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Re: La Paz Properties S.A de C.V.  
vs. Inmobiliaria Ensenada de los  
Muertos S.A. de C.V.

Dear Michael,

After reviewing the information you sent us and the documents provided by Rafael Brito, Attorney in fact for Inmobiliaria Ensenada de Muertos S.A. de C.V. (herein referred to as "**IEM**") I hereby inform you of the results of our analysis on the referenced case.

Mr. Rafael Brito informed us that the only legal action started by La Paz Properties S.A. de C.V. (hereinafter referred to as "**LPP**") is the case filed before the Third Trial Civil Court sitting in La Paz, under number 166/99, and all appeals filed within such case in chief. Mr. Brito also informed us that there is no other legal action or trial, civil or criminal, started by LPP against IEM or any other buyer of the disputed land.

In order to explain the merits of the case, it is important to consider the following:

**Background**

1.- On March 27<sup>th</sup>, 1998 a purchase and sale agreement (hereinafter referred to as the "**Contract**") executed over the property named "ENSENADA DE

MUERTOS”<sup>1</sup> was signed by IEM and LPP. The total amount agreed for the operation was set at \$5,000,000 USD.<sup>2</sup> The final deed was supposed to be signed when the full price was paid by LPP. Consequently, LPP paid part of the price in installments to IEM according to the Contract. LPP paid also other installments of the price, but not on a timely basis, this is, the payments were not done on the dates that were previously agreed. The total amount paid by LPP up to that time was 600,000 USD.<sup>3</sup>

2.- On June 16<sup>th</sup>, 1998 IEM and LPP signed a first amendment to the Contract which was planned to defer the date of closing. The parties agreed to sign the final deed when the full amount was paid. The rest of the dues were to be paid on August 12<sup>th</sup>, 1998. However, no payment was made by LPP on that date.<sup>4</sup>

3.- On August 15<sup>th</sup>, 1998 IEM and LPP agreed to assign the rights of buyer (LPP) in the Contract to Cortez Properties S.A. de C.V. (“CP”)<sup>5</sup>

4.- On October 6<sup>th</sup>, 1998 a second amendment to the Contract was signed between CP and IEM, same that was planned to defer the date for signing the final deed and to agree that full payment was to be made on October 31<sup>st</sup>, 1998. However, no payment was made by CP<sup>6</sup> on that date.

5.- On March 8<sup>th</sup>, 1999, IEM signed with CP a cancellation of the said assignment of rights. LPP was named again beneficiary of the rights arising from the Contract. A new date for signing the final document encompassing full payment was set for April 15<sup>th</sup> 1999. Again, no payment was ever made.<sup>7</sup>

6.- On April 16<sup>th</sup> 1999, IEM notified LPP that the rescission clause terminated all the obligations between the parties, as expressly agreed on the Contract. IEM also claimed damages and a penalty payment from LPP.<sup>8</sup>

7.- On June 18<sup>th</sup> 1999, Fernando Garibay Bagnis as attorney in fact for LPP filed lawsuit against IEM, Marty Davis, Desierto Verde Real Estate & Development, Gary Mark Wagner Pisa, Stephen Charles Games, Bahía de los Sueños S. de R.L. de C.V. The main claim of LPP was to obtain a court declaration stating that the Contract was in force and valid and that any other contracts regarding the land sales were null and void.<sup>9</sup>

IEM filed counterclaim against LPP seeking payment of damages, among other things.<sup>10</sup>

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<sup>1</sup> Land located in La Paz Baja California Sur, extension 1,604-64-00 hectares.

<sup>2</sup> See purchase and sale agreement of March 27<sup>th</sup>, 1998.

<sup>3</sup> See initial plaintiff complaint and answer to complaint by defendant.

<sup>4</sup> See initial plaintiff complaint and answer to complaint by defendant.

<sup>5</sup> See initial plaintiff complaint and answer to complaint by defendant.

<sup>6</sup> See initial plaintiff complaint and answer to complaint by defendant.

<sup>7</sup> See initial plaintiff complaint and answer to complaint by defendant.

<sup>8</sup> See answer to initial complaint by defendant.

<sup>9</sup> See initial complaint filed by plaintiff.

<sup>10</sup> See counterclaim by defendant.

8.- The Trial Court dealing with the case issued a judgment on January 11<sup>th</sup> 2002. Essentially, the Court ruled that LPP didn't show its causes of action, that IEM was not liable, that the Contract was properly rescinded and that both parties must have to return to each other whatever they gave between them as consideration under the Contract. Payment of a contractual penalty was granted in favor of IEM.<sup>11</sup>

9.- Both Plaintiff and Defendants appealed the ruling at different legal stages, that is, before State Superior Court and later, when the State Superior Court had rendered her ruling, the parties challenged such state ruling before a Federal Circuit Court of Appeals. The Federal Court granted at least three times such appeals and remanded the case so the State Court of Appeals would fulfill the Federal Court's instructions.<sup>12</sup>

A brief explanation of all these appeals is as follows:

Revising January 11<sup>th</sup> 2002 judgment issued by the Trial Court, the State Court of Appeals within file 104/2002 issued a judgment on December 3<sup>rd</sup> 2000, modifying in part and affirming in part.

"Amparo Directo" claims (which is essentially an Appeal, but its grounds is a Constitutional application of the law by a Federal Court), were filed against the December 3<sup>rd</sup>, 2000 judgment under numbers 173/2003 and 174/2003.

Federal Constitutional protection was granted to LPP, therefore the State Court of Appeals issued a new judgment on January 23<sup>rd</sup>, 2004.

Again new "Amparo Directo" constitutional claims were filed by LPP and IEM under numbers 177/2004 and 178/2004 against judgment issued on January 23<sup>rd</sup>, 2004. Federal Constitutional protection was granted to LPP, therefore the State Court of Appeals issued a new judgment on January 10<sup>rd</sup>, 2005.

Against the January 10<sup>rd</sup>, 2005 judgment, new "Amparo Directo" claims were filed by LPP and IEM under numbers 179/2005 and 180/2005. Federal Constitutional protection was granted to LPP, therefore the State Court of Appeals issued a new judgment on January 12<sup>rd</sup>, 2006.

New "Amparo Directo" claims were filed by LPP and IEM under numbers 65/2006, 66/2006 and 67/2006 against judgment issued on January 12<sup>rd</sup>, 2006.

10.- On March 29<sup>th</sup>, 2007 the Federal Court sitting in La Paz issued a judgment within "amparo directo civil" case file number 65/2006. The Federal Court of Appeals, ordered the State Court of Appeals to issue a new ruling, following this guideline:

*"... determine en principio, que en el tercer convenio modificatorio no se estableció la mora de treinta días precisada en la cláusula decimatercera del*

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<sup>11</sup> See judgment issued by the Third Trial Civil Court.

<sup>12</sup> See judgment issued by Federal Court of Appeals file number 65/2006.

*originario contrato de compraventa, y que por ello, el término máximo que la actora principal tenía para el cumplimiento de su obligación de pago lo era hasta el quince de abril de 1999; y que además, al momento de analizar la procedencia o improcedencia de la acción principal considere que los actos señalados por la actora principal como perturbadores, no obstaculizaron su obligación de pago del precio, por lo que, no generaron el derecho de retención de pago a favor de esta parte, aunado a que dicho derecho debe hacerse valer dentro del plazo convenido para ello;...”<sup>13</sup>*

A fair translation of this part is as follows:

*“... to first determine that in the third amended contract there was no grace period of 30 days, pointed out in clause 13<sup>th</sup> of the original sale and purchase agreement, and therefore, the maximum term that plaintiff had to fulfill her payment obligation was until April 15<sup>th</sup> 1999, and plus, when analyzing if the principal cause of action was proper or improper, the court should consider that the acts pointed out by plaintiff as a perturbation, were not an obstacle to fulfill the obligation to pay the price, therefore, did not generated a right to withhold payment on its favor, provided that such right should be used within the period agreed for that”*

11.- Accordingly to the Federal Court of Appeals order, on May 3<sup>rd</sup>, 2007, the State Court of Appeals issued a new judgment . Essentially the ruling states the following:

- a) The Contract rescission notified by IEM to LPP was proper and should be effective since April 15<sup>th</sup> 1999.
- b) Both parties have to return to each other whatever they gave as consideration between each other; the amount of such indemnification should be decided in the stage of liquidation and execution of the final judgment. In other words the amount that IEM will have to return to LPP as a consequence of the ruling will be determined during the stage of enforcement, due to the fact that the Contract has both a liquidated damages clause and an interest clause.

12.- Against the May 3<sup>rd</sup>, 2007 judgment issued by the State Court of Appeals, LPP filed a new “Amparo Directo”<sup>14</sup>. As of July 11<sup>th</sup> 2007 the federal appeal brief was still in the State Court of Appeals waiting to be sent to the Federal Court for final adjudication. A judgment on this new appeal should be expected in more than 6 months.

### **Legal Opinion of ruling 65/2006.**

According to Mexican Jurisprudence and basic principles of Constitutional and “amparo” law, the judgment issued under number 65/2006 by the Federal Court of

<sup>13</sup> See page 267 of “Amparo Directo” ruling 65/2006.

<sup>14</sup> See “Amparo Directo” lawsuit filed by LPP.

Appeals is final and binding for all the parties involved in the litigation. Furthermore, it has a reflex effect over any other litigation proceedings that might arise in the future. The legal reasoning of the Federal Court cannot be changed or challenged before any other court.

This means that any further ruling issued by either the State Court of Appeals or the Federal Court of Appeals, should be issued considering that (a) the rescission of the Contract made by IEM was proper and effective April 15<sup>th</sup>, 1999 and that (b) LPP had no right to withhold the price because there were no acts performed by IEM that will allow LPP to exercise such right.

### **Possible ramifications of the controversy in the future.**

1.- In our opinion the litigation between IEM and LPP will continue for quite some time. It is very likely that the new "Amparo Directo" lawsuit filed by LPP will grant federal protection to LPP on the topic of the monies IEM has to return to LPP, as a consequence of the rescission of the Contract<sup>15</sup>.

This is true because we saw that during the whole process, the State Court of Appeals issued judgments with several inconsistencies, contradictions and lack of analysis on numerous arguments made by LPP or IEM. These defects in the analysis or the arguments of both parties caused the case to be remanded in quite a few occasions to the State Court of Appeals, in order to comply with the orders issued by the Federal Court of Appeals.<sup>16</sup>

The Judgment issued by the State Court of Appeals in May 3<sup>rd</sup>, is not the exception, there are some serious inconsistencies that will give LPP a high chance of receiving the Federal Protection again, but in any case, the protection will be narrowed just to any topic related to (1) lack of analysis of the appellate brief arguments raised by LPP before State Appellate Court, (2) wrong analysis of appellate brief arguments raised by LPP before State Appellate Court, (3) improper calculation by the Appellate Court analysis that she did on the Trial Court ruling, on the amount that IEM has to return to LPP.

As I have said, the topic of the lawful rescission is final and Res Judicata for any other Court of Law.

2.- Although the principal topic that might affect the property is resolved and LPP cannot contest anymore the rescission, others issues are still pending for final adjudication. Therefore, there is a possibility that any sale performed by IEM might be impeached by LPP on the grounds that the trial has not been resolved up to a final and definitive judgment.

If that is the case, IEM and any new buyers can use as a defense the Res Judicata contained in judgment 65/2006, however, they will have to defend before any other trial court, passing through State Court of Appeals and finishing in Federal Court of Appeals, if that's the case.

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<sup>15</sup> As ordered by the State Court of Appeals in the May 3<sup>rd</sup>, 2007 judgment

<sup>16</sup> See judgment issued by Federal Court of Appeals file number 65/2006 pages 199 to 206.

This kind of lawsuits might be just a way of harassment to IEM and her potential land buyers.

The fact that LPP has no assets to face any potential liability<sup>17</sup>, like being forced to pay attorneys' fees, might encourage the filing of frivolous lawsuits.

3.- As a consequence of the rescission, as a matter of law, IEM should return monies to LPP. The amount is still not determined so far, but the amount should be set by the trial court, once all appeals are finished.

Therefore, litigation between LPP and IEM will continue in Trial Court to determine what amount must be returned from IEM to LPP. It should be said that such determination of the indemnification might be a matter of appeal as well.

Thus, the final judgment, now on the amount that has to be returned by IEM, might also be appealed and sent to a Federal Court for constitutional revision.

As said previously, the court ordered IEM to return LPP certain amount of the paid price, so if IEM refuses payment then LPP might even seek execution of the judgment. That will take place over any assets IEM might have, including the land at stake, on the name of IEM at that point of execution.

Now, if by some reason IEM at such time has no money or assets to pay LPP because IEM sold all the property and has no more resources, then LPP will have the right to sue again LPP, any buyers, assignees or whoever holds the property at stake, under a civil action called "acción pauliana".

This civil law action, allows a party to sue other individuals or entities to force them to return assets to the debtor, if the selling or transferring of the assets has as a consequence the insolvency of such debtor. This action, among other requisites, involve that the debtor must know by a judgment (which is the case), that she has to pay a debt and no matter that obligation, is getting rid of assets in order to avoid payment.

If you need any more information regarding the matter at stake please do not hesitate to contact us.

Best regards,

Felipe Torres  
Torres Abogados

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<sup>17</sup> We were informed that LPP was just created to buy the land and has no more assets or operations