UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Metropolitan Municipality of Lima, *Petitioner and Cross-Respondent,* v. Rutas de Lima S.A.C., *Respondent and Cross-Movant.*	)	Case No. 20-CV-02155 (ACR)

JOINT STATUS REPORT

Pursuant to the Court's May 19, 2023 Minute Order, the parties hereby submit this Joint Status Report addressing issues raised by the Court at the May 18-19 hearing. The parties' respective responses to the questions that the Court assigned are set forth below. A chart summarizing the information that the Court requested regarding the First Arbitration and Second Arbitration is attached as **Annex A**.

THE MUNICIPALITY'S RESPONSES

I. Introduction

In response to the Court's directive to the Municipality to respond to certain issues raised at the May 18-19, 2023 Hearing, the Municipality respectfully submits the following documents filed as Annexes hereto:

- Sur-Reply on New Evidence of Corruption After the First Arbitration, attached hereto as **Annex B** (*see* May 19, 2023 Hr'g Tr. at 121:21-122:3);
- Chart Regarding Admissibility of Evidence, attached hereto as **Annex C** (*see* May 19, 2023 Hr'g Tr. at 105:15-106:19);

- Description of Investigative Files Provided by Peru's *Ad Hoc* Public Prosecutor to the Municipality, attached hereto as **Annex D** (*see* May 19, 2023 Hr'g Tr at 81:1-13, 82:20-83:5)

On the evening of July 27, 2023, one day before the deadline for the Joint Status Report, the Municipality received the current version of the below portion of the Joint Status Report labeled "Rutas' Responses." That portion, specifically in Sections III and V below, sets forth lengthy additional argument that was not part of Rutas' original transmission to the Municipality on June 29, 2023. The Municipality previously conveyed to Rutas that it understood the Court to have asked each party to address certain topics independently and did not want the parties to engage in substantive, iterative responses to the topics that the Court assigned to individual parties. Rather, the parties were to jointly prepare the portions of this Status Report addressing the Court's factual questions about the procedures of the First and Second Arbitrations, *see* May 19, 2023 Hr'g Tr. at 116:23-119:21, and independently prepare responses to the Court's additional questions, *see id.* at 120:18-22. With respect to the topics assigned to individual parties, the Court advised the parties that it did "not want briefing" and, if briefing was absolutely required, "it should be short and concise." *Id.* at 120:18-22. The Court further advised Rutas that it should not respond to the Municipality's Sur-Reply on New Evidence of Corruption After the First Arbitration "unless it[] [contains] something egregiously wrong." *Id.* at 121-122; *see also id.* at 122:5-7 ("You [Rutas] should accept what they're going to put in and not put in something else unless it's like egregious."). Rutas has not identified anything "egregious" about the Municipality's Sur-Reply on New Evidence of Corruption After the First Arbitration, which summarizes arguments that the Municipality has made in its prior briefing and at the hearing in this matter. The Court also

requested that the Municipality address the topics covered in Annexes B through D, and Rutas did not ask the Court for an opportunity to respond to the Municipality's submissions on those topics.

Given these directives from the Court, the Municipality believes that Rutas' briefing in Sections III and V below is improper and beyond the scope of the Joint Status Report. *See id.* at 120:18-22. The Municipality further understands that the Court did not request and would not accept a substantive response from the Municipality to Rutas' briefing. The Municipality believes that there are meritorious responses to Rutas' arguments, however, and reserves all of its rights with respect to these responses. If the Court decides that Rutas' briefing in Sections III and V below are properly before it, the Municipality is available to submit a substantive response should the Court consider such a response to be useful.

II. Responses to Questions Posted by the Court Concerning the Findings of the Second Arbitral Tribunal and the Villarán Indictment

The Court invited the Municipality to provide answers to the following two questions.

First, the Court requested that the Municipality clarify whether the arbitral tribunal in the Second Arbitration determined that Jorge Henrique Simoes Barata provided inconsistent testimony regarding whether Rutas received corrupt benefits for its payments to the Villarán campaign. *See* May 19, 2023 Hr'g Tr. at 95:21-96:25. The second tribunal's majority opinion did not determine that Barata's testimony regarding whether Rutas and Odebrecht received a benefit from the corrupt payments was inconsistent. Instead, the second tribunal's majority opinion only cited and credited Barata's testimony that Rutas and Odebrecht did not receive a benefit from making corrupt payments to the Villarán campaign. *See, e.g.*, Dkt. 60-1, ¶¶ 314, 597, 716 & n.416. Only the dissenting opinion of Arbitrator Elvira Martínez Coco referenced Barata's testimony that the Concession Contract would be vulnerable if the Villarán administration were to be replaced, testimony that she credited. *See id.*, Dissent ¶ 134 n.99.

Second, the Court requested that the Municipality clarify whether the Villarán Indictment concerned corruption in regard to the Concession Contract. *See* Tr. Day 2, 92:4-25. The Municipality confirms that the Indictment, a copy of which the Municipality has transmitted to Rutas, does concern corruption in regard to the Concession Contract. *See, e.g.*, Vol. 1, pp. 120-25, 152-56; Vol. 2, pp. 208-11, 216-22, 248-49, 252-71; Vols. 2-3, pp. 383-444; Vol. 3, pp. 505-21, 543-80; Vol. 4, pp. 630-48, 657-59, 671-768; Vol. 5, pp. 830-42, 857-73, 877-80, 904-26, 939-46, 949-65; Vol. 6, pp. 1075-80, 1100-04, 1129-34, 1145-46, 1170, 1174-77; Vol. 7, p. 1207, 1280, 1292, 1314-18; Vol. 8, pp. 1445, 1573-74; Vol. 9, pp. 1618-19, Vol. 12, pp. 2352-14, Vol. 13, pp. 2415-42, 2550-51; Vol. 14, pp. 2613-14, 2616-23, 2625-27, 2662-70, 2695-96, 2699-2701, 2706-07.

RUTAS' RESPONSES

I. The Indictment of Mayor Villarán

The Court asked each party to address whether the Indictment of former Mayor Villarán issued on August 25, 2022 "concerned specifically taking bribes in exchange for the concession contract." May 19, 2023 Hr'g Tr. 91:19-92:21. The Court directed MML to provide Rutas with the Indictment in order to address this issue. *Id.* at 92:11-25. MML provided Indictment materials to Rutas on June 21, after follow-up requests by Rutas on June 16 and June 20, and Rutas has undertaken a review during the time available. As the Tribunal in the Second Arbitration was aware, the Indictment materials include reference to allegations by the Prosecutor's Office, in an early stage of the proceeding which has never been tested in court, that Mayor Villarán's campaign accepted contributions after the granting of the Concession Contract that related to the Contract. Those allegations were in the Indictment materials that the Tribunal in the Second Arbitration authorized MML to submit into the record, eight months after the final hearing.

II. Applicability of the Federal Rules of Evidence

The Court asked Rutas to address whether the Federal Rules of Evidence apply to the assessment of evidence that MML relies on in its motion and opposition papers. May 19, 2023 Hr'g Tr. 109:21-23. The answer is yes. Rule 101 of the Federal Rules of Evidence ("FRE") governs the "scope" of the Rules and states that "[t]hese rules apply to proceedings in United States courts." Rule 1101 governs the "applicability of the rules" and states that "[t]hese rules apply to proceedings before . . . United States district courts." Further, none of the exceptions to the FRE's applicability applies here. *See* FRE Rule 1101(d) (providing exceptions for a court's determination on a preliminary question of fact governing admissibility, grand-jury proceedings, and certain miscellaneous proceedings). Accordingly, the FRE apply to these proceedings before this Court.

Jurisprudence in the D.C. Circuit (and other jurisdictions) confirms that the FRE apply specifically in proceedings to vacate or confirm arbitral awards in U.S. federal court. *See, e.g.*, *Cearfoss Constr. Corp. v. Sabre Constr. Corp.*, 1989 U.S. Dist. LEXIS 9639, at *5-8 (D.D.C. Aug. 10, 1989) (striking as inadmissible hearsay statements in an affidavit that respondent submitted in support of motion to vacate award under FAA § 10); *Owen-Williams v. BB&T Inv. Servs.*, 717 F. Supp. 2d 1, 17 n.8 (D.D.C. 2010) ("[T]o the extent Plaintiff's statements consist solely of unsupported, hearsay statements, such statements are clearly insufficient to support his motion for an order vacating the arbitration award[.]"); *Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria*, 2015 U.S. Dist. LEXIS 197905, at *4 (D.D.C. Oct. 16, 2015) (taking judicial notice of fact "in accordance with Rule 201 of the [FRE]" in proceeding to confirm award under the New York Convention); *see also Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 751-52 (8th Cir. 2003) (affirming district court's decision to strike under the FRE portions of affidavit supporting a petition to vacate award); *LGC Holdings, Inc. v. Julius Klein Diamonds, LLC*, 238 F. Supp. 3d 452, 469-70 (S.D.N.Y. 2017) (denying petition to vacate award because, among other

issues, respondent failed to provide "non-hearsay" evidence in support); *Merrill Lynch Fenner & Smith v. Estate of Estate of Robert C. Postell & Joan P. Postell*, 2012 U.S. Dist. LEXIS 207640, at *4-5 (N.D. Ga. Oct. 25, 2012) (denying petitioner's motion to expand the record in support of its petition to vacate award because evidence was inadmissible hearsay or irrelevant under the FRE); *Skinner v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 2003 U.S. Dist. LEXIS 24045, at *6-7 (N.D. Cal. Dec. 29, 2003) (refusing to take judicial notice of documents supporting petition to vacate because they were "not appropriate documents to take judicial notice of, [were] irrelevant to the issues before the court, and [were] hearsay" under the FRE).

III. Inadmissibility of MML's Evidence

The Court asked the parties to address issues concerning the admissibility of MML's evidence. *See* May 19, 2023 Hr'g Tr. 103:24-104:5, 105:15-106:21, 108:22-110:13. Rutas provides the following focused comments in response to MML's lengthy 42-page submission on "Admissibility of Evidence."

MML bears the burden of presenting "clear and convincing evidence" that the Award was procured through corruption, fraud, or undue means. *ARMA, S.R.O. v. BAE Sys. Overseas*, 961 F. Supp. 2d 245, 253 (D.D.C. 2013). The unreliable and inadmissible documents offered by MML—replete with hearsay statements, among other evidentiary flaws—are insufficient to meet this burden. *See Owen-Williams*, 717 F. Supp. 2d at 17 n.8 (stating that "unsupported, hearsay statements" are "clearly insufficient to support [a] motion for an order vacating [an] arbitration award"). As the D.C. Circuit Court of Appeals has held, "[v]erdicts cannot rest on inadmissible evidence," and absent an applicable exception, hearsay is not capable of being "converted into admissible evidence." *Gleklen v. Democratic Congressional Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000).

A. Rutas' Evidentiary Objections Are Properly Raised

MML suggests that Rutas forfeited its evidentiary objections because it did not raise them sooner. To the contrary, Rutas timely and repeatedly objected to the admissibility of MML's evidence during the hearing on MML's Petition and Rutas' Cross-Motion, including on the basis that the documents contain hearsay, are not properly authenticated, and/or violate the "best evidence" rule. *See* May 18, 2023 Hr'g Tr. 131:20-132:1, 136:13-18; May 19, 2023 Hr'g Tr. 83:24-84:3, 84:19-21, 85:3-17; *see also Davis v. Rhoomes*, 2010 WL 3825728, at *8 (S.D.N.Y. Sep. 30, 2010) ("Any objections to the admissibility of evidence can, of course, be raised at trial, and any proposed trial evidence must comply with the Federal Rules of Evidence."); *United States v. Payden*, 613 F. Supp. 800, 823 (S.D.N.Y. 1985) ("Objections to the admissibility of [hearsay] statements are properly raised at trial.").

The cases on which MML relies for its forfeiture argument are inapposite. *See* MML Chart 3-4. Both *Davis* and *Northwest Immigration Rights Project* concerned the forfeiture of substantive legal arguments, not evidentiary objections. *See United States ex rel. Davis v. District of Columbia*, 793 F.3d 120, 127 (D.C. Cir. 2015); *Nw. Immigr. Rts. Project v. U.S. Citizenship & Immigration Servs.*, 496 F. Supp. 3d. 31, 80 (D.D.C. 2020). MML's own quotation from *Athridge* clearly states that, unlike Rutas, the objecting party failed to raise its objections at trial. *Athridge v. Rivas*, 421 F. Supp. 2d 140, 151 (D.D.C. 2006). *Healthbridge Mgmt. v. NLRB* involved a party's failure to preserve on appeal a hearsay objection raised only in a footnote of the party's brief in the district court. 672 F. App'x 1, 1 (D.C. Cir. 2016). It is well established that hiding an argument in a footnote is "insufficient to preserve the issue on appeal." *Id.* That is not the situation here. Finally, MML's citations to *Animal Legal Defense Fund* are drawn from a dissenting opinion and

without precedential value. *See Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 451 n.1 (D.C. Cir. 1998) (Sentelle, J., dissenting).

Here, at MML's insistence, the Court set aside two days for a hearing on the parties' cross-motions to vacate and confirm the Award. It was obvious that the parties and the Court would address the merits of MML's evidence, including its admissibility, during the hearing. Indeed, at the hearing the Court also raised issues with respect to the admissibility of MML's evidence, and the Court has the authority to rule on those issues *sua sponte*. *See, e.g.*, *Graterol-Garrido v. Vega*, 2021 U.S. Dist. LEXIS 75828, at *14 (S.D.N.Y. Apr. 20, 2021) (noting that the court has "'inherent authority to exclude irrelevant or otherwise inadmissible evidence despite a failure of either side to object to its admission'"); *Bellard v. Gautreaux*, 675 F.3d 454, 461 (5th Cir. 2012) (affirming district court's decision to exclude hearsay evidence *sua sponte*).

The fact that MML is now getting a subsequent opportunity to address the deficiencies in its evidence is what is exceptional here, not the fact the objections were addressed at the hearing. MML has had more than a complete opportunity to establish the admissibility of its evidence—evidence which, admissible in this Court or not, has already been deemed by two arbitral Tribunals, under lower evidentiary standards, not to show the corruption upon which MML's application is predicated.[1]

B. MML's Evidence Is Inadmissible and No Hearsay Exceptions Apply

In response to Rutas' evidentiary objections, MML has provided a 40-page chart in which it contends that the documents it has submitted fall into hearsay exceptions. Some of the

[1] Moreover, some of MML's documents were first introduced with MML's Reply brief, and Rutas did not have an opportunity to comment upon their admissibility in its own briefing. *See, e.g.* ECF 84-5, 84-7, 84-8.

documents MML has submitted with its petition are not addressed at all in the chart, and MML has not otherwise attempted to establish their admissibility. *See, e.g.*, Mr. Soares' testimony (ECF 74-16); Mr. Lira's testimony (ECF 74-5); Mr. Yamada's testimony (ECF 74-8); Mr. Garreta's testimony (ECF 74-10); Mr. Castro's testimony (ECF 74-17). The absence of any response with respect to such documents only underscores that MML has put forward an unreliable and inadmissible record in support of its application. The responses that MML has provided as to other documents, moreover, are without merit.

For the sake of efficiency, rather than respond to every entry in MML's 40-page chart, Rutas responds categorically as follows to the hearsay exceptions addressed by MML.

1. Statements not offered for their truth. MML argues that several documents are not hearsay because they are not offered for their truth, but rather for "context," their "effect on [the listener]," or to show a declarant's "motive," "intent," or "understanding," among others. *See, e.g.*, MML Chart 14, 22, 23, 27, 30, 32, 41. As the D.C. Circuit has held, however, "[a]ll relevant evidence provides context." *United States v. Stover*, 329 F.3d 859, 870 (D.C. Cir. 2003) (citing *United States v. Bowie*, 232 F.3d 923, 928-29 (D.C. Cir. 2000)). The central "question is whether the [out-of-court] statement is offered for its truth," in which case the statement is inadmissible. *Id.* Here, several statements MML submits as purported non-hearsay "context" clearly are offered for the truth of what they assert. For instance:

- MML states that Mr. Meiggs "himself confessed" that he entered into "sham contracts" to "launder money to [Villarán's] campaign." Pet. 15. In support, MML cites to Mr. Meiggs' purported statements (ECF 74-23) that he entered into alleged overvalued contracts to direct funds to the campaign. MML Chart 23. Mr. Meiggs' statements could not be "probative of that fact unless [MML] offered the statement[s] for the truth of [their] content." *Stover*, 329 F.3d at 870. The same is true of Mr. Castro's purported statements regarding the alleged overvalued contracts (ECF 74-12).

- MML submits a statement by Mr. Torre (ECF 81-4) in which he purportedly stated that Ms. Flores requested a $200,000 contribution from Odebrecht individuals during a

meeting. While MML claims the statement shows Mr. Torre's "understanding" (MML Chart 34), MML clearly quotes the statement in its Petition for the alleged truth of what is asserted (*i.e.* that the meeting and the request took place). MML's Opp'n to Cross-Mot. (ECF 81) at 13-14 ("[Torre] further admitted that during this meeting Flores . . . entered into a *quid pro quo* arrangement with the Odebrecht officials under which Odebrecht provided a bribe of $200,000 . . . Specifically, [Mr. Torre] testified: . . . ").

- MML submits Mr. Bustamante's alleged statement that "Odebrecht's interest" in making alleged payments "was to maintain the legal stability of the Rutas de Lima contract." ECF 74-27. MML quotes this statement precisely for its truth, asserting in its Petition that "Bustamante confirmed in his testimony that 'Odebrecht's interest was to maintain the legal stability of the Rutas de Lima contract.'" Pet. 16.

Moreover, as even MML recognizes, several of the documents contain double hearsay. *See, e.g.*, MML Chart 5-6, 9, 12-13. As such, even if part of a statement were offered for "context" or another non-hearsay purpose, that statement still is inadmissible if contained within another statement that does not qualify for a hearsay exception. *See Klotzbach-Piper v. AMTRAK*, 2022 U.S. Dist. LEXIS 186072, at *35 (D.D.C. Oct. 12, 2022) (stating that when assessing "hearsay within hearsay," "each level of hearsay . . . must be covered by either an exemption or exception to the hearsay rule") (citing Fed. R. Evid. 805).

2. Party admissions. MML claims that several statements made by Mr. Neto, Mr. Migliaccio, Ms. Tavares, Mr. Barata, and Mr. Serra, as well as the Odebrecht ledgers recording alleged payments, are not hearsay because they are party admissions under FRE 801(d)(2)(D). That exception applies if "the statement is offered against an opposing party" and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." *Gilmore v. Palestinian Interim Self-Government Auth.*, 843 F.3d 958, 970 (D.C. Cir. 2016) (quoting FRE 801(d)(2)(D)). Such statements are admissible as "the result of the adversary system" because "the party himself is present and can explain, deny, or rebut any such statement." *Dyer v. McCormick & Schmick's Seafood Rests., Inc.*, 264 F. Supp. 3d 208, 240 (D.D.C. 2017).

The exception does not apply to Mr. Neto's statements because they were not made during his employment. Fed. R. Evid. 801(d)(2)(D). He was Rutas' General Manager from 2016 to 2017,[2] and his alleged statements were made in 2018. ECF 74-9. The exception also does not apply to statements of Mr. Migliaccio, Ms. Tavares, Mr. Barata and Mr. Serra because they were employees of Odebrecht, not Rutas (and some not even employees of Odebrecht at the time of the statements). *See United States v. American Tel. & Tel. Co.*, 1981 WL 2047 at *4 (D.D.C. Apr. 9, 1981) (stating that the "mere ownership of one company's stock by another" does not justify attributing admissions of one company's employees to the other). The same reasoning applies to the Odebrecht ledgers.

3. Verbal acts. MML argues that several statements are non-hearsay "verbal acts." Verbal acts are statements that "affect[] the legal rights of the parties" and "have independent legal significance, such as contractual offers or inter vivos gifts." *Stover*, 329 F.3d at 870 (citing Fed. R. Evid. 801 advisory committee's note). "By their very nature," verbal acts "may ***not be asserted for the truth of the matter asserted***; rather, they are not hearsay as long as 'the significance of an offered statement lies solely in the fact that it was made.'" *United States v. Tann*, 425 F. Supp. 2d 26, 32 (D.D.C. 2006) (citing Fed. R. Evid. 801(c) advisory committee's note) (emphasis added). MML does not attempt to assert what independent legal significance (akin to a contractual offer or gift) the statements it offers supposedly have. It is also clear that several of these statements are offered for the truth of the matter asserted and thus do not qualify as verbal acts. For example:

- MML submits Mr. Castro's alleged statement that during a meeting Mr. Neto "explained" the execution of "additional works" and "proposed the amount by which the toll price should be raised" to finance the works. MML Chart 28 (citing ECF 74-38). MML clearly offers this statement for its truth, to support the claim that "Castro testified that . . . he met

[2] *See* Raul Pereira Neto's Profile, Linkedin, *available at* https://www.linkedin.com/in/raul-pereira-neto/?originalSubdomain=br.

with [Mr. Neto] . . . to discuss 'additional benefits' to be awarded to Rutas," and they "agreed[] to amend the Concession Contract to assign Rutas overvalued additional works and allow Rutas to increase toll charges." Pet. 14.

- MML submits an alleged statement by Mr. Neto stating that, during a meeting, Mr. Castro asked Mr. Barata to support Villarán's anti-recall campaign. MML Chart 6 (citing ECF 74-9). MML offers this statement for its truth, to support the proposition that "each [witness] confirmed an agreement was reached in these meetings to illegally pay $3 million in support of Villarán's campaign." Pet. 10.

4. Statements against interest. MML argues that several documents contain "statements against interest" under FRE 804(b)(3). The party offering a statement under this exception "[bears] the burden of proving the statement me[ets] each requirement" of the exception. *United States v. Bigesby*, 685 F.3d 1060, 1065 (D.C. Cir. 2012). First, the exception only applies if the declarant is unavailable as a witness. Fed. R. Evid. 804(b)(3). MML has not attempted to show that the declarants are unavailable under any of the conditions outlined in FRE 804(a), instead merely stating that it had no occasion to investigate their availability. MML Chart 6-7. Second, the exception only covers statements that are reliable because, "when made, [were] so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability." Fed. R. Evid. 804(b)(3). The statements offered by MML were not contrary to the declarants' pecuniary interests nor did they have a great tendency to expose them to liability. Several occurred in private settings where the declarants were not exposed to liability and were allegedly seeking benefits or acting in their own interest. Others are statements by cooperating witnesses to prosecutors where the declarants stood to ***gain*** from their declarations (*e.g.*, by obtaining reduced sentences or immunity). *See United States v. Hsia*, 87 F. Supp. 2d 10, 16 (D.D.C. 2000) (noting the "skepticism with which courts traditionally view statements against interest in criminal cases that may actually have been made to gain an advantage or curry favor, such as those made pursuant to a plea bargain or immunity agreement"). The statements offered by MML include, for instance:

- Alleged statements by Mr. Barata and Mr. Castro regarding making and receiving contributions to Villarán's anti-recall campaign that were made in private meetings where declarants were not exposed to civil or criminal liability and, under MML's account of the facts, it would have been in the declarants' financial interest to make such statements. MML Chart 6-7, 13. The same reasoning applies to the alleged exchanges between Mr. Castro and Mr. Meiggs concerning the execution of "overvalued" contracts (MML Chart 14-15), and the alleged statements of Ms. Flores regarding campaign contributions. MML Chart 33-36.
- Statements by Mr. Meiggs, Mr. Bustamante, Mr. Castro, and Mr. Torre made as collaborating witnesses under the "effective collaboration process." As MML acknowledges, such statements may lead to the conclusion of a "formal benefits agreement" with the prosecutor which "may include a reduced sentence or even immunity" for the declarant. MML Chart on Corruption Exhibits ¶ 6. The statements were thus not against the declarants' interests.

5. Public records. MML contends that the Prosecutor's statements regarding the alleged corruption evidence in certain prosecutorial files are "public records" under FRE 803(8). "A record or statement of a public office" is admissible if it "sets out . . . factual findings from a legally authorized investigation" and "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8). The prosecutorial summaries of the evidence should not be admitted as public records because they lack trustworthiness. First, the Prosecutor's statements largely summarize other hearsay statements. *See MF Global Holdings Ltd. v. PricewaterhouseCoopers LLP*, 232 F. Supp. 3d 558, 568-69 (S.D.N.Y. 2017) ("Investigative reports are frequently regarded as untrustworthy where the reports are based on unattributed hearsay statement[s]."); *Eng v. Scully*, 146 F.R.D. 74, 80 (S.D.N.Y. 1993) ("Rule 803(8) will not be used to circumvent the hearsay rule. The reports of the Inspector General are not admissible as they contain untrustworthy double hearsay."). Second, they were prepared by the Prosecutor in an effort to prepare criminal charges against the individuals whose statements are described in the files. *See In re Fannie Mae Secs.*, 892 F. Supp. 2d 59, 75 n.30 (D.D.C. 2012) (refusing to admit reports as public records because they "were part of an effort to prepare administrative charges against the individual defendants and raise substantial questions of

trustworthiness"). Third, the Prosecutors here bear an atypically close relationship to the party offering the document, the Municipality. Fourth, the Prosecutor's files have not been properly authenticated as foreign public documents by the proper diplomatic officials under FRE 902(3). Fifth, by MML's own admission, the Prosecutorial files are uncorroborated and preliminary in nature, not tested by the adversarial process, nor submitted before a court or tribunal. MML Description of Investigative Files Provided by Peru's *Ad Hoc* Prosecutor ¶¶ 1-2, 4, 11, 15,17, 19.

6. Residual exception. MML argues that several documents are admissible under the "residual exception" of FRE 807. That exception requires the proponent of the statement to demonstrate "(1) that the declarant is unavailable, (2) that it has made reasonable efforts to make the declarant available for trial, (3) that the statement is offered as evidence of a material fact, (4) that the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, (5) that the hearsay statement has circumstantial guarantees of trustworthiness, and (6) that the interests of justice would be best served by admission of the statement." *Hsia*, 87 F. Supp. 2d at 16. The court's "central task" is to "gauge whether the declarant was 'highly unlikely to lie,'" which requires consideration of whether there is "evidence . . . corroborating the statement." *United States v. Smith*, 2020 WL 5995100, at *7 (D.D.C. Oct. 9, 2020) (quoting *United States v. Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017)). Courts also consider other factors, including whether the declarant had the "incentive to speak truthfully and whether the declarant has been consistent in her story." *Id.* (citing *Slatten*, 865 F.3d at 808). The exception is "extremely narrow" and requires the proffered hearsay "to be 'very important and very reliable.'" *Partido Revolucionario Dominicano (PRD) v. Partido Revolucionario Dominicano*, 311 F. Supp. 2d 14, 19 (D.D.C. 2004) (quoting *United States v. Washington*, 106 F.3d 983, 1001-02 (D.C. Cir. 1997)). Accordingly, the proponent "bears a 'heavy

burden to come forward with indicia of both trustworthiness and probative force.'" *Id.* at 19 (quoting *Boca Investerings P'ship v. United States*, 128 F. Supp. 2d 16, 22 (D.D.C. 2000)).

MML falls far short of establishing this exception. MML has not attempted to demonstrate that the declarants are unavailable, and in fact asserts that it had no occasion to investigate their availability. *See* MML Chart 6-7. Moreover, even assuming that the statements are evidence of a material fact and more probative than other evidence MML could reasonably obtain (which MML has not attempted to show), they lack guarantees of trustworthiness. Indeed, they include statements by collaborating witnesses (*e.g.*, Mr. Barata, Mr. Castro, Mr. Meiggs) that were not tested in court, not subject to cross-examination, not made under oath, made in a context where the declarants were seeking prosecutorial benefits, and obtained by MML from Peruvian authorities in "piecemeal" fashion through a selection process that still remains unclear. MML's Opp'n to Cross-Mot. 11. These statements also lack corroborating evidence and consistency. For example, MML relies heavily on the investigative testimony of Mr. Castro (*see, e.g.*, MML Chart 14-16, 20-21, 28-32), but the Tribunal in the Second Arbitration expressly highlighted that the testimony was inconsistent and contradicted by the documentary evidence. *See, e.g.*, Second Award ¶ 595 ("[T]he Tribunal has no additional evidence to substantiate the statement of Mr. Castro, whose testimony raises doubt."), ¶ 648 ("[T]he documentary evidence on the record shows that Mr. Castro's assertion is wrong."), ¶ 714 ("The Tribunal has found serious inconsistencies in Mr. Castro's testimony.").

7. Business records. MML claims that Odebrecht documents recording alleged payments are admissible as "business records" under FRE 803(6). But MML again fails to meet the requirements of this exception. MML has not attempted to demonstrate that these documents were kept in the "course of a regularly conducted activity" of Odebrecht or that "making the record

was a regular practice of that activity." Fed. R. Evid. 803(6). Nor has MML authenticated the documents through the "testimony of the custodian or other qualified witness." *Id.*; *see also United States v. Houser*, 746 F.2d 55, 61 (D.C. Cir. 1984) (refusing to admit evidence as business record where there was a lack of "proper authentication"); *Barry v. Trustees of Intern. Ass'n*, 467 F. Supp. 2d 91, 106 (D.D.C. 2006) ("Business records must be properly authenticated by a qualified witness or in accordance with other provisions of the Federal Rules.").

8. Co-conspirator statements. MML argues that statements by Mr. Serra, Mr. Lossio, Mr. Sepúlveda, Ms. Flores and Mr. Torre are admissible as statements by co-conspirators of Rutas under FRE 801(d)(2)(E). Such statements are only admissible if the court finds by a preponderance of the evidence that a conspiracy existed; that Rutas and the declarant were members of the same conspiracy; and that the statement was made "in furtherance of the common goal" of the conspiracy. *United States v. Bazezew*, 783 F. Supp. 2d 160, 166 (D.D.C. 2011). MML must present independent evidence of the conspiracy apart from the statement at issue. *United States v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996). MML has failed to make any such showing of the elements of a conspiracy in this case. As the case law makes clear, its bare assertion that certain statements are "co-conspirator statements" is decidedly insufficient.

IV. The Third Arbitration

The Court asked the parties to address the provisional measures decision, once issued, in the ongoing arbitration between the parties under the Concession Contract (the "Third Arbitration"), if that decision "speaks at all to whether there was corruption." May 19, 2023 Hr'g Tr. 115:15-24. On June 13, 2023, the Tribunal in the Third Arbitration issued its provisional measures decision. The Tribunal unanimously granted Rutas' provisional measures request and ordered MML to suspend the process to terminate the Concession that MML had initiated on January 30, 2023.

In its decision, the Tribunal specifically took into consideration MML's position that termination of the Contract was warranted by considerations of public interest, including in respect of MML's allegations that the Contract purportedly was procured through corruption. *See* June 13, 2023 Procedural Resolution No. 5, ¶ 156, *see also id.* ¶ 64. The Tribunal held that it was "*prima facie* persuaded that the chronology of events that has led to the unilateral termination of the Contract, along with certain conduct of the MML during the termination process, indicate that the public interest reasons that were invoked were not duly founded and justified." *Id.* ¶ 153. The Tribunal further held that "considering the current status of the record . . . there exists a *'reasonable possibility'* that the supplemental claim [Rutas' claim regarding the wrongful termination of the Contract] succeeds." *Id.* ¶ 157 (emphasis in original). Accordingly, the Tribunal decided to "**Order** the Respondent [MML] that the *status quo* be maintained until the controversy that is the subject of this proceeding is resolved, suspending the termination process of the Contract in progress, during the process of this arbitration." *Id.* ¶ 182 (emphasis in original).

Following the provisional measures decision, MML suddenly challenged all three arbitrators on the grounds of bias, including the arbitrator that MML itself appointed in at least three consecutive arbitrations (Dr. Martínez Coco). More recently, MML lodged criminal complaints against the entire Tribunal, which prompted Dr. Martínez Coco to resign. *See* Susannah Moody, *Arbitrators face criminal complaint in Peruvian toll-road dispute*, Global Arbitration Review (July 17, 2023), *available at*, https://globalarbitrationreview.com/article/arbitrators-face-criminal-complaint-in-peruvian-toll-road-dispute. Further, the mayor of Lima announced to Peruvian media outlets on July 11, 2023 that the Municipality had filed the criminal complaints due to the interim measures decision, and that MML intended to defy the Tribunal's order and terminate the Concession Contract on July 29, 2023. *Id.*

V. MML's Purportedly "New" Evidence

The Court directed MML to provide responses regarding its purported "new evidence," and permitted Rutas to respond briefly if warranted. *See* May 19, 2023 Hr'g Tr. 121:24-122-3. MML's response is substantially longer than the focused Rutas comments to which it responds, and is really an attempt by MML to submit another merits brief. Mindful of the Court's instructions, Rutas limits its response to two basic points. First, MML still fails to acknowledge that the evidence in question ***was***, in fact, considered by the Tribunal in the Second Arbitration. Second, MML continues to rely on incomplete or misleading descriptions of that evidence—including in the following instances, among others:

- MML asserts that encrypted e-mails showing certain Odebrecht ledger entries were not before the Tribunal. MML's Chart 2-3. The Tribunal, however, considered both excerpts and the Prosecutor's summary of the ledgers. *See* ECF 90-3 at 2-4; ECF 74-4 ¶ 20. MML further fails to address the fact that none of the ledger entries (in the encrypted emails or otherwise) are dated before the Concession Contract was awarded, and therefore would not have changed the Tribunal's decision.

- MML claims that it was "not allow[ed]" to introduce Mr. Meiggs' testimony. MML's Chart 3-4. In fact, MML introduced both the Prosecutor's selected excerpts and highlights of that testimony, and the Tribunal considered them. *See* ECF 90-3 at 4-8.

- MML repeatedly asserts that the Tribunal excluded certain evidence (*e.g.*, full transcripts of Mr. Meiggs', Mr. Soares', and Ms. Tavares' testimony). *See, e.g.*, MML's Chart 2, 3, 11. In fact, MML ***never even asked*** to submit that evidence. This is addressed in detail in Rutas' Opposition to MML's Petition to Vacate the Second Award, which is pending before this Court. *See* Rutas' Opp'n 16-21, *Metropolitan Municipality of Lima v. Rutas de Lima S.A.C.*, No. 23-cv-680 (D.D.C. 2023), ECF No. 26.

In sum, MML's arguments are not responsive to the basic fact, as previously addressed by Rutas, that MML's so-called "new" evidence was already considered and rejected by the Tribunal in the Second Arbitration. Rather, MML continues to improperly take further opportunities to brief issues already submitted to both Tribunals and to this Court, while giving incomplete accounts of the evidence and of the Tribunals' rulings with respect to that same evidence.

Dated: July 28, 2023

/s/ Andrew B. Loewenstein
Andrew B. Loewenstein
FOLEY HOAG LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600
Tel: 617-832-1000
Fax: 617-832-7000
aloewenstein@foleyhoag.com

Nicholas Renzler
Shrutih Tewarie
James M. Gross
FOLEY HOAG LLP
1301 Avenue of the Americas, 25th Floor
New York, NY 10019
Tel: 212-812-0400
Fax: 212-812-0399
nrenzler@foleyhoag.com

Counsel for the Metropolitan Municipality of Lima

Respectfully submitted,

/s/ David G. Hille
David G. Hille
Renata Rogers de Castilho
WHITE & CASE
1221 Avenue of the Americas
New York, NY 10020
Telephone: + 1 212 819 8200
Facsimile: + 1 212 354 8113
dhille@whitecase.com
renata.rogers.de.castilho@whitecase.com

Jonathan Hamilton
Jonathan Ulrich
Nicolle Kownacki
Blair E. Trahan
WHITE & CASE
701 Thirteenth Avenue, NW
Washington, DC 20005
Telephone: + 1 202 626 3600
Facsimile: + 1 202 639 9355
jhamilton@whitecase.com
julrich@whitecase.com
nkownacki@whitecase.com
blair.trahan@whitecase.com

Counsel for Rutas de Lima S.A.C.