Jun. 2014 (C-0751).

Translation

pertained to issues that needed to be addressed by MINSA, such as the resolution of financing issues,²⁷ explanations as to why certain information was not included in the request for proposals,²⁸ resolution of differences in the CNOs between MINSA and the Comptroller General's Office with respect to interest on arrears,²⁹ provision of documentation that MINSA was supposed to deliver to the Comptroller General's Office regarding the problems with the Kuna Yala Indigenous Region,³⁰ and identification of the events considered by MINSA as necessitating the modifications to and extensions of the contract.³¹

17. Similarly, the comments by the Comptroller General's Office on Change Order No. 4 of the Río Sereno Contract pertained to the absence of signatures by MINSA officials,³² as well as a series of additional objections that could have been dealt with only by MINSA, including objections to the methodology used for the calculation of the financing cost,³³ to MINSA's justifications for extending the contract,³⁴ to delays caused by a series of inter-institutional administrative procedures,³⁵ to a poorly drafted change order,³⁶ and to the failure to provide budget items.³⁷ Again, none of these issues could have been resolved by the Omega Consortium.

²⁷ Letter No. 3340-2014-DFG-UCEF from the Comptroller General of the Republic to the Ministry of Health (C-0685) # 1.

²⁸ *Id* #2.

²⁹ *Id* #4.

³⁰ *Id* #6.

³¹ *Id* #7.

³² Evaluation report of Change Order No. 4 issued by the Comptroller General of the Republic dated 10 Jun. 2014 (C-0687) # 4-6.

³³ Letter No. 3081-2014-DFG-UCEF from the Comptroller General of the Republic to the Ministry of Health dated 10 Jul. 2014 (C-0686). Since February 2012, MINSA had computation and support conducted with BAC/BBVA.

³⁴ *Id*.

³⁵ Evaluation report of Change Order No. 4 issued by the Comptroller General of the Republic dated 10 Jun. 2014 (C-0687) # 1.

³⁶ *Id* #2.

³⁷ *Id* #3.

Translation

18. Change Order No. 4 of the Puerto Caimito Contract was the object of similar observations from the Comptroller General's Office, including the failure by MINSA to provide budget items,³⁸ errors in the preparation of the change order,³⁹ letters from MINSA lacking signatures,⁴⁰ a lack of supporting documentation for the change orders by the DIS (*i.e.*, MINSA),⁴¹ the absence of legal and technical justifications from MINSA,⁴² and the *alleged* failure to provide certain documents.⁴³ As with the Comptroller General's previous observations, these could not be resolved by us.

19. As I explained previously, although these Change Orders for additional costs were signed by MINSA and the Omega Consortium in May 2014, they were not returned by the Comptroller General's Office to MINSA until July 2014.⁴⁴ Once back with MINSA, we tried to work with the DIS and its technical personnel so that the issues with these very necessary cost Change Orders could be resolved, re-signed and sent to the Comptroller General's Office for endorsement. Unfortunately, by that time MINSA's attitude had completely changed, communication had significantly deteriorated and, therefore, I recall we had to wait until October 2014⁴⁵ for MINSA to agree to sign these amended Change Orders that had originally been signed in May 2014. There were

³⁸ Memorandum No. 1480-2014-DAEF from the Economic Director of the Comptroller General of the Republic to the Legal Director of the Comptroller General of the Republic dated 5 Jun. 2014 (C-0750) #1, Memorandum No. 3702-2014-DMySC-R.P. from the Accounting Director of the Comptroller General of the Republic to the Legal Director dated 17 Jun. 2014 (C-0739) #2-3.

³⁹ Memorandum No. 1480-2014-DAEF from the Economic Director of the Comptroller General of the Republic to the Legal Director of the Comptroller General of the Republic dated 5 Jun. 2014 (C-0750) #2.

⁴⁰ *Id* #5.

⁴¹ *Id* #3.

⁴² Letter No. 695-15-LEG-F.J.PREV. from the Comptroller General of the Republic to the Ministry of Health dated 17 Apr. 2015 (C-0176) #2-3.

⁴³ *Id* #4-6.

⁴⁴ *Supra* ¶ 15.

⁴⁵ Draft of Addendum No. 3 of Kuna Yala, undated (C-0780); Draft of Addendum No. 4 of Puerto Caimito, undated (C-0781); Draft of Addendum No. 4 of Rio Sereno, undated (C-0782).

Translation

several versions of these Change Orders and throughout all of that time, both my opinion and that of the Omega Consortium was that MINSA was not working to resolve the matter of the cost Change Orders; rather it was simply making excuses for delaying and preventing us from being able to progress with the project and collect what MINSA owed us. However, as we wanted to continue to make progress and to finalize the projects, we complied with everything that MINSA required of us to get the Change Orders signed and submitted to the Comptroller General's Office, which ultimately occurred in December 2014.⁴⁶ However, the Comptroller General's Office still did not grant the requested endorsements and eventually they returned the Change Orders to MINSA once again. By that time we had begun to feel that the Comptroller General's Office was already mistreating the Omega Consortium with respect to all of our Projects, something we later confirmed when [REDACTED]

[REDACTED]

[REDACTED]⁴⁷ Sadly, all of our efforts to complete the projects were in vain.

20. Now, it is my understanding that Panama has acknowledged that it took "some" time to review the Change Orders.⁴⁸ I want to clarify that it was not just "some" time, but rather a truly substantial period of time. And, in fact, as I commented previously, most of the Change Orders were *never* approved. I have also seen that Panama has said that the Comptroller General's Office, within its general responsibilities, is responsible for finding and correcting errors in change orders that have been presented to it.⁴⁹ While this is correct, the problem here was that the Comptroller General's review of our Change Orders related, almost exclusively, to corrections that were MINSA's

⁴⁶ Results of SCAFID for Costs Addendum of Puerto Caimito, dated 3 Dec. 2014 (C-0783); Results of SCAFID for Costs Addendum of Rio Sereno, dated 3 Dec. 2014 (C-0784).

⁴⁷ [REDACTED]

⁴⁸ Panama's Reply ¶ 246.

⁴⁹ Panama's Reply ¶ 244.

Translation

responsibility. This meant that we could do nothing to correct the situation, preventing us from making progress while two Panamanian Government Agencies caused delay after delay.

21. I understand that Panama has also argued that one of the reasons why the Omega Consortium did not quickly obtain approval for the Change Orders in the MINSA CAPSI Contracts was that all of the pending Change Orders contained a cost increase.⁵⁰ In my opinion, this is simply an unjustified excuse. In the three MINSA CAPSI projects, we were requested by MINSA to perform additional work, and we complied with those requests and incurred expenses. However, as of May 2014, we had not been reimbursed for the work required by those additional requests, despite the fact they had been approved by MINSA.⁵¹ For this reason the cost increases were incorporated into Change Orders No. 3 for Kuna Yala, No. 4 for Rio Sereno and No. 4 for Puerto Caimito.⁵² MINSA, the owner of the projects, was in agreement with the cost increases and, in fact, *signed* the Change Orders in May 2014.⁵³ And although the Comptroller General's Office is responsible for checking the supporting information for such change orders, this does not justify the extremely long delays and, in the end, the failure to endorse our Change Orders for the MINSA projects that occurred after Mr. Varela was elected and assumed office. As I explained previously, in my opinion, the delay in approving these Change Orders was due to strictly political considerations.⁵⁴

22. I also understand that Panama is saying that MINSA was working with the Omega

⁵⁰ Panama's Reply ¶ 246.

⁵¹ Addendum No. 3 to Contract 085 (2011) dated 2 Aug. 2013 (R-0031), p. 8 (indicating that "[s]ince the time extension recognized under this Addendum No. 3 was not for causes attributable to THE CONTRACTOR, the costs incurred by reason of the time extension shall be assumed by THE STATE, and shall be determined in a subsequent Addendum").

⁵² Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2), Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171), Addendum No. 3 to Contract No. 083 (2011) dated 26 Dec. 2014 (C-0107).

⁵³ Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2), Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171), Addendum No. 3 to Contract No. 083 (2011) dated 26 Dec. 2014 (C-0107).

⁵⁴ [REDACTED]

Translation

Consortium, because the change orders for equipment were finalized. These were Change Orders No. 5 of Rio Sereno (which ended up being number 4, because the original number 4 for costs of May 2014 was never endorsed), No. 5 of Puerto Caimito (which ended up being number 4, because the original number 4 for costs of May 2014 was never endorsed), and No. 4 of Kuna Yala (which ended up being number 3 of Kuna Yala, because the original number 3 for costs of May 2014 was never endorsed).⁵⁵ As I mentioned in my previous statement, these Change Orders were signed by the Omega Consortium with the sole intention of showing our good faith and our intention to continue to develop the MINSA projects.⁵⁶ In my opinion, the only reason MINSA decided to sign these Change Orders was to pretend that it was in some way working with the Omega Consortium and keeping a line of communication open. Indeed, it is telling that these three Change Orders are related only to equipment changes, and thus did not extend the validity of the contracts or impact costs, and as such their approvals did not change that fact that we had to continue working without being able to obtain payment on most of our CNOs. In addition, it is my understanding that, under the rules of the Comptroller General's Office, these Change Orders did not have to be endorsed, yet both MINSA and the Comptroller General chose to subject us to this process anyway.⁵⁷

23. *Third*, that the attitude of MINSA and the Comptroller General's Office in relation to the Omega Consortium notably changed when President Varela was elected and took office is evident from the fact that the payment applications for the MINSA CAPSI contracts that were not endorsed by the Comptroller General. During the previous administration, we received payment for CNO Nos.

⁵⁵ Barsallo 2 ¶ 28.

⁵⁶ López 1 ¶ 110.

⁵⁷ Manual of Procedures for the Control of Public Works, Fourth Edition, Section C.4.G. #25, dated May 2013 (C-0785) ("Any account support involving activities that do not change the cost of the contract will proceed to authenticate such activities if they are formalized through a change order formally signed by the entity and will not need an Addendum").

Translation

1-15 corresponding to the Rio Sereno Contract,⁵⁸ CNO Nos. 1-19 corresponding to the Puerto Caimito Contract,⁵⁹ and CNO Nos. 1-20, 22, 23 and 24 corresponding to the Kuna Yala Contract.⁶⁰ This unfortunately changed during Mr. Varela's administration, when we generally stopped receiving payments. I would like to make a clarification with respect to CNO Nos. 22-24. Although these CNOs were endorsed between October and November 2014, this happened *after* the expiration of those same CNOs had already occurred in September 2014.⁶¹ To be able to collect payment under these CNOs, Banco BAC Credomatic ("**Banco BAC**") required us to present the CNOs 90 days *before* their expiration date. Given that these CNOs had already expired, and that the Assignment Contracts⁶² between Banco BAC and the Omega Consortium had also already expired, the bank did not want to pay them. The only way that we found to collect them was to enter into a Factoring Contract⁶³ with Banco BAC. However, the consequence of the factoring was that the Omega Consortium lost [REDACTED] because of the rate of both the Factoring Contract itself and the interest rate charged in that Contract, as a result of the State's failure to pay the CNOs to Banco BAC.⁶⁵

24. It is my understanding that Panama has alleged various justifications for the

⁵⁸ McKinnon 1, Annex 1, p. 4.

⁵⁹ McKinnon 1, Annex 1, p. 12.

⁶⁰ McKinnon 1, Annex 1, p. 8.

⁶¹ Certificates of No Objection to Contract No. 83 (2011) several dates (C-0260), pp. 109, 111, 113.

⁶² Credit Assignment Contract between Omega and BBVA for the Puerto Caimito Contract, dated 9 Dec. 2011 (C-0786); Credit Assignment Contract between Omega and BBVA for the Río Sereno Contract, dated 9 Dec. 2011 (C-0787); Credit Assignment Contract between Omega and BBVA for the Kuna Yala Contract, dated 9 Dec. 2011 (C-0788); Letter from BBVA to Omega Engineering, dated 13 Nov. 2013 (C-0789) (indicating that the extension of the assignment contracts was subject to the approval of the addenda).

⁶³ Factoring is a financing contract between a banking institution or factoring agency and an individual, for which the bank or agency buys a debt due to the individual, with the bank or agency taking over its collection.

⁶⁴ The total of the CNOs was [REDACTED] and the Bank ended up charging [REDACTED] Email from Jorge Fistonich to Oscar Rivera dated 17 May 2016 (C-0941).

⁶⁵ The State finished paying the CNOs in May 2016.

Translation

Comptroller General's delay in endorsing the MINSA payment applications, including the amounts and submission dates of the requests.⁶⁶ But none of these excuses justifies the actions of the Comptroller General's Office. *First*, although the amounts of the requests were [REDACTED], this does not explain why the Comptroller General's Office, with the exception of CNO No. 15 for Rio Sereno, and CNO Nos. 22-24 for Kuna Yala, never endorsed the payment applications for the Omega Consortium's MINSA CAPSI projects. The fact that the amount was high, and that this required further scrutiny, does not justify the fact that, *for an entire year*,⁶⁷ the Comptroller General's Office only endorsed *one* payment application in excess of [REDACTED]. This is plainly unreasonable. At this rate, and according to Panama's twisted logic, the Omega Consortium would have been forced to wait *nine years* for the nine payment applications that exceeded [REDACTED] to be endorsed.⁶⁸ Nine years of waiting is in no way a reasonable period of time for a contractor to wait when they need to continue with public works projects. Indeed, quite frankly, even a year of waiting is unreasonable.⁶⁹ *Second*, the fact that the Omega Consortium presented various payment applications on the same day in October 2014⁷⁰ should also not have constituted a reason for failing to endorse them. The fact that various payment applications were submitted on the same day simply means that they would have been endorsed one at a time, within a reasonable period of time. Thus, while some delay might have been expected, this in no way justifies the fact that, with the exception

⁶⁶ Panama's Reply ¶ 249, 251.

⁶⁷ Panama's Reply ¶ 250. With respect to CNO No. 15 of Rio Sereno, Panama has said that "the payment request was endorsed in favor of the Omega Consortium and paid on 26 Mar. 2014, a year after the request was submitted."

⁶⁸ Panama's Reply ¶ 249.

⁶⁹ The Omega Consortium Contracts established certain deadlines for the payments. For example in the MINSA CAPSI Contracts, as well as in the Mercado Publico de Colon Contract and the Ciudad de las Artes Contract the deadline was thirty working days. Contract No. 077 (2011) dated 22 Sep. 2011 (C-0028 resubmitted) at 34-35; Contract No. 083 (2011) dated 22 Sep. 2011 (C-0030 resubmitted) at 33-34; Contract No. 085 (2011) dated 22 Sep. 2011 (C-0031 resubmitted) at 33-3; Contract No. 093-12 dated 6 Jul. 2012 (C-0042 resubmitted) at 11. In the case of the La Chorrera Contract, the Municipality of Colon, and the Municipality of Panama the deadline was ninety calendar days. Contract No. 150/2012 dated 22 Nov. 2012 (C-0048 resubmitted) at 3; Contract No. 01-13 dated 24 Jan. 2013 (C-0051 resubmitted) at 5; Contract No. 857-2013 dated 12 Sep. 2013 (C-0056 resubmitted) at 2.

⁷⁰ Panama's Reply ¶ 251; Barsallo 2 ¶ 24.

Translation

of CNO Nos. 15 for Rio Sereno, and 22 to 24 for Kuna Yala, none of these payment applications were ever endorsed. *Third*, it is important to note that MINSA owed us at least [REDACTED] in pending payment applications and that CNO No. 15 thus only represented a mere 10 percent of that amount. The fact that CNO No. 15 was submitted in April 2014⁷¹ and was only paid a year later⁷² shows just how unworkable the situation was for us. *Fourth*, the only reason various accounts were submitted together was to facilitate the Comptroller General's review and signature process.⁷³ In addition, many of the "requests for payments" were not new requests, but rather were corrections to requests that we had previously presented to the Comptroller General and that we had been requested to amend. This further minimizes any justification for delay, and demonstrates that the failure to endorse was part of plan to harm the Omega Consortium.

25. The Comptroller General's Office also made-up excuses for refusing to endorse CNO No. 20 for the Puerto Caimito Contract. It is my understanding that Panama is saying that that CNO was rejected because it had expired by the time it was submitted for approval by the Comptroller General's Office,⁷⁴ but this is misleading at best. When the Omega Consortium submitted all the required documentation to obtain the Comptroller General's endorsement of CNO No. 20, the CNO *had not* expired. However, as I recall there were such significant delays both within the MINSA and the Comptroller General's Office that the CNO expired *during the endorsement process*.

26. It is also correct to say that the Comptroller General's Office proposed that a new document be prepared so that we could collect payment for the expired CNO. But the reality was that preparing the new documentation would have taken a lot of time and the Omega Consortium was simply not in a position to wait. In addition, the Ministry of Economy and Finance ("MEF") had, in

⁷¹ McKinnon 1, Annex 1, p. 4.

⁷² Certificates of No Objection for Contract No. 077, various dates (C-0252) at 16.

⁷³ Email between Leopoldo Vega and MINSA staff, dated 29 Sep. 2014 (C-0790).

⁷⁴ Panama's Reply ¶ 254.

Translation

any event, confirmed that the Comptroller General's Office had to endorse all the expired CNOs (which included CNO No. 20) because the MEF was paying expired CNOs. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁷⁵ But even then, and in any case, the Comptroller General's Office refused to endorse the expired CNOs, including CNO No. 20 pertaining to the Puerto Caimito contract. This lack of endorsement, of course, prevented the MEF from paying CNO No. 20, and the Omega Consortium from collecting that payment.

27. In addition, for the collection of this particular CNO, it was in any event necessary for the Comptroller General's Office to have previously endorsed Change Order No. 4 pertaining to the Puerto Caimito Contract, which was signed in May 2014, and which would have approved the increased costs and extended the period of the Contract, making it valid once again.⁷⁶ As I noted above, this never occurred.

28. In fact, as I mentioned previously, what Panama did through the Comptroller General's Office was keep us in a vicious cycle (and one which they are continuing to use to this day in this case).⁷⁷ The only way we could collect payment for the completed work was if we had valid contracts. But since Panama (through the Comptroller General's Office) would not endorse our various change orders, we did not have valid contracts (as they had expired) and therefore we could not submit payment applications for the work we had already completed. So in this way, due to the lack of approvals from the Comptroller General's Office, we were caught in a vicious cycle from which we

⁷⁵ [REDACTED]

⁷⁶ Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171).

⁷⁷ See Panama's Reply ¶ 253.

Translation

could not escape. Panama now has the audacity to say that we do not have the right to charge for some of the work we completed on the MINSA CAPSI projects because it was performed under some of the Change Orders for additional costs that were still pending approval by the Comptroller General's Office.⁷⁸ But the fact that these Change Orders were not approved was strictly the fault of Panama, and particularly the Comptroller General's Office, not the Omega Consortium. The Omega Consortium diligently completed the additional work requested by MINSA and submitted the requisite payment requests for this completed work.

29. To me, it was obvious that the Comptroller General's Office had been given orders not to approve payment applications from the Omega Consortium and, as I explained previously, sometime later I found out that [REDACTED]

[REDACTED]

[REDACTED].⁷⁹ [REDACTED]

[REDACTED].⁸⁰ Mr. Barsallo has also confirmed that these problems were the result of orders from the office of the President.⁸¹

30. Later we found out that the issue was not only the Comptroller General's Office, but MINSA's willingness to continue with our Projects. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷⁸ Panama's Reply ¶ 253.

⁷⁹ [REDACTED]

⁸⁰ *Id.*

⁸¹ WhatsApp messages between Frankie López and Nessim Barsallo dated 3 Mar. 2016 (C-0681).

⁸² [REDACTED]

Translation

[REDACTED]

[REDACTED] .⁸³ [REDACTED]

[REDACTED]

[REDACTED] However, the problem was that not all of the projects had the same characteristics, nor were they of the same size, nor did they need the same materials, nor were they located in the same place. In fact, the Rio Sereno site (like the Kuna Yala site) was in a remote part of Panama. Therefore, attempting to establish a single price for construction cost per square meter turned out to be so unrealistic that it became very difficult for us to be able to continue satisfactorily with the projects.

31. It is my understanding that Panama has said that, toward the end of 2014, the Omega Consortium was in “litigation mode.”⁸⁵ But our intention was always to completely fulfill our contracts with MINSA and with the other Agencies, so that we could continue to increase our presence and reputation in Panama.

32. Finally, I would like to clarify once again that the Omega Consortium did not abandon the MINSA CAPSI projects in October 2014. We had no option but to reduce the personnel assigned to the MINSA CAPSI projects because, as I explained previously, MINSA was not paying us and we could not continue to finance the project without any source of repayment. The physical work had to be suspended as of that date because Panama had us in a financial chokehold on all the contracts, but this absolutely does not mean that we abandoned the projects. As I explained previously, we kept our permanent personnel, some workers and security personnel, while we tried to work to move forward

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Panama’s Reply ¶ 252.

Translation

with the projects.⁸⁶ If we had abandoned the projects, we would have simply left, and we would not have continued to incur the costs to reactivate and protect the projects.⁸⁷ It is my understanding that, as evidence to justify the alleged abandonment of the project, Panama uses the justification that the Omega Consortium did not submit payment applications for some of the projects.⁸⁸ However, the reason for the lack of submission was that, since we had no valid contracts, we could not submit the payment applications. And, again, the reason we had no valid contracts was because the Comptroller General's Office *refused to endorse our change orders*. Once again, Panama is using the vicious cycle it created to harm us in an attempt to justify its deplorable actions toward the Omega Consortium.

2. *The Ciudad de las Artes Project*

33. This is a project which, in my opinion, clearly shows that the relevant Panamanian Agency's attitude toward us completely changed with the change of government. Before Mr. Varela assumed the Presidency, and when Ms. Herrera was the Director of INAC, everything was working well, although the kickoff of the project had admittedly been a little bit complicated by the issuance of two orders to proceed. As I explained in my First Witness Statement, a second order to proceed was issued as a result of the fact that the INAC had issued the first order to proceed without having in place INAC's internal regulations for the CPPs.⁸⁹ Seven months passed between the issuance of the first and second orders to proceed. During that time the Omega Consortium had to pay to the employees that it had hired for the project, and the bonds and insurance were triggered.⁹⁰ But,

⁸⁶ Email from Leopoldo Vega to Omega staff, dated 19 Dec. 2014 (C-0792); Payroll of Puerto Caimito workers, dated 16 to 28 Feb. 2015 (C-0793) (which shows 6 employees on the Puerto Caimito Project during the second part of February 2015); Email thread between Ruben Dario Carles, Frankie López and Yadelis Buendía dated 31 Mar. 2015 (C-0794).

⁸⁷ Payroll of Puerto Caimito workers, dated 16 Feb. to 1 Mar. 2015 (C-0795) (which shows 2 watchmen on the project).

⁸⁸ Panama's Reply ¶ 263.

⁸⁹ López 1 ¶ 54.

⁹⁰ López 1 ¶ 54.

Translation

importantly, before the change of administration, neither Ms. Herrera nor the team at Sosa Arquitectos (“**Sosa**”)—the project inspectors—had said that the Omega Consortium was not properly performing the project or that there was any kind of serious problem.⁹¹ In her Witness Statement, Yadelis Buendía likewise never contends that Sosa reported any serious problems before August 2014.⁹² And it is my understanding that Ms. Herrera has confirmed that as of the time she left her position in July 2014, there were “no major problems with the Omega Consortium’s performance of the work.”⁹³ However, with the change of administration, everything suddenly changed in our relationship with Sosa and the new INAC director, Ms. Núñez, for no apparent reason.

34. As I commented in my first statement, from the moment Ms. Núñez took up her new post, she had a hostile attitude toward the Omega Consortium and worked to hinder the progress of our contract. Indeed, I understand that Panama has admitted that INAC began to withhold approval of the CPPs as soon as Ms. Núñez arrived and then supposedly completed an audit.⁹⁴ These are CPP Nos. 13 to 20, of which CPPs 13 and 14 correspond to work completed prior to 1 July 2014 (*i.e.*, prior to Ms. Nunez’s arrival).⁹⁵

35. The same change of attitude began to appear with Sosa after the change of administration. Ms. Buendía, the Sosa inspector for the Ciudad de las Artes project, has made a number of erroneous criticisms and statements in her witness statement in this case, including the allegation that, beginning in August 2014, there began to be serious problems with our performance which, according to her, were caused by the alleged deterioration in the Omega Consortium’s

⁹¹ López 1 ¶ 55.

⁹² First Witness Statement of Yadelis Buendía dated 18 Nov. 2019 (“**Buendía**”) ¶ 6.

⁹³ Witness Statement of Maria Eugenia Herrera dated 13 May 2019 (“**Herrera**”) ¶ 12.

⁹⁴ Panama’s Reply ¶ 312.

⁹⁵ Contract Payment Application No. 093-12, several dates (C-0284), pp. 44-63.

Translation

relationship with its subcontractor, Arco (a Panamanian corporation).⁹⁶ This is incorrect.

36. The difficulties the Omega Consortium experienced on the Ciudad de las Artes project were not the result of any problem with our relationship with Arco since, contrary to what Ms. Buendia is claiming, the Omega Consortium did not dismiss Arco from the project.⁹⁷ Instead, in the middle of 2014 Arco informed us that it did not wish to continue to work on the Ciudad de las Artes project, because it apparently had heard that the project was going to be attacked by the Government and that problems were going to arise. We tried to persuade Arco to continue with the project, but they refused. When they confirmed that they would not continue with the project, we began a transition process with them, whereby, as they reduced their personnel, we injected Omega Consortium personnel. In September 2014 we had 64 employees working on the project who were strictly employed by the Omega Consortium.⁹⁸ It was at that time that Engineers Francisco Alejandro Feliú and José G. Mandarakas joined the project.

37. As I have already explained in my First Witness Statement,⁹⁹ the Omega Consortium's main problem related to the Ciudad de las Artes project was INAC's failure to approve CPPs 13 to 20 so that we could be paid.¹⁰⁰ Failure to receive all of these payments and the repercussions for our cash flow affected not only us, but also our subcontractors and suppliers. However, Panama, through its witness, Ms. Buendía,¹⁰¹ has said that a temporary cash flow interruption should not have been a problem for the Omega Consortium because the Consortium was over-funded as a result of the

⁹⁶ Buendía ¶ 7.

⁹⁷ Buendía ¶ 7.

⁹⁸ Biweekly payroll of Ciudad de las Artes, dated 1-15 of September 2014 (C-0796); Biweekly payroll of Ciudad de las Artes, dated 27 Oct. to 9 Nov. 2014 (C-0797).

⁹⁹ López 1 ¶¶ 119, 122.

¹⁰⁰ Panama's Reply ¶ 312.

¹⁰¹ Buendía ¶ 20; Panama's Reply ¶ 329.

Translation

advance payment it had received. In my opinion, Ms. Buendía's statement does not reflect reality and is incorrect. In the first place, and as I explained previously,¹⁰² since the middle of 2014 *all* of the Panamanian Agencies with which we had contracts *and* the Comptroller General's Office began to delay payment approvals, cost changes and/or time extensions, which put us in a financial chokehold. While we could likely have handled a temporary cash flow interruption on one, or maybe two, of our projects, a complete cessation of cash flow on all of our project simultaneously was a different matter entirely. Moreover, while a suspension of cash flow for a reasonable amount of time that did not impact all of our projects could have been anticipated, the much more serious, coordinated campaign of harassment that happened to us could *never* have been anticipated. *Second*, the claim that the Omega Consortium was over-funded due to the advance payment is false. It is important to note that the contracts of the projects do not contain unit prices. Each project has separate activities, which many times are altered at the request of the owner of the facility, which in turn increases the associated costs of a given project. Further, as I detailed in my First Witness Statement,¹⁰³ this project in particular had two orders to proceed. This meant that the start date of the Ciudad de las Artes Project was delayed by seven months, during which period we had had to start spending money without having financing for the project. As such, we did not have a way to bill and collect the many costs that we incurred on this project between the issuance of the first and second orders to proceed. It is for this reason that, simply taking into account only the payment of the advance and comparing it with the progress of the work to determine whether the contractor had been "over funded" would not truly represent the expenses actually incurred by the contractor. *Third*, I understand that under the Ciudad de las Artes Contract, the INAC was obligated to make both an advance payment at the beginning of the Project, and also to make subsequent performance payments

¹⁰² *Supra* ¶ 8.

¹⁰³ López 1 ¶ 54

Translation

for the work completed by us during the course of the Project.¹⁰⁴ But the latter was an obligation which, in fact, the INAC violated.

38. It is my understanding that Ms. Buendía also alleges that, as part of its contractual obligations, Sosa had to ensure that the Omega Consortium was complying with its obligations as stated in the Ciudad de las Artes Contract.¹⁰⁵ However, that in no way justifies the number of letters sent by Sosa in which it purported to have conducted a legal analysis of an alleged contractual breach committed by the Omega Consortium. It is one thing is to simply check whether a contractor is complying with its contract; it is a very different thing to conduct a legal analysis of the termination clause of a contract to then make a recommendation to the INAC based on that legal analysis.

39. It is also my understanding that Ms. Buendía has said that Sosa did not stop attending the Ciudad de las Artes Project meetings with INAC, but I maintain what I said in my previous Witness Statement.¹⁰⁶ There were two meetings with INAC which Sosa did not attend, namely the initial meeting between the Omega Consortium and the new INAC administration,¹⁰⁷ and a second meeting on 23 October 2014.¹⁰⁸ Considering that INAC was not being cooperative with the project, it particularly caught my attention that Sosa was not at these meetings, which were extremely important, not only for the Omega Consortium but also for the project in general. However, Sosa did attend the meetings with just the Omega Consortium, and in fact it tripled the number of staff who were going to our weekly meetings. Since Sosa was the eyes of the INAC, and given the lack of cooperation from the INAC, this was extremely curious to me.

¹⁰⁴ Contract No. 093-12 dated 6 Jul. 2012 (C-0042), clauses 6, 35.

¹⁰⁵ Buendía ¶¶ 12-13.

¹⁰⁶ López 1 ¶ 128.

¹⁰⁷ Email between Frankie Lopez, Mariana Nuñez y Luis Pacheco dated 17 Sept. 2014 (C-0818).

¹⁰⁸ Email Chain between Frankie Lopez, Luis Pacheco, Mariana Nuñez y Melva de Pimento dated 20 Nov. 2014 (C-0704).

Translation

40. On the other hand, I understand that Panama, through its witness Ms. Buendía, has said that the Omega Consortium acknowledged Sosa's criticisms of the Project and worked together with them to prepare a recovery plan in September 2014.¹⁰⁹ As I explained in my First Witness Statement,¹¹⁰ before July 2014, the communication exchanges with Sosa were friendly and did not cover any type of serious complaints or claims against the Omega Consortium. However, this drastically changed with Panama's change of administration. In an attempt to rescue the relationship with Sosa, the Omega Consortium prepared a "recovery plan." In the construction industry, a recovery plan is a plan of action or work plan that, *without identifying responsibilities* for the delays to a project, creates a plan for handling various tasks and matters in a construction project. Within this framework, the Omega Consortium sent Sosa a letter with a work plan,¹¹¹ which included two attachments with time impact schedules¹¹² on which the Omega Consortium never received any sort of comment or response. In short, while the Omega Consortium was trying its best to complete the project during the Varela Presidency, Sosa was not interested in working cooperatively with us anymore.

41. To make matters worse, a short while later the INAC informed us that it was evaluating the legality of our CPPs.¹¹³ This gave us the impression that the INAC was not going to pay us for all of the work already performed or for all the costs we had already incurred. As a result, without a payment commitment from the project's owner, we could not hire personnel and begin to work on and incur new expenses. In addition, the contract was expiring in January and INAC was not showing

¹⁰⁹ Buendía ¶ 10.

¹¹⁰ López I ¶¶ 55, 129.

¹¹¹ Letter from Omega to Sosa dated 5 Sep. 2014 (R-0045).

¹¹² Letter from Omega to Sosa dated 5 Sep. 2014 (R-0045); Annexes C and D correspond to Letter Sosa-04-A-2014, undated (C-0798). A time impact schedule is a method used by contractors to determine the extent of the impact of potential delays in the construction process.

¹¹³ Letter DG/149 from INAC to the Omega Consortium dated 23 Oct. 2014 (C-0074).

Translation

any indication that it was going to sign a change order with us to extend the contract, meaning that the payments for the work generated by the recovery plan were going to be stopped.

42. Now, it is my understanding that Panama is saying that the Omega Consortium was in breach of the Ciudad de las Artes Contract, and that it based that conclusion on the premise that the INAC became aware of the “low progress” of the Ciudad de las Artes project when it conducted an *internal and informal review* of the project in the middle of 2014,¹¹⁴ (in other words, at the same time as the change of administration).¹¹⁵ And, based solely on that internal and informal audit, INAC decided to withhold payments to the Omega Consortium relating to the Ciudad de las Artes project.¹¹⁶ In my opinion, this demonstrates the extreme level of arbitrariness with which the INAC handled the Ciudad de las Artes Project to the detriment of the Omega Consortium. This is evidenced by the fact that I was *never* personally informed, nor was the Omega Consortium *ever* informed, about this alleged internal and informal review conducted by the INAC after Mr. Varela was elected. In fact, I am informed that neither Panama’s Reply, nor Ms. Buendía’s Witness Statement, is accompanied by any documents confirming that this review actually occurred.¹¹⁷ In addition to that alleged internal review, it is my understanding that Panama claims that an audit was conducted at the end of December 2014. I have no knowledge of that audit or its results, since we were never informed about it and I have seen no documentation in that regard either. In addition I must note that it is curious that while the Omega Consortium was not informed about any of these reviews or audits, Sosa appears to have been involved with at least some of them.

¹¹⁴ Compare Panama’s Reply ¶ 312 (“Based on the concerns that arose from the internal audit of INAC...”) and *Id.* ¶ 311 (“In December 2014, INAC asked the Comptroller General of the Republic to conduct a **formal** ‘audit’ of the Project”).

¹¹⁵ Panama’s Reply ¶¶ 309-310.

¹¹⁶ Panama’s Reply ¶ 312; Buendía ¶ 18.

¹¹⁷ Buendía ¶¶ 18-19; Panama’s Reply ¶¶ 309-310.

Translation

43. When one adds this to all of the payment problems we were experiencing, it was clear to us that in late 2014 the INAC had no interest in signing the change order to extend the contract term so that we could complete the Ciudad de las Artes project. The Omega Consortium originally submitted its request for a time extension on 15 July 2014¹¹⁸ and the INAC did not respond to our request for two months.¹¹⁹ When it did respond, the INAC rejected some of the additional costs requested by the Omega Consortium related to new elevators for the project, the increase in size of the construction areas, and the operational expenses submitted by Omega. This meant that the Omega Consortium was not going to be reimbursed for the aforementioned expenses.¹²⁰ With respect to the time extension request, the INAC asked the Omega Consortium to submit to them our daily operational costs so that they could review them.¹²¹ The Omega Consortium responded that it would address the matter of the daily operating costs in a subsequent change order¹²² because we did not want to delay the change order for extension of the contract, and because requesting additional operating costs was going to require authorization from the MEF. However, the only response we received from the INAC was that they were going to conduct a “legal assessment” of the change order, but without any type of commitment.¹²³ Subsequently, in a meeting held in January 2015, which was attended by representatives of INAC, the MEF, the Ministry of the Presidency, ASSA, IGRA (the Omega Consortium’s Counsel), Morgan & Morgan (Credit Suisse’s Counsel), and the Omega Consortium, Mr. Saltarin was introduced as an attorney representing the Office of the President. I understood that Mr. Saltarin was there to represent the interests of the Office of the

¹¹⁸ Letter No. INAC-N16-2014 from Omega to INAC dated 16 Oct. 2014 (C-0597).

¹¹⁹ Letter DG/107 from INAC to Consorcio Omega dated 9 Sep. 2014 (C-0073).

¹²⁰ Letter DG/107 from INAC to Consorcio Omega dated 9 Sep. 2014 (C-0073).

¹²¹ Letter DG/107 from INAC to Consorcio Omega dated 9 Sep. 2014 (C-0073).

¹²² Letter No. INAC-N16-2014 from Omega to INAC dated 16 Oct. 2014 (C-0597).

¹²³ Letter DG/149 from INAC to Consorcio Omega dated 23 Oct. 2014 (C-0074).

Translation

Presidency in relation to the Ciudad de las Artes Project. [REDACTED]

[REDACTED].¹²⁴ That is when we realized that, in addition to the INAC and the Comptroller General's Office, the Office of the President also wanted to impede the progress of our projects.

44. I would also like to clarify that the Omega Consortium did not abandon the Ciudad de las Artes project at the end of November 2014, as Panama has stated.¹²⁵ As I explained previously, the INAC's failure to pay us for the work we had already completed meant that we had had to stop the physical work on the projects, which is not at all the same thing as abandoning a project.¹²⁶ This has been confirmed by Ms. Buendía, who noted in her Witness Statement that the construction work on the project was suspended in November 2014 but that administrative and security personnel remained on the project after that date.¹²⁷ Thus, the Omega Consortium maintained the presence of its key personnel, as well as security personal to protect the physical integrity of the project, until the middle of 2015.¹²⁸

45. Likewise, I noticed that Panama has said that by November 2014 Omega had all the necessary permits to continue the progress of construction of the Ciudad de las Artes Project.¹²⁹ This is irrelevant. Although there were indeed valid permits, they were of no use because the INAC was not paying us, there was no budget, the change order for the extension of time that we needed was

¹²⁴ [REDACTED]

¹²⁵ Resolution No. 391-14 DG/DAJ of the INAC dated 23 Dec. 2014 (C-0044).

¹²⁶ See Email from Luis Pacheco to Frankie López dated 4 Dec. 2014 (C-0800) (reporting that in December 2014 the Omega Consortium received ANAM staff on the Ciudad de las Artes project).

¹²⁷ Buendía ¶ 8.

¹²⁸ López 1 ¶ 157.

¹²⁹ Panama's Reply ¶¶ 93-94, 339.

Translation

not signed, and the legality of the CPPs was under review by the INAC.

46. Finally, I would like to clarify that, contrary to what Ms. Buendía and Panama have said,¹³⁰ I was at all times kept informed of what was happening with the Omega Consortium projects, including the Ciudad de las Artes project, because I was the person managing the company's operations in Panama. The fact that Mr. Luis Pacheco was primarily responsible for the *day-to-day* operations of the project does not mean that I was not involved in what was happening there. As I have said previously, I was responsible for supervising and managing all of the Omega Consortium projects in Panama. And with regard to this particular project, I was *always* copied on the emails and letters, and I communicated frequently with Mr. Pacheco.

3. The La Chorrera Project

47. It is my understanding that Ms. Vielsa Rios and Panama say that the attitude of the Judiciary toward the Omega Consortium did not change when the Administration changed.¹³¹ This is not true. After July 2014, the approval by the Comptroller General's office of change orders for time extensions was considerably delayed and the Judiciary failed to comply with certain requirements needed to continue with the project.

48. *First*, with respect to the issue of Change Order No. 2, I feel obligated to clarify (again), the dates on which it was signed. Contrary to what Ms. Ríos¹³² incorrectly reiterates, Change Order No. 2 was not signed in August 2014, but rather in May 2014.¹³³ I personally signed the Change Order and presented all of the documentation necessary for it to be approved by the Comptroller

¹³⁰ Panama's Reply ¶ 324; Buendía ¶¶ 15-16.

¹³¹ Second Witness Statement of Vielsa Rios ("Rios 2") ¶ 15; First Witness Statement of Vielsa Rios ("Rios 1") ¶¶ 21-36, 38; Panama's Reply ¶ 295.

¹³² Rios 2 ¶ 11.

¹³³ Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366).

Translation

General's Office. The Change Order was *signed for the second time* in October 2014,¹³⁴ only after the Omega Consortium repeatedly sent letters to the Judiciary requesting its support so that the Change Order could be approved by the Comptroller General.¹³⁵ Finally, the Comptroller General endorsed the Change Order on 23 December 2014, seven months after it had originally been signed.

49. *Second*, Ms. Vielsa Ríos says that the Judiciary was generous to the Omega Consortium by approving the extensions of time. Respectfully, this does not make any sense. As I established in my First Witness Statement, the Judiciary was not “generous” with the Omega Consortium in this regard. Panama itself has recognized that the test to determine whether or not to grant an extension of time is “whether the contractor has demonstrated that the delays [of the Project] have been caused by the owner [of the Project] or by third parties for which the contractor is not responsible.”¹³⁶ This is why the Judiciary was not “generous” with the Omega Consortium. Instead when it agreed to extensions of time, it did so for the simple reason that it had caused delays to the La Chorrera Project. The decision as to whether to grant an extension of time requested in a change orders has nothing to do with “generosity.”

50. *Third*, as I have already explained, the Omega Consortium did not abandon any of its projects in December 2014, including the La Chorrera Project. In December 2014 the Omega Consortium informed the Judiciary that it would be in recess until 12 January 2015, and that it would then return.¹³⁷ The Omega Consortium returned to the project as stated, and during the period between January and February 2015, we had both Grupo CHK Ingeniería S.A., an electrical subcontractor, and

¹³⁴ Addendum No. 2 to Contract 150-2012 dated 24 Oct. 2014 (R-0008).

¹³⁵ Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366) (“[W]e inform you that due to the lack of endorsement of Addendum No. 2, by extension of time of 260 calendar days, which has been evaluated and approved by the Judicial Body since May 2014, has prevented us from processing accounts for progress of work since July 2014.”).

¹³⁶ Panama's Reply ¶ 285.

¹³⁷ Letter from the Omega Constortium to the Judiciary dated 17 Dec. 2014 (C-0367).

Translation

Omega Panama personnel working on the project. We also had security personnel at the facility. However, unfortunately, we were unable to make physical progress during that short period of time because, by then, the Omega Consortium had been placed in a chokehold from a cash flow perspective (as I discussed above), and the only check that Omega Panama collected for this project during the Varela administration ended up with the Panamanian Social Security Fund. This explains the absence of payment applications by the Omega Consortium after 31 December 2014 – although we were working in January and February 2015, we were unable to meet additional progress milestones. However, that no payment applications were submitted from this date in no way supports the theory that the Omega Consortium *abandoned* the Project.¹³⁸ If the Omega Consortium had abandoned the Project, it would not have bothered to answer¹³⁹ the letter that the Judiciary sent to regarding its intent to terminate the contract.¹⁴⁰ In that response, we explained all of the points that had to be dealt with by the Judiciary in order for the La Chorrera project to be successful,¹⁴¹ proving that we were intent on completing the project, not abandoning it. Likewise, the Omega Consortium would not have bothered continuing to negotiate with the Judiciary over signature of Change Order No. 3 to the La Chorrera Contract if it intended to abandon the project. That we did so proves we *did not* abandon it.

51. *Fourth*, it is my understanding that Ms. Ríos has said that Change Order No. 3 to the La Chorrera Contract provided the Omega Consortium with enough time to complete construction of the project, and that with this Change Order, we could have collected the pending payments that we were claiming.¹⁴² That is wrong. This contract was originally for 540 days, and with this Change

¹³⁸ Ríos 2 ¶ 13.

¹³⁹ Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated 18 Mar. 2015 (R-0015 resubmitted).

¹⁴⁰ Letter N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated 11 Mar. 2015 (R-0013).

¹⁴¹ Response letter from N. P.C.S.J./604/2015 of the Authority of the Judiciary to Omega dated 18 Mar. 2015 (R-0015).

¹⁴² Ríos 2 ¶ 20.

Translation

Order we were going to be granted a third extension of time doubling that period. The doubling of the number of days obviously involved a related series of costs and expenses for the Omega Consortium that had not originally been contemplated, meaning that the Omega Consortium would have to continue disbursing money that it did not have because the Panamanian Government was not paying the Omega Consortium in any of its projects.¹⁴³ In addition to that, and although Ms. Ríos says that with approval of the Change Order we could have collected the pending payments, the reality is that the Omega Consortium had already, at that time, been placed in a situation where it was unable to reactivate its operation. As I explained in my First Witness Statement, by that time the Government owed the Omega Consortium more than [REDACTED] for work that it had performed, which is why Omega understandably lacked liquidity.¹⁴⁴ In addition, again as I explained previously, the La Chorrera Project had many other problems that had not been solved by the Change Order including key budgetary, technical and physical issues. As such we were simply not in a position to accept a change order for a project that we knew was not going to progress because of the lack of solutions offered by the Judiciary.

52. In fact, as of today, the Judiciary has still not resolved the problematic issues that we identified and that prevented progress of the La Chorrera contract, including: (1) the lack of a set of complete, approved plans as provided in the Contract; (2) the lack of documentation that would allow us to obtain a building permit; (3) the lack of the endorsement of the Panama's National Fire Inspectorate (i.e. DINASEPT); and (4) the lack of approval of the Preliminary Design.¹⁴⁵ Ms. Ríos ignores all of this in her testimony, although it is my understanding that she had knowledge of these

¹⁴³ Email between Travelers and Frankie López dated 10 Apr. 2014 (C-0801) (demonstrating that extending bonds generated costs for Omega).

¹⁴⁴ López 1 ¶ 106.

¹⁴⁵ Letter No. 366/DSG/2015 from the General Services Department to the Legal Director of the Judiciary dated 17 Apr. 2015 (R-0016).

Translation

problems because she was copied on an internal Judiciary letter discussing them. In that letter, the Judiciary recognizes that all of the previously-mentioned matters were the Judiciary's responsibility, that they had not been resolved as of that date (17 April 2015), and that our request to suspend the termination process was well-founded.¹⁴⁶ And, once again, these issues had not been resolved by the Change Order, which meant that they were going to cause the project to be shut down once again.

53. It is my understanding that Ms. Ríos has also said that “there were almost [REDACTED] left for the project, and that it was not necessary to increase the cost of the Contract at that time.”¹⁴⁷ But that [REDACTED] figure was not enough for the Omega Consortium, because we had already incurred significant costs to maintain the project's progress, and these costs already *exceeded* Ms. Ríos' [REDACTED] figure. At that time, the Panamanian state had debts to the Omega Consortium of more than [REDACTED], and the Judiciary did not want to recognize the costs involved with Change Order No. 3, nor had any of the key budgetary, technical or physical issues of the project been resolved by the Judiciary.¹⁴⁸ It was therefore not only impossible for us to continue with the project, but also for the surety to renew the bonds. The surety could not renew our bonds if we did not have cash flow because, at the end of the day, if the surety renewed the bonds it was making a commitment with the Government notwithstanding that the Omega Consortium had no way of executing the projects. At that point in time, the surety was not looking at every project individually, but at the entire operation of the Omega Consortium, which was paralyzed because of the lack of payment from the Panamanian Government on all projects.

54. *Fifth*, with respect to the payments disbursed after July 2014, the truth is that the payment for the work from July 2014 to December 2014 in the amount of [REDACTED] did not

¹⁴⁶ *Id.*

¹⁴⁷ Ríos 2 ¶ 20.

¹⁴⁸ López 1 ¶ 103.

Translation

reach the Omega Consortium's accounts.¹⁴⁹ This was due to another vicious cycle that Panama created. To be able to collect for the work they have performed, contractors have to have a Certificate of Good Standing from the Ministry of Economy and Finance, the Social Security Fund, and each project's Municipality. This Certificate is given to contractors when they do not have any debt to Panamanian social security. In the case of the Omega Consortium, it was not collecting on its Contracts (as I have already discussed), and, as a result, it began to get into debt with the Social Security Fund for all of its projects. So the consortium lost its Certificate of Good Standing and therefore the possibility of collecting for the work performed on its projects. I personally tried to agree upon a payment plan with the Social Security Fund, but it refused.¹⁵⁰ Consequently, Panama left us with no other option than to let the payment for the La Chorrera Contract go directly into the Panamanian coffers for the payment of our Social Security debt. It bears reiterating that, by this time, the Omega Consortium had: a declaration of default by the State on the Ciudad de las Artes project, two frozen bank accounts because of the investigation into Justice Moncada Luna, claims from suppliers as a result of the investigation, and a complete lack of payment on practically all of its Contracts.

55. In addition, it is my understanding that it has been said in this case, or at least it has been insinuated, that Mr. Roberto Samaniego supposedly worked as a technical engineer liaison between the Judiciary and the Omega Consortium on the La Chorrera project.¹⁵¹ I do not have any recollection of Mr. Samaniego working on this project with the Judiciary or otherwise. I do know that

¹⁴⁹ Ríos 2 ¶ 22.

¹⁵⁰ The Directorate General of Income ("DGI") did not allow the Omega Consortium to use a credit it had with the DGI of at least ██████████ to pay the debt of ██████████ that the DGI said the Omega Consortium had. See E-Tax Panama Account Statement for Omega Engineering, Inc, dated 30 Oct. 2015 (C-0854). Thus, the check for ██████████ from the La Chorrera Contract was used as follows: ██████████ went to the Social Security Administration, ██████████ went to the Panamanian National Treasury, and ██████████ were retained by the MEF due to a precautionary measure in a civil law case. Check No. 14952 from the MEF to SSA, dated 30 Oct. 2015 (C-0855); Check No. 14972 from the MEF to the National Treasury, dated 30 Oct. 2015 (C-0856); Letter No. 900-01-520-DT-DGP, from the MEF dated 12 Jun. 2015 (C-0852)

¹⁵¹ Roy Pollit Report ("Roy Pollit"), p. 24.

Translation

he was an engineer who worked with the Corcione Group, which was a contractor in Panama that I understand was working on private projects for the most part.

56. Finally, I would like to clarify what was said in my last statement with respect to how the negotiation of Change Order No. 3 for the La Chorrera Project terminated. When I said “[a]lthough already at the end of 2015 it appeared that the Judiciary was finally coming around to our position”¹⁵² I was referring to the fact that the Judiciary had begun to understand the problems that the Omega Consortium had with the Project, which were not our responsibility. However, despite beginning to understand that we needed the Judiciary to resolve budgetary, physical and technical issues, *at no time did it take any action and resolve them*, which made it impossible for us to formalize the Change Order.

4. *The Municipality of Panama Project*

57. To begin, as I explained in my first statement, I would like to reiterate that I never had any contact with Mr. Eric Díaz, witness for Panama, because he was not working for the Municipality of Panama in those days. It is my understanding that he started working with the Municipality in August 2016, so I do not understand how he could have knowledge about what happened with our project. As a matter of fact, what both Panama and Mr. Díaz say is simply incorrect.

58. In this project, we were likewise affected by a change in attitude toward the Omega Consortium by the Municipality and the Comptroller General’s Office. Contrary to what Panama has said, the two Los Mercados projects were progressing very well initially. By August 2014, Juan Díaz had advanced to some 54% completion and Pacora some 73%.¹⁵³ Although it is true that in April 2014, Mr. Johnathan Rodríguez of the Municipality of Panama identified some problems with the

¹⁵² López 1 ¶ 105.

¹⁵³ Report for Project DEYD-1220-79-14, undated (C-0695).

Translation

two markets,¹⁵⁴ these were resolved by the Omega Consortium in less than a month, when the Municipality recognized that there had been progress in the work and that they had seen it.¹⁵⁵ We continued to work with the Municipality and Mr. Rodriguez before Mr. Varela came to power, without any sort of complication,¹⁵⁶ other than a few issues such as the Ministry of Housing's delay in issuing the Certificate of Soil Use. The situation was such that in May 2014 architect María Serracín of the Municipality of Panama informed the Director of Work and Construction that a Change Order for the extension of time of the Contract was going to be issued.¹⁵⁷ [REDACTED]

[REDACTED]¹⁵⁸ Looking back, and taking into consideration the fact that Mr. Bandon was from the same political party as Mr. Varela (the Panameñista Party), the fact that Mr. Bandon originally refused to meet with me was an early sign that both he and his administration were against the Omega Consortium.

59. Now, it is my understanding that, according to Mr. Díaz and Panama, the Omega Consortium breached the Municipality of Panama Contract because it submitted defective designs, and that this occurred in two forms: (1) because we allegedly did not obtain the Certificate of Soil Use for the Pacora Market; and (2) because the Omega Consortium allegedly did not resolve the problem of accessibility to the site for the Juan Díaz Market.¹⁵⁹ Although I already discussed this in

¹⁵⁴ Memorandum No. 26-2014 from Jonathan Rodriguez to Juan Manuel Vazquez dated 16 Apr. 2014 (C-0561).

¹⁵⁵ Emails between Omega and the City of Panamá dated 14 May 2014 (C-0552).

¹⁵⁶ Email thread between Arnaldo Fernandez and Jonathan Rodriguez dated 30 Jun. 2014 (C-0802).

¹⁵⁷ Letter No. DEYD-1220-84-14 from María Serracin to the Director of Works and Construction dated 23 May 2014 (C-0553), Letter No. DEYD-1220-92-14 from Maria Serracin to ASSA dated 28 May 2014 (C-0554). This Change Order was finally signed in November 2014 since the Municipality of Panama was not responsive between May and November 2014. Letter from the Municipality of Panama to ASSA, dated 18 Nov. 2014 (C-0803). But it was never approved by the Comptroller General's office.

¹⁵⁸ [REDACTED]

¹⁵⁹ Second Witness Statement of Eric Diaz (“Diaz 2”) ¶¶ 7, 11; Panama’s Reply ¶¶ 207, 214.

Translation

my First Witness Statement,¹⁶⁰ I want to reiterate the reasons why Mr. Díaz and Panama are wrong.

60. First of all, with respect to the easement for the Juan Díaz Market, I would like to make it clear once again that Panama never informed us that the reason for the suspension of the project was due to the lack of an easement and the allegation the Omega Consortium had to obtain it. I have reviewed the letter regarding the suspension of the project and it explains that the purpose of the suspension was to “perform a complete analysis of the project for the compliance of terms and conditions stated in contract no 857-2013.”¹⁶¹ The alleged easement and the Omega Consortium’s alleged obligation to obtain it are not mentioned anywhere in this letter. Secondly, I understand that Mr. Díaz mentioned that we knew about the problems with the easement because I signed a document that explained it.¹⁶² I have reviewed the document and I have not found any passage in it that mentions that the Omega Consortium had to obtain this easement and that the failure to obtain it was what led to the suspension of the project. All the alleged document states is that the location of the market did not allow access to vehicle parking lots.¹⁶³

61. In addition, it is my understanding that Panama has said that we were contractually obligated to obtain this easement because the Statement of Objections stipulates that the Contractors must submit “designs and the preparation of complete construction drawings.”¹⁶⁴ But we complied with the requirement concerning submission of all of the drawings and plans,¹⁶⁵ which, in addition,

¹⁶⁰ López 1 ¶¶ 134-136, 139-143.

¹⁶¹ Letter No. S.G.-087 of the Municipality of Panama to the Omega Consortium dated 2 Sep. 2014 (C-0058 resubmitted).

¹⁶² Díaz 2 ¶ 18; Addendum No. 2 to Contract No. 857-2013 of 2014 (R-0125).

¹⁶³ Addendum No. 2 to Contract No. 857-2013 of 2014 (R-0125).

¹⁶⁴ Panama’s Reply ¶ 208; Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (R-0099), p. 32, Cap. III, Introduction.

¹⁶⁵ Summary for approval of plans, undated (C-0805).

Translation

were approved.¹⁶⁶ It is my understanding that Panama also has said that Order No. 116/1996 of the Municipality of Panama also obligated us as Contractors to obtain the easement.¹⁶⁷ I have reviewed this order for the purpose of providing this testimony and, although I am not an attorney, I disagree with what has been said by Panama. This order nowhere mentions that the Contractor must *obtain* the easement. Therefore, both Panama and Mr. Diaz are wrong again when they say that the Omega Consortium had to do so.¹⁶⁸ The Omega Consortium instead merely had to indicate the location where the easement would be, which it did, and then request certification from the Municipality,¹⁶⁹ which it also did on 18 July 2014.¹⁷⁰

62. With respect to the Certificate of Soil Use for the Pacora Market, as I mentioned in my First Witness Statement,¹⁷¹ Panama was the only party that could obtain this certificate. To be able to obtain the Certificate of Soil Use, the land had to comply with a certain zoning requirement, with which it originally did not comply. So then, it was necessary to obtain “variance” to that zoning classification. The Municipality of Panama was the only party that had jurisdiction to apply for such a change. The Omega Consortium could do nothing more than what it had already done: submit all of the documentation necessary to commence processing of the Certificate of Soil Use. This is in fact what happened with the Certificate of Soil Use for Juan Díaz, which was approved.¹⁷²

63. Panama is arguing that the Municipality of Panama did not have the authority to provide additional information or modify the information submitted by the Omega Consortium with

¹⁶⁶ Juan Diaz’s drawings, several dates (C-0806).

¹⁶⁷ Diaz 2 ¶ 13; Panama’s Reply ¶ 216.

¹⁶⁸ Diaz 2 ¶ 13.

¹⁶⁹ Summary for approval of plans, undated (C-0805).

¹⁷⁰ Summary for approval of plans, undated (C-0805).

¹⁷¹ López 1 ¶ 141.

¹⁷² Summary for approval of plans, undated (C-0805) (indicating that “the Municipality is processing this paperwork directly with the MIVI”).

Translation

the application for the Certificate of Soil Use, which supposedly shows that it was the Omega Consortium which had to obtain the Certificate.¹⁷³ However, it is my understanding that when the Ministry of Housing decided to modify the process for obtaining the certificate, it sent notice to the Municipality of Panama – not to the Omega Consortium.¹⁷⁴ The Municipality of Panama answered the Ministry of Housing and recommended that the procedure *not* be modified, but all this without giving the Omega Consortium any notice of the matter.¹⁷⁵ This shows that the only point at which the Omega Consortium could have submitted information was in relation to its only contractual obligation, which was to submit the application for the certificate, and not as concerns modifications to the procedure for obtaining the Certificate.

64. Another fact confirming that the Certificate of Soil Use had to be obtained by the Municipality of Panama is that, as Panama has recognized, most of the extension of time in the relevant Change Order (*viz.* Change Order No. 2) that we negotiated with the Municipality of Panama was agreed as a result of the delay caused by the Certificate of Soil Use.¹⁷⁶ As I explained previously, change orders for extensions of time are granted only where the owner of the facility, or a third party for which the Contractor is not responsible, have caused the delay.¹⁷⁷ In other words, the Municipality of Panama, in recognizing that 200 days of delay, also necessarily recognized *its responsibility for obtaining the Certificate of Soil Use and the delay that the lack of a Certificate caused.*

65. In my opinion, the mistreatment that the Omega Consortium received in relation to the Municipality of Panama project was strictly for political reasons. My statements regarding the

¹⁷³ Panama's Reply ¶ 211.

¹⁷⁴ Letter from the Municipality of Panama to the Ministry of Housing dated 28 Aug. 2014 (R-0102).

¹⁷⁵ Letter from the Municipality of Panama to the Ministry of Housing dated 28 Aug. 2014 (R-0102).

¹⁷⁶ Panama's Reply ¶ 225.

¹⁷⁷ *See Supra* ¶ 49.

Translation

conversation I had with Guillermo Bermudez do not in any way lack sense, as Panama has said,¹⁷⁸ and it was Mayor Blandón himself who informed me from his own mouth at a meeting he had with me that he did not want the Omega Consortium to build the Juan Díaz project. I will go into more depth on these conversations in the next section of my statement.¹⁷⁹

66. As with the other projects, this one was likewise not abandoned by the Omega Consortium. It is my understanding that the authenticity of a series of “follow ups” that I sent to the Municipality in 2015 has been called into question. For the avoidance of doubt, and as I mentioned in my previous statement, I am including with this Witness Statement evidence that the Omega Consortium continued to follow up on the project until June 2015.¹⁸⁰ As the attached documents show, Genaro Matias, an employee of the Omega Consortium, sent follow-up emails to Mr. Guillermo Bermudez from the Municipality of Panama, attaching a letter explaining all the pending issues that the Municipality of Panama had to resolve with the Mercados Perifericos Project. The last follow-up email was follow-up No. 6 dated 1 June 2015.¹⁸¹ Once again, the Omega Consortium was continuing to try to complete the projects, but Panama simply would not let us do so. The fact that this was happening on *all* of our contracts *at the same time* showed us there were decisions against the Omega Consortium coming from the very top of the Panama’s Government.

5. *The Municipality of Colón Project*

67. With regard to this project, it was also clear that the Municipality’s attitude, particularly that of Mayor Policani, had changed toward the Omega Consortium by July 2014 when President Varela took office. Unfortunately, this change of attitude manifested itself in a series of

¹⁷⁸ Panama’s Reply ¶ 229.

¹⁷⁹ *See infra* § II.B.

¹⁸⁰ Letter from the Omega Consortium to the Municipality of Panama (C-0184); Follow-up of Letter No. P010 – 2015 4 08 – 010, several dates (C-0807).

¹⁸¹ Letter from the Omega Consortium to the Municipality of Panama (C-0184); Follow-up of Letter No. P010 – 2015 4 08 – 010, several dates (C-0807).

Translation

problems that we had not had with the Municipality under the previous administration.

68. During the previous administration, the project did not experience any major problems and those that it did experience had no political subtext that I could detect. Although the beginning of the work was delayed because the approval by the Comptroller General's Office took six months, and because the temporary facilities had not been vacated by the Municipality, the Omega Consortium submitted and obtained the approval of the preliminary design, the design of the temporary facilities and the environmental impact study in 2013, and then it finished all of the design work in April 2014.¹⁸² The Municipality worked with the Omega Consortium during that time and we were able to finish all of the work referred to above. This is completely different from what happened after Mr. Varela's administration came to power; at that time the Municipality began giving us the run-around by suggesting a change to the construction site, which prevented us from beginning the physical progress of the project.

69. Our first alarm bell was when the then Mayor of Colón, Federico Policani, who was just starting his term, informed me that the Office of the President had sent him instructions to cancel the project. I met with him on several occasions, and he commented to me that the pressure that was being put on him was heavy. Mayor Policani, together with the Municipal Council of Colón, then proposed changing the construction site to a location where the municipal building had previously been located¹⁸³ and had burned down. The problem, we were told by the Municipality, was that the Municipality did not have title to this land, and without purchasing or changing the title to the land, we clearly could not build. For more than a year, the Municipality was confusing us with the excuse that the construction site was going to be changed. I believe, however – based on what Mayor Policani had told me – that the reality always was that the President's Office had ordered the municipality to

¹⁸² López 1 ¶ 62.

¹⁸³ Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated 2 Oct. 2014 (C-0178).

Translation

terminate this Omega Consortium project and the need for a site change was just an excuse to render the project unworkable. I confirmed this with Mr. Victor Almengor, one of the legal advisors of the Municipal Council of Colón, who told me that the Municipal Council and the Municipality of Colon wanted to get us off of the project. It was he himself who also informed me that President Varela, after making a presentation in Colón during the national holidays, had said that the contract that we had for the construction of the Colón Palace had to be rescinded.¹⁸⁴

70. The Municipality also ceased being cooperative and communicative after Mr. Policani took office as Mayor.¹⁸⁵ I have seen that Panama has said that the Municipality was communicative with the Omega Consortium.¹⁸⁶ But not only were these communications spaced out over a significant period of time, but, in addition, as Panama has indicated, they referred *only* to the proposed change to the location of the construction site that I just discussed. In other words, these communications show nothing more than the Municipality giving us the run-around to prevent us from being able to progress with the project.

71. With respect to the change order for the extension of time for this project (*viz.* Change Order No. 1), which we sought in June 2014,¹⁸⁷ *after* Mr. Varela's 4 May 2014 election, the Municipality never cooperated with the Omega Consortium to reach an agreement, despite our requests.¹⁸⁸ The only time we received any sort of information with respect to this Change Order No. 1 was in September 2015.¹⁸⁹ But once we responded to the Municipality's letter explaining to it

¹⁸⁴ Chat with Víctor Almengor, dated 26 Nov. 2015 (C-0808).

¹⁸⁵ Email from Ana Graciela Medina to Lic. Reyes of the Municipality of Colón, dated 14 Jul. 2015 (C-0809) (this email was never responded to).

¹⁸⁶ Panama's Reply ¶¶ 414-15.

¹⁸⁷ Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 Jun. 2015 (C-0180 resubmitted).

¹⁸⁸ Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated 5 Feb. 2014 (C-0179).

¹⁸⁹ Letter No. AL-55/15 of the Municipality of Colón to Omega dated 2 Sep. 2015 (C-0703).

Translation

everything that the change order had to address,¹⁹⁰ the Municipality simply did not answer and abandoned the negotiations.¹⁹¹ This demonstrated to us that the Municipality never truly intended to sign a change order with the Omega Consortium. I understand that Panama is now saying that the Municipality declined to continue the negotiations because the Omega Consortium had not renewed the bonds.¹⁹² But the two reasons why we did not renew the bonds were that, *first*, the Municipality of Colon had not committed to sign the change order, and, *second*, by that moment the Omega Consortium was in a financial chokehold since the Government of Panama owed the Omega Consortium in all of its contracts.

72. With respect to the temporary facilities built by the Omega Consortium, these were finished around the beginning of 2014, and we never received any sort of criticism about them more than a year. To my surprise, and that of the rest of the Omega Consortium team, for the first time in September 2015 (*sixteen months after we had finished construction*) we received the criticism that the facilities were allegedly deficient and unsafe, and that they lacked windows. But it was the Municipality itself that had given the Omega Consortium the drawings of how they wished the facility to look,¹⁹³ so it astonished us that those types of allegation were being made. Despite the fact that now Panama is saying that those facilities are not being used as their principal Municipal offices, Panama has acknowledged that it is using them as workshops for the Municipality's maintenance personnel, as well as a place for storage. This indicates to me, then, that the facilities are not as inefficient or unsafe as Panama alleged in September 2015. If Panama really believed the facilities were unsafe, they would be putting their maintenance employees and equipment in danger.

¹⁹⁰ Letter No. P08-014 from Omega to the Municipality of Colón dated 28 Sep. 2015 (C-0610).

¹⁹¹ Panama's Reply ¶ 416.

¹⁹² Panama's Reply ¶ 417.

¹⁹³ Plans for the Temporary Facilities for the Municipality of Colón Contract, undated (C-0810).

Translation

73. In my opinion, what occurred with the Contract with the Municipality of Colón was motivated by purely political considerations and materialized through a series of actions taken by the Municipality, which, as I have explained both in my previous Witness Statement and here, prevented the Omega Consortium from being able to execute the project in a normal manner. In fact, as I have seen that Panama has now recognized,¹⁹⁴ this project was awarded to a new Contractor, which is building the Municipal Palace at the very same location they told the Omega Consortium it could not be built.

6. *The Public Market of Colón Project*

74. This project followed the same pattern, and ultimately suffered the same fate, as the others. Although at first the project experienced some delays, the Secretariat of the Cold Chain under the previous administration had open communication and a cooperative attitude with the Omega Consortium. But that changed with the arrival of the Varela administration in July 2014.

75. As I commented in my First Witness Statement, in December 2012 the Ministry of the Presidency (under the previous administration) issued an order of “temporary suspension of the physical work on the project” since it had not been able to evict the vendors who were on the site of the work.¹⁹⁵ After suspension of the physical construction of the project, the Omega Consortium still fully complied with the preconstruction activities, including the development of manuals and studies relevant to the Project, which the Ministry of the Presidency had requested.¹⁹⁶ During this period, we retained the necessary people in our central offices to perform the tasks involved in the parts of the project that had not been suspended. Because we never had personnel mobilized to the construction site, the personnel costs associated with this phase of the project were more than reasonable.

¹⁹⁴ Panama’s Reply ¶ 420.

¹⁹⁵ López 1 ¶ 48.

¹⁹⁶ López 1 ¶ 48.

Translation

76. The Ministry of the Presidency decided, together with the Omega Consortium, to discuss a change order for this project around the beginning of 2014. The reason for this was that there had been delays caused by the Ministry's inability to free up the construction site and, consequently, the Omega Consortium was going to need an extension of time for the project. That is why before the previous administration ended, I requested that Mr. Duque record all of the delays and problems that we had suffered in writing and extend the Contract for us. Mr. Duque accepted my request and told me that he wanted to leave everything on track so that the Public Market of Colón project would be kept alive.¹⁹⁷ As such, in May 2014, we confirmed with the Ministry of the Presidency an extension of 41 months from the order to proceed.¹⁹⁸ So then, contrary to what Panama is saying,¹⁹⁹ I signed the change order (*viz.* Change Order No. 1) and subsequently delivered to the Ministry of the Presidency all of the documentation necessary for it to be submitted to the Comptroller General's Office for approval. Among these documents was a letter from Assa confirming that the bonds had been extended in accordance with the extension granted in Change Order No. 1.²⁰⁰ I do not know why Panama is now saying that we never extended the bonds,²⁰¹ but this statement by them is untrue. As we had delivered to the Ministry of the Presidency all of the documents necessary for Change Order No. 1 to be submitted to the Comptroller General's Office,²⁰² an email was written to Eng. Maruquel Madrid, from the Ministry of the Presidency,²⁰³ asking her for the SCAFID number

¹⁹⁷ Email thread between Jose Mandarakas and López dated 13 May 2014 (C-0811) (indicating that "Duque accepted our request").

¹⁹⁸ Email thread between Jose Mandarakas, Maruquel Madrid and Frankie López dated 13 May 2014 (C-0544).

¹⁹⁹ Panama's Reply ¶ 395.

²⁰⁰ Endorsement Extension Validity Bond Compliance – Policy 86B63650-87B50311 dated 5 May 2014 (C-0545); *See also* Email from Jean Carlos Cerezo to Frankie López, dated 6 Oct. 2014 (C-0812) (confirming that the extension of the bond for the addendum of the Public Market of Colón was given).

²⁰¹ Panama's Reply ¶¶ 395, 398.

²⁰² Email thread between Omega and the Municipality of Colón, dated 30 May 2014 (C-0813) (confirming that the documents necessary for the addendum to be submitted to the Comptroller General's Office were delivered).

²⁰³ Email thread between Jose Mandarakas and Frankie López (Omega) to Maruquel Madrid (MoP) dated 2 Jul. 2014 (C-0694).

Translation

corresponding to the change order.²⁰⁴ The SCAFID number should have been assigned as soon as the change order had reached the Comptroller General's Office. But, since we never received a response to our email, we investigated in the SCAFID system and determined that no number had been assigned to the change order. The most logical explanation for this was that this was because the new administration had never submitted Change Order No. 1 to the Comptroller General's Office.

77. Unfortunately, after the change of administration, we tried to get in contact with the Secretariat of the Cold Chain, but we did not receive any response. Not until the end of 2014 was I able to meet with Mr. Andrés Camargo, who had been appointed Manager of the Secretariat of the Cold Chain by the Varela administration.²⁰⁵ At that meeting I introduced myself, gave him a summary of the project and commented to him on the issues that the Cold Chain had pending to resolve in this project. However, I quickly realized that he did not have any intention of reactivating the project, which he claimed to be unaware of.²⁰⁶ From then on, nobody in the Government addressed our problems.²⁰⁷

78. In June 2015, I met again with Mr. Camargo, and informed him that we were committed to continuing with the project if the Ministry and the Secretariat of the Cold Chain agreed to address certain issues, such as: ensuring the contract's economic balance, reimbursing the Omega Consortium's expenses incurred in employing personnel during the suspension, and an additional commitment that the plans for the project would be approved by the Government in due time and form. We followed up in an e-mail to personnel at the Cold Chain Secretariat.²⁰⁸ But these issues

²⁰⁴ The SCAFID number is a "tracking" number to follow the progress of the endorsement process in the Comptroller General's Office.

²⁰⁵ López 1 ¶ 151.

²⁰⁶ López 1 ¶ 151.

²⁰⁷ López 1 ¶ 151.

²⁰⁸ Email thread between Onelia Delis, Andrés Camargo and Francisco Feliu dated 27 May 2015 (C-0622).

Translation

were never addressed, and later, [REDACTED]

[REDACTED] 209

79. I have seen that Mr. Duque has said that his work at the Cold Chain terminated in August 2014,²¹⁰ so it strikes me as odd that he says that the problems that affected the cold chain projects were not political,²¹¹ since he was not working there for much of the relevant time, nor is he an official in any other Agency of the Panamanian Government. In addition, I have seen that Panama and Mr. Duque alleged that the Colón Public Market project was not awarded to Odebrecht after it was taken from us, but rather that Odebrecht is carrying out another project renovating the market building. To me, this is simply semantics. The point here is that the Omega Consortium was thrown off the project, and in exchange, Odebrecht is now building where the Omega Consortium should have been building.

80. In the end, the government of Panama under President Varela managed to destroy each and every one of our projects – and with them, Omega Panama itself. I do not understand how Panama can say that everything that happened to us were a mere series of commercial disputes.

B. Various Sources Confirmed that the Actions of All of the Different Governmental Agencies Were Part of a Concerted Action by the Government Against the Omega Consortium

81. My suspicion that we were victims of a campaign of harassment by Mr. Varela and his Government was corroborated by several people, including Mr. Nessim Barsallo. It was Mr.

209 [REDACTED]

[REDACTED] I want to clarify that in my last statement I inadvertently cited the document Note No. 12031-15-ING-UFOGOE of the Comptroller General's Office to ASSA dated 27 Jul. 2015 (C-0623) as corresponding to the Mercado Publico de Colon Contract. Reviewing documents for this new Witness Statement, I realized that the document Note No. 12031-15-ING-UFOGOE of the Comptroller General's Office to ASSA dated 27 Jul. 2015 (C-0623) corresponds to the Municipality of Colón Contract.

²¹⁰ Testimonial Declaration of Fernando Duque (“Duque”) ¶ 8.

²¹¹ Duque ¶ 20.

Translation

Barsallo who explicitly told me “*I conclude* they have orders”²¹² and that those orders “come[] from the Presidency.”²¹³ I am quite certain that Mr. Barsallo actually believed that those orders were coming from the Office of the President, and that it was for that reason he followed this up by saying, “I’ll cut off my balls.”²¹⁴ Although it is crude, this is an expression from the Spanish language to denote that one would bet almost anything that what he just said is completely true. In fact, I believed at that time, and I continue to believe today, that Mr. Barsallo was sure that the orders were coming from the President’s office. In addition to that, I want to clarify that although Mr. Barsallo spent some free time with the Omega Panama team on his time off, he did not trust any other member of Omega Panama sufficiently to discuss these political issues with them. Therefore, it is false that he heard about how the Omega Consortium was being affected by political decisions from the Omega team. I believe that Mr. Barsallo was put in an uncomfortable situation when he was shown these messages and that his only option is to retract, and to say that those messages did not come from his own thoughts. However, as I commented earlier, just from reading the chat, it is evident that that is not true.

82. Ms. Ana Graciela Medina also corroborated my worst suspicions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²¹⁵ It is my understanding that Panama has said that the WhatsApp conversation is not clear because there is no information about one message that I wrote to Ana

²¹² WhatsApp message between Frankie López and Nessim Barsallo dated 3 Mar. 2016 (C-0681).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ [REDACTED]

Translation

Graciela saying [REDACTED] ²¹⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ²¹⁷ [REDACTED]
[REDACTED]
[REDACTED] ²¹⁸ [REDACTED]
[REDACTED]

83. As I commented previously, I also heard similar statements from the Mayor of Colón, Federico Policani. Just after Mr. Policani started his term, he commented to me that he had received instructions to cancel our project from the Office of the President. Later, I met several times with him, and on all of the occasions he commented to me that the pressure that he was receiving from the President’s Office was very heavy. Also related to this project, Legal Advisor Víctor Almengor of the Municipal Council of Colón confirmed to me that he had heard straight from the President’s mouth that our Contract “had to be rescinded.”²²⁰

84. With respect to the Municipality of Panama, the General Secretary of the Municipal Government, Guillermo Bermúdez, told me the same thing. He personally told me that he had instructions to wait for the results of the investigation into Justice Moncada Luna and that until that

²¹⁶ Panama’s Reply ¶ 280; [REDACTED]
[REDACTED]

²¹⁷ *Id.*

²¹⁸ [REDACTED]

²¹⁹ [REDACTED]
[REDACTED]

²²⁰ Chat with Victor Almengor (C-0808). See *supra* ¶ 69.

Translation

time we were not going to have any advance on our accounts or on the project. Similarly, when I had the opportunity to meet with the Mayor of the Municipality of Panama, José Isabel Blandón, he told me that he did not want the market projects that the Omega Consortium had in Panama City, and that we should not go ahead with the work because it would not make any sense to have a market in the town of Juan Díaz. In fact, he told me that he wanted to build a warehouse at that location, not a market. He also commented to me that we were going to be paid for all of the work that we had done, but that we should not continue any additional work. I also received comments from an employee²²¹ of the Municipality of Panama, who informed me that it was public knowledge that we were considered to be *persona non grata*. That person commented to me, at a Municipality event (which was hosted by the same political party as Mr. Varela), that President Varela had spoken in a derogatory manner in front of several people about “Ana Graciela’s friends,” referring to Oscar Rivera and Omega.

85. In the context of the La Chorrera Contract, people also informed me that instructions had been issued to undermine the Omega Consortium. In particular, when we received notice of Panama’s intention to terminate the La Chorrera Contract, engineer José Mandarakas told me that an order had come down from above and that there was surprise even in the engineering department.²²²

86. In sum, and based on all of these similar statements from so many different people, there is no doubt in my mind that President Varela ordered a campaign against us, which was carried out by the Agencies with whom we had projects and the Comptroller General’s Office.

III. STATEMENT OF TRUTH

Unless it appears otherwise, all of the facts and matters declared in this Statement come from my own

²²¹ In this case, I prefer not to identify the name of the person who worked in the Municipality because I do not want to affect this person’s work.

²²² Messages between Frankie López and Mandarakas dated 12 Dec. 2015 (C-0815).

Translation

knowledge and belief. The facts declared in this Statement are true and correct.

Signed by: [a signature]

Frankie J. López
17 January 2020