**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:13-cv-20544-KMM

ARCHITECTURAL INGENIERIA SIGLO XXI, LLC, a Florida limited liability Company, and SUN LAND & RGITC LLC f/k/a SUN LAND & RGITC, CO., a Florida limited liability company,

Plaintiffs,

v.

DOMINICAN REPUBLIC, a foreign state. And INSTITUTO NACIONAL DE RECURSOS HIDRAULICOS, a foreign Government agency,

Defendants.
_____/

This cause comes before the Court for final disposition after an eight-day bench trial in Miami, Florida.[1] Based upon the evidence presented during the bench trial, the record, the arguments of counsel, and being otherwise fully advised in the premises, the Court issues the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

## I. PROCEDURAL HISTORY

On February 13, 2013, Plaintiffs Architectural Ingenieria Siglo XXI, LLC's ("Architectural") and Sun Land & RGITC LLC's ("Sun Land") (collectively, "Plaintiffs") filed a two-count complaint against the Dominican Republic, and Instituto Nacional de Recurosos

[1] The bench trial lasted for a total of eight days. It began on January 30, 2017, and concluded on March 14, 2017.

Hidraulicos ("INDRHI") (collectively, "Defendants"), alleging breach of contract and unjust enrichment against. *See* Complaint (ECF No. 1).

Defendants failed to respond to the Complaint in a timely manner and Plaintiffs moved for entry of default judgment (ECF No. 13). The Court entered default judgment (ECF No. 15), and Defendants moved to vacate final default judgment (ECF No. 23). The Court denied the Motion to Vacate (ECF No. 30) and Defendants appealed that order, as well as the Court's order on the motion for default judgment (ECF No. 38).

On appeal, the Dominican Republic challenged whether the district court had subject-matter jurisdiction over all or part of Sun Land and Architectural's breach of contract claim.[2] On June 10, 2015, the Court of Appeals reversed the Court's order denying the Dominican Republic's Rule 60(b)(4) motion to vacate for voidness and the order denying the Dominican Republic and INDRHI's Rule 60(b)(1) motion to vacate for excusable neglect. The Court of Appeals remanded the case.

On December 2, 2015, this Court entered an order on Defendants' Motion to Dismiss the Complaint (ECF No. 82).[3] The Court granted the Dominican Republic's Motion to Dismiss with prejudice all claims based on several documents which the Court of Appeals held were not a part of the same contract at issue[4] because it lacks subject matter jurisdiction over any claim against the Dominican Republic based on alleged breach of those documents. *See* Order dated

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[2] *See Architectural Ingenieria Siglo XXI, LLC, et al. v. Dominican Republic, et al*, 788 F.3d 1329, 1340 (11th Cir. 2015).

[3] The Order also ruled upon Defendants' Motion to Vacate Default Judgment and Motion to Strike, and Plaintiff's' Motion for Leave to Amend Complaint.

[4] These documents, referred to as the "Amendment" and the "Addenda" by the Court of Appeals, will be discussed as necessary herein but the Court notes that it is bound by the decision of the Court of Appeals that these documents are not interpreted as part of the underlying contracts at issue here. *See Architectural*, 788 F.3d at 1341.

December 2, 2015 at 7 (ECF No. 82). The Court also granted INDRHI's motion to dismiss without prejudice all claims that were not related to those same documents. *Id.* The Court dismissed Count II, alleging unjust enrichment, without prejudice. Plaintiffs were granted leave to file an amended complaint "asserting any cause of action not barred by the Eleventh Circuit's decision." *Id.* at 11.

On January 9, 2016, Plaintiffs filed an Amended Complaint (ECF No. 88), alleging one count of breach of contract by INDRHI and the Dominican Republic. Plaintiffs allege that the Defendants terminated the contract in violation of its terms and failed to pay Architectural the agreed price for work completed. (*See* Am. Compl., ¶ 1).

On summary judgment, the Court found INDRHI liable for breach of contract by failing to adhere to the notice provisions related to force majeure but found that issues of fact remained regarding what did or did not cause force majeure and the respective liability of Defendants.

## II. FINDINGS OF FACT[5]

### A. The Parties and Jurisdiction

Architectural and Sun Land are both limited liability corporations organized and existing under the law of the State of Florida, and at all relevant times maintained offices in Miami-Dade County, Florida. (Day 1 Trial Tr. 34:21–25; 35:16–18.)[6]

The Dominican Republic is a foreign sovereign state under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, at § 1603(a). (Am. Compl., ¶ 5.) Defendant INDRHI is a governmental agency created on September 8, 1965, for the purpose of supervising,

[5] The Court notes that certain quoted material herein may contain alternatively defined materials. Additionally, there may be turns of phrase or perceived grammatical or typographical errors in some of the quoted material due to translation from Spanish to English.

[6] References to the Bench Trial Transcripts, found at ECF Nos. 195–201, shall be in the following format: "Day __ Trial Tr. page:line."

managing, and administering the Dominican Republic's water resources and executing approved government water resources projects for the Dominican state. (Defs.' Tr. Ex. 219.)[7] INDRHI is part of the Ministry of Natural Resources and Environment and substantially, although not wholly, funded by designations in the Dominican Republic's national budget. (Day 4 Trial Tr. 83:15–21; 85:4–13; 145:12–16; 146:2–6.)

The Court has jurisdiction over both INDRHI and the Dominican Republic on this breach of contract claim because Defendants expressly waived sovereign immunity in the Contract. *Architectural*, 788 F.3d at 1338.

**B. The Azua II Project**

In 2000, INDRHI proposed the construction of an irrigation project ("Azua II Project" or "Project") in the Dominican Province of Azua. (Day 1 Trial Tr. 35:21–36:4.) The Project involved the construction of a large-scale irrigation infrastructure project in Azua. (Day 4 Trial Tr. 85:17–23.) The purpose of the Project was "the amplification, improvement and modernization of the YSURA Irrigation System in the Province of Azua, with an irrigation area of 17,500 hectares, out of which 4,500 correspond to new areas to be developed, directly benefiting 9, 152 poor farmers." (Pls.' Trial Ex. 34.)

Azua II does not have its own water supply. (Day 2 Trial Tr. 72:15–16.) In order to irrigate the 3,000 hectare area, Architectural "prolonged the Ysura Canal from the presently existing segments of the canal to the eastern extreme of Azua II." (*Id.* 72:17–19.) Water from the Villarpando dam flows into the Ysura Canal, which is 13-kilometers long and within the Azua I region. (*Id.* 72:24–25; 73:17–18.)

[7] References to exhibits propounded by Defendants at trial shall be in the following format: "Defs.' Trial Ex. __." References to exhibits propounded by Plaintiffs at trial shall be in the following format: "Pls.' Trial Ex. __."

INDRHI and the Secretario Tecnico de la Presidencia de la Republica ("Technical Secretary"), acting on behalf of the Dominican Republic, invited contractors to submit proposed bids on the Project. (Day 1 Trial Tr. 45:9–22.) Architectural and Sun Land submitted the winning bid. (*Id.* 45:20–22.) On November 20, 2001, then-President Hipolito Mejia issued an executive order granting the Technical Secretary and INDRHI to enter into various agreements on behalf of the Dominican Republic in furtherance of the Project. (Pls.' Trial Ex. 7 at 1.)

Julio Morales Perez ("Mr. Morales"), one of Architectural's owners and an engineer, described the initial scope of the project as follows:

> Basically, Azua II Pueblo Viejo represents the essence of the project, as indicated by its name. Azua II is on the eastern side of the City of Azua, with some magnificent land to be used, which greatly lacked natural resources in the area; and until the project starts working fully, they're being irrigated through a series of pumping stations, that since the Azua II is near the ocean, alarming penetration by seawater is occurring. In order to continue to improve and extend irrigation in Azua II, resources of natural water were needed, water that would not be mixed with seawater . . . our objective was to irrigate 3,000 hectares.

(Day 2 Trial Tr. 65:24; 66:9–10; 71:4–19.)

### C. The Contract

On December 7, 2001, the Technical Secretary executed an agreement (the "Purchase Agreement") with Sun Land in the amount of $51,777,321.00 to purchase and export to the Dominican Republic all products and services necessary for an irrigation infrastructure project known as the Azua II project. (Defs.' Trial Ex. 13 at 1, 11.)

On March 7, 2002, INDRHI, on behalf of the Technical Secretary, and Architectural executed Contract No. 10375. (ECF No. 88, Ex. D.) Contract No. 10375 was entered into for the study, design, and construction of the Azua II Project.

On February 13, 2004, Sun Land, Architectural, and INDRHI entered into an agreement (the "Protocol"), that was designed to execute the terms of the Purchase Agreement. (Defs.'

Trial Ex. 18 at 1, 43.) The Protocol explicitly superseded Contract No. 10375. *See Architectural*, 788 F.3d at 1334. The Protocol and the Purchase Agreement, together, are the "Contract" that is at the center of this dispute.[8]

1. The Contract: Products and Services

The Contract called for the Azua II Project to be fully financed, designed, and constructed as a turnkey project, to be completed in twenty-four months, for a "Total Contract Price" of $51,771,321. (Defs.' Trial Ex. 13 at 3.) Pursuant to the Contract, the Total Contract Price included every expense, fee, charge and cost that the parties could reasonably expect to incur with regard to the Project, including all financing fees and charges with the sole exception of loan interest, which would be paid by the borrower. (*Id.* at 3.)

On April 11, 2003, Sun Land entered into an agreement with Architectural to provide the studies, designs, and the construction of the Azua II Project. (Pls.' Trial Ex. 70.)

Appendix A, entitled "Products," lists in general terms products that were to be provided in two phases. The first phase included the rehabilitation of the existing roads in the Project area, the construction of the on-site camp, and the rehabilitation and repair of the existing irrigation system. (Defs.' Trial Ex. 13, Appendix A at 4–6.) The second phase called for the construction of such items as the actual irrigation system, the drainage system, the main conduits system, and the water storage and supply networks. (*Id.*)

Appendix A also includes a map entitled "Azua II – Pueblo Viejo Development Project." (Defs.' Trial Ex. 13, Appendix A at 1.) The map shows the area to be irrigated and also includes the entire irrigation system at the time of the rendering—which includes area to the west of Azua

[8] The Court of Appeals held that the Purchase Agreement and the Protocol, although executed on different dates and involving different parties, are both part of the same transaction. *See Architectural*, 788 F.3d at 1340.

II. Included in the illustration are the San Juan and the Yaque del Sur Rivers, the Villarpando water system, and the YSURA Canal. The Project intended to extend the Ysura Canal further east, which required ensuring that the Ysura Canal had sufficient flow to reach the new area to be irrigated. (Defs.' Trial Ex. 13, Appendix A at 2–4.) To ensure the Ysura Canal's sufficient flow, rehabilitation and repair, storage ponds, and aqueducts were created. (*Id.*)

Appendix B, entitled "Services," listed services to be provided, also in two phases. The first—the design stage—included studies and designs for, among other things, the water supply needs, the availability of water, the condition and status of existing wells, the drainage system, irrigation methods, topographical plans, the design of water storage systems and aqueducts connecting to the main existing canal system, and other main aqueducts. (Defs.' Trial Ex. 13, Appendix B, 1–6.)

Article 3 of the Protocol describes the area to be irrigated as including the area under irrigation by the Yaque del Sur-Azua (Ysura) Irrigation System," thus including the entire water irrigation system as envisioned in the Purchase Agreement. (Defs.' Trial Ex. 18 at 6, Art. 3.) It also states that if potential water sources were located outside the area, the Project could be extended to include those areas. (*Id.*) Further, the Project included infrastructure for the storage and distribution of water as well as the installation of the irrigation development support work, which would necessarily include roads, storage ponds, and so on. (*Id.*) Article 3 also states: "The Scope of THE PROJECT is subject to and limited by the available funds under the Acquisition List and this PROTOCOL [that is, $51.7 million]." (*Id.*)

Mr. Morales Rus, one of Architectural's owners, testified that the Project would be split into two parts because "there wasn't enough money to do what everybody wanted to do" and the "SunTrust funds were insufficient to execute the Project." (Day 1 Trial Tr. 165–167.) Mr.

Morales Rus also testified that it was understood that the first stage would include the subcomponents that must be performed under the existing Contract, and that the second phase would include those which would require additional resources. (*Id.* at 167–169.) Architectural's letter to INDRHI further acknowledged this staging and that the second stage encompassed components "for which additional financial resources would be needed." (Defs.' Trial Ex. 239.)

At the time of the signing of the Contract, precise components and work to be done were not included because the designs had not yet been prepared. (Day 4 Trial Tr. at 99–102, 124–125; Pls.' Trial Ex. 7 at 13–15, Art. 10.)

2. The Contract: Financing

According to the Protocol, the Project was to be financed in two parts: (i) 85% of the Total Contract Price (totaling approximately $43 million) (the "85% Financing") would be financed by a "U.S. Lending Bank,"[9], for which loan Sun Land would obtain a guarantee from the Export-Import Bank of the United States ("Ex-Im Bank") (Defs.' Trial Ex. 15 at 1–4, §1; Pls.' Trial Ex. 6 at §8(c)–(d)); and (ii) the remaining 15% of the Total Contract Price (totaling approximately $6.8 million) would be financed through a lender engaged by Sun Land (the 15% Financing") (*id.* at 5–6, § 2).

**D. Performance of the Azua II Project**

1. Financing of the Project

Prior to beginning work on the Azua II Project, financing needed to be in place. On September 15, 2003, through the efforts of Sun Land, the Dominican Republic, SunTrust Bank, N.A. ("SunTrust"), and Ex-Im Bank executed a credit agreement under which SunTrust agreed to provide 85% of the financing for the Project to the Dominican Republic (the "Credit

[9] Ultimately, SunTrust Bank N.A. ("SunTrust") became the lender.

Agreement"). (Pls.' Trial Ex. 35; Day 2 Trial Tr. 122:24–123:6; 139:10–23.) Under the Credit Agreement, the Dominican Republic was the borrower, SunTrust was the lender through a letter of credit, and Ex-Im Bank was the guarantor. (Day 2 Trial Tr. 122:16–25, 123:1–20.)

The Credit Agreement initially provided funding for the Project for a two-year period, until October 15, 2005—the final disbursement date. (Day 2 Trial Tr. 142:9–12; 143:1–3.) The Credit Agreement contained several conditions precedent that the Dominican Republic, as borrower, had to meet prior to disbursement of funds. (Day 2 Trial Tr. 140:3–25.) One such condition was that the Dominican Republic was required to provide proof of authorization, including ratification or approval of the Credit Agreement by the Dominican Congress. (Pls.' Trial Ex. 35, §6(1).) On March 3, 2006, the Dominican Congress ratified the Credit Agreement. (Day 1 Trial Tr. 78:5–7; Day 2 Trial Tr. 141:8–10; Day 4 Trial Tr. 167:11–18; Vasquez Dep. Tr. 87–18.)[10] This ratification was after the expiration of the final disbursement date and thus required amendment in order to extend the Credit Agreement. (Vasquez Dep. Tr. 166:11–16.) Based on the evidence presented at trial, the Court finds that the pre-ratification delay cannot be attributed to the Dominican Republic or INDRHI.

On August 14, 2006, the Dominican Republic, SunTrust, and Ex-Im Bank entered into Amendment No. 1 to the Credit Agreement, which extended the final disbursement date to October 15, 2007. (Pls.' Trial Ex. 36.)

On March 2, 2007, the Dominican Republic, SunTrust, and Ex-Im Bank entered into Amendment No. 2 to the Credit Agreement to address the issue involving certain local costs. (Pls.' Trial Ex. 37.)

[10] Due to the inability of certain witnesses appear at trial, the Parties submitted videotaped depositions which the Court has reviewed and considered. References to those deposition transcripts admitted into evidence shall be in the following format: "[Name] Dep. Tr. page:line."

On September 4, 2008, the Dominican Republic, SunTrust, and Ex-Im Bank entered into Amendment No. 3 to the Credit Agreement, which extended the final disbursement date to October 15, 2009.

Per the terms of the Contract, Sun Land was to provide 15% financing or $8,114,128 (the "15% Financing"). This amount includes $6,864,382 to pay for Project cost and $1,249,746 for certain fees. Sun Land funded the 15% Financing through the sale of ten promissory notes. The face value of the notes was $9,461,972, which generated $8,126,161 in proceeds.

Sun Land did not have to use the 15% Financing until the SunTrust 85% Financing became available. (Pls.' Trial Ex. 7, Art. 19.)

In June of 2007, Sun Land paid Architectural the full $2.9 million Article 19.1 down payment in a lump sum from a Sun Land account at SunTrust. (Defs.' Trial Ex. 7.) The Article 19.1 down payment was made from the $6.8 million 15% Financing. (Defs.' Trial Ex. 276.) Sun Land was entitled to recover the Article 19.1 down payment through an "amortization" process under the Protocol Article 19.4. This amortization process required a 15% deduction of subsequent invoice payments made to Architectural until the entire down payment had been recovered. (Defs.' Trial Ex. 18 at 30, Art. 19.4.) By the close of the Project, approximately $1.1 million had been recovered.

2. Project Design and Construction

On March 16, 2004, INDRHI ordered Architectural to initiate work on the Project and it did so. (Day 1 Trial Tr. 71:7–9.) Architectural began performing design work in 2004. (Day 1 Trial Tr. 116:15–16.) Architectural also began actual construction work at the start of the Project, specifically it began with the leveling of the Lavador Farm. (*Id.*, 116:17–20.)

Shortly after the Project began, in August of 2004, INDRHI directed Architectural to stop work. (Day 1 Trial Tr. 73:20–74:13, 75:3–21.) In a letter to Architectural, INDRHI stated:

> We remind you that as of August 16th of this year another government administration will begin, and with same there will be a change in the authorities who will direct this institution. Pursuant to this fact the National Hydraulic Resources Institute (INDRHI) informs you that the activities in the Lavador Pilot Farm are halted as of 5:00 P.M. of Friday, August 13th, of the present year. This halt shall be revoked when the new authorities so order in writing.

(Pls.' Trial Ex. 86.)

This directive resulted in a delay in the construction of the Project. (Day 1 Trial Tr. 74:17–19.) On November 15, 2004, INDRHI directed Architectural to resume work and stated:

> [INDRHI] has decided to initiate the execution of the Azua II – Pueblo Viejo Project with the reactivation of all the contracts and agreements that compose same, such that, pursuant to the availability of a preliminary disbursement of resources by SUN LAND, for an amount of approximately US$500,000.00 (which will be designated to carry out final design activities by the company Arquitectural Ingenieria Siglo XXI (AISXXI) and the activation (*of)*the supervision of the Project by the Utah State University – USU). (*sic*) we are notifying this order to begin.

(Pls.' Trial Ex. 88.)

The letter halting the work purports to only apply to construction in Finca Lavador. However, the letter instructing that work resume, coupled with the testimony of Architectural's representatives regarding their understanding of the cessation of work, supports the Court's finding that all work on the Project was stopped from August 13, 2004, until November 15, 2004—a total of ninety-four days.

The majority of the actual construction work done by Architectural took place in 2007 and 2008. (Day 1 Trial Tr. 116:21–23.) Pursuant to the Purchase Agreement, Architectural constructed lagoons and dykes, and also moved dirt and land. (Day 1 Trial Tr. 117:24–118:11.)

The work done by Architectural falls into one of two categories: (1) work that was part of the original intent of the Project; and (2) work that was not a part of the original Project.[11] The Court finds that the work outlined in the Contract was not all-inclusive but that the Contract contemplated the need for additional work. *See, e.g.*, (Day 4 Trial Tr. 171:13–172:25.)

The Project did not proceed within the original timeline anticipated by the parties and as set forth in the Contract. The delays, save for INDRHI's directive to halt work for the aforementioned ninety-four days, were due to difficulties in obtaining approval of the Credit Agreement and subsequent amendments. These delays are not attributed to any one party but were instead the result of bureaucratic delays and a complex approval system. There is no evidence that Architectural caused any of the delays.

It became impossible to provide a turnkey project for the initial budget of $51.7 million. But based on the record before it, the Court does not find that the entire scope of the Project expanded.

3. Payments Made Under the Contract

SunTrust made twenty-seven disbursements under the Credit Agreement, totaling over $15 million. (Keough Dep. Tr. 95:5–15; Vasquez Dep. Tr. 99:5–16.) Architectural issued a total of 22 invoices or "Cubicaciones," in the total amount of $12,398,044. (Pls.' Trial Ex. 16.)

[11] The Court of Appeals stated that "[a]lthough the repair work contemplated by each addendum was similar in kind to that performed as part of the Azua II project, the work under each addendum was not directly related to the Azua II project. Nor were the payment terms the same: work related to the Azua II project was to be paid for in U.S. dollars, but work under each addendum was to be paid for in Domincan pesos. For these reasons, we cannot conclude on the current record that the three addenda should be interpreted together with the purchase agreement and the protocol—documents that they never explicitly reference—nor can we conclude that the addenda amended the protocol." *Architectural*, 788 F.3d at 1340. As to the March 2006 Amendment, the Court of Appeals stated "[o]n its face, [the March 2006 Amendment] is thus neither an amendment of a document that relates to the Azua II project nor a stand-alone agreement . . . we cannot conclude that the scope of the Azua II project was indeed extended in March 2006." *Id.* at 1341.

INDRHI approved the amounts for payment. In June of 2007, the 85% Financing became available and Architectural was paid $10,260,687 (Defs.' Trial Ex. 127), leaving a balance of $2,137,357.

All funding from the SunTrust 85% Financing ceased on October 15, 2007—the Final Disbursement Date. (Keough Dep. Tr. 101:25–102:9.) Shortly before the Final Disbursement Date, the parties took an advance payment of $3.5 million in order to permit the work to continue through December of 2007. (Day 5 Trial Tr. at 21–25.) This was done through Architectural's Cubicacion 18 in the amount of $3,506,378. (Defs.' Trial Ex. 290.) Eighty-five percent of that amount, $2,980,421, was disbursed from SunTrust's 85% Financing Loan and was held by Sun Land in its account. (Day 1 Trial Tr. at 25–26). There is no evidence that Sun Land is responsible for any delays in obtaining financing.

INDRHI approved all of Architectural's invoices which were submitted for approval. Architectural was paid in full for Cubicaciones 1–18(b). With respect to Cubicaciones 18(c) through 22, INDRHI instructed Sun Land in writing to pay Architectural the balance owed. There is no evidence that INDRHI failed to pay monies owed to Architectural on Cubicaciones 18(c) through 22—the remission of payment was Sun Land's responsibility once Sun Land had the requisite funding, which it did.

**E. Termination of the Contract**

On February 13, 2009, INDRHI sent Sun Land a letter notifying it that INDRHI was terminating the contract due to force majeure. (Pls.' Trial Ex. 43.) INDRHI did so in violation of the notice provisions of the Contract. *See* Order on Summary Judgment (ECF No. 160.)

The evidence does not support finding that the Dominican Republic terminated the Contract. Plaintiffs assert that it was then President, Leonel Fernandez, who terminated the

Contract. Plaintiffs rely upon a conversation between President Fernandez and Mr. Morales Perez in March of 2009—*after* INDRHI sent Sun Land the notice of termination—during which Mr. Morales Perez testified that the President said that he did not like Sun Land and "[u]nder these conditions, the Dominican State will not continue the work." (Day 2 Trial Tr. 83:22–84:2.) Mr. Fancher, the "Financial Arranger" at Florida Export Finance Corporation hired by Sun Land, testified that the President terminated the deal. (Day 7 Trial Tr. 14:24–15:3.) Finally, Plaintiffs rely upon an April 2009 memorandum from Utah State University, the Dominican Republic's agent on the Project, which described the then current status of the Project as follows:

> In mid-December 2008, USU's Chief-of-Party was unofficially informed by INDRHI personnel that there was a dispute between INDRHI and the financing entity, Sun Land & RGITC Corp. of Miami, Florida. In particular, the President of the Dominican Republic was reportedly offended by representatives from Sun Land & RGITC Corp. and decided to freeze all project activity in mid-December 2008. With INDRHI's approval, USU responded by reducing all project activities to a bare minimum.

(Pls.' Trial Ex. 60.)

This hearsay evidence of the Dominican Republic's role in terminating the Contract is exactly that—hearsay, and thus insufficient to support finding that the Dominican Republic breached the Contract. Based on the record and the evidence presented at trial, the Court finds that Plaintiffs have not met their burden of proving by a preponderance of the evidence—much less by admissible evidence—that the Dominican Republic terminated the Contract or caused the Contract to be terminated.

**F. <u>Post-Termination</u>**

In December of 2011, INDRHI issued several press releases stating that it had executed an agreement with Constructora Queiroz Galvao, S.A. ("CQG"), a Brazilian company, to complete the Azua II Project. The estimate for the cost of this work was $98,384,923.

## III. ISSUES BEFORE THE COURT

In the Amended Complaint, Plaintiffs allege that INDRHI and the Dominican Republic materially breached the Contract by: (a) failing to pay amounts owed under the Contract; (b) engaging in an improper "start and stop" approach on the Project; (v) unjustifiably terminating the Contract; and (d) otherwise violating the covenant of good faith and fair dealing. (ECF No. 88 at ¶¶ 51–58.) Plaintiffs allege that they suffered damages as a direct and proximate result of Defendants' material breaches. (*Id.* at ¶ 57.)

Defendants argued at trial that: (1) the Dominican Republic did not breach the Contract; (2) INDRHI did not breach the Contract; (3) that Sun Land breached the Contract first; and that (4) Plaintiffs' alleged damages are unsupported by the evidence.

## IV. CONCLUSIONS OF LAW

In order to state a cause of action for a breach of contract under Florida law, there must be a valid contract, a material breach, and damages resulting from that breach. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009) (citing *Friedman v. N.Y. Life Ins. Co.*, 985 So.2d 56, 58 (Fla. 4th DCA 2008)). Plaintiffs bear the burden of proving breach of contract by a preponderance of the evidence.

### A. The Contract Was Not Modified.

In order to assess the Parties' respective responsibilities and alleged breaches, the Court first looks to the Contract. Plaintiffs argue that the scope of the Contract was expanded, as evidenced by the performance of works not specifically identified in the Contract. Defendants, on the other hand, contend that works that were not specifically identified in the Contract but

were performed by Architectural were still within the scope of the Contract and that the scope of the Project remained unchanged.

It is the law of the case that the Purchase Agreement and the Protocol are to be read together. *See United States v. Anderson*, 772 F.3d 662, 668 (11th Cir. 2014) (the law of the case doctrine provides that "[a]n appellate decision binds all subsequent proceedings in the same case not only as to explicit rulings, but also to issues decided necessarily by implication on the prior appeal") (internal quotation omitted).

It is clearly established that under Florida law a "written contract may be modified by a subsequent oral agreement or subsequent conduct of the parties, even though the written contract purports to prohibit such modification." *Beach Higher Power Corp. v. Granados*, 717 So.2d 563, 565 (Fla. 3d DCA 1998), *see also Martinez-Pinillos v. Air Flow Filters, Inc.*, 738 F. Supp. 2d 1268, 1284 (S.D. Fla. 2010).

Plaintiffs argue that the scope of the Contract was expanded as evidenced by the Parties' performance. Specifically, Plaintiffs argue that the following work was within the scope of the Contract: (1) rehabilitation of segments of Villarpondo, Los Toros Canal; (2) rehabilitation of critical segments of the Ysura Canal; (3) construction of settlement pond for control of suspended solids; and (4) Finca Lavador. (Day 1 Trial Tr. 94:2–14; 94:24–96:14; Day 8 Trial Tr. 98:9–99:9.) These projects all involved repairs to the irrigation system in a different region, the Azua I region, which is up-stream from the Azua II region. (Day 1 Trial Tr. 87:14–89:20; 90:5–15.) Defendants contend that this was work contemplated by the Contract but not specifically identified therein because the Contract was signed prior to any design work taking place.

This Court finds the Court of Appeals' analysis regarding Contract 10375, the March 2006 Amendment (Pls.' Trial Ex. 15), and the subsequent Addenda useful in its present analysis regarding modification of the Contract. In March of 2006, INDRHI sent Architectural a letter approving a list of "Components of Works in New Contract" that updated and expanded the scope of the Project. *Id.* at 1335. These new components increased the cost of the Azua II Project, with a new total cost of $106.1 million. *Id.* In November of 2007, INDRHI and Architectural entered into the first addendum—which covered structural repairs to sections of the Yaque del Sur-Azua Canal, a system of water pathways in the Azua II region. *Id.* In January of 2008, INDRHI and Architectural entered into the second addendum to repair sections of the same canal following damage caused by Tropical Storm Noel. *Id.* In July of 2008, INDRHI and Architectural entered into the third addendum to repair sections of the same canal following damage caused by Tropical Storm Olga. Each of Architectural's invoices was paid in full except for the invoice as to the work pertaining to the third addendum, which was paid in part. *Id.*

The Court of Appeals rejected Plaintiffs' argument that the March 2006 Amendment and the subsequent addenda amended the Contract. Upon reviewing the March 2006 Amendment, the Court of Appeals was "unpersuaded that it constitutes an amendment of either the purchase agreement or the protocol, the documents memorializing the Azua II project." *Id.* at 1340. The document was not a properly executed amendment of the Contract and does not contain terms or obligations. *Id.* at 1341. "Based solely on a review of 'the Amendment,'" the Court of Appeals said that it could not conclude that the scope of the Azua II project was extended in March of 2006.

Plaintiffs continue to rely upon the March 2006 Amendment as evidence that the scope of the Project expanded. (Day 4 Trial Tr. 171:9–172:11.) Plaintiffs' expert, Ben Davis Nolan, III,

testified that the March 2016 Amendment "would be a completion contract, and if you look at the line items and you match them up with what was being done in the first phase, things that was [*sic*] in the Azua II project from the start that got pushed out into the contract, you'll find that they're not two separate contracts, it's the continuation of one contract." (*Id.* 171:14–19.) Mr. Nolan stated that Architectural "did the work and they were in the process of continuing the work, the mix of work that was in the original contract and the new work when they were stopped." (*Id.* 172:5–7.)

Plaintiffs also rely upon Section 12 of the Purchase Agreement which provides that the agreement shall be a "Turnkey Contract." (Pls.' Trial Ex. 6, § 12.) On the one hand, Plaintiffs argue that two essential components of the Contract—the scope of the Project and the budget—both changed, but that another component—the turnkey provision—did not change. The evidence does not support this conclusion.

Section 10 of the Purchase Agreement, entitled "Increase in Products and Services," provides:

> During the life of this Agreement INDHRI shall have the option to purchase additional Products and Services, by providing SL & RGITC a written amendment to the Purchase Order signed by the authorized agents of both INDHRI and STP. This amendment to the purchase order shall become part of the Purchase Order and shall be subject to all the terms, conditions and provisions contained herein as if it was part of the original Purchase Order.

(Pls.' Trial Ex. 6, § 10.)

Section 11 of the Purchase Agreement provides that "[a]ll Products and Service prices shall be determined by the results of the feasibility study and be in compliance with the Total Contract Price of this Purchase Agreement and INDHRI budgetary considerations." (*Id.*, §11.)

Section 10 explicitly addresses the possibility of needing additional products and services and Section 11 requires that all product and service prices shall be in compliance with the Total

Contract Price. Given these provisos, and the ambiguity surrounding the intent of the parties as to a "turnkey" project, the Court concludes that the Contract was not modified as a result of the disputed additional work.

In light of the Court of Appeals conclusion that the March 2006 Amendment did not amend the Contract, and following a thorough review of the relevant testimony and record evidence, the Court cannot conclude that the Contract was modified by performance either.

**B. INDRHI and the Dominican Republic are Entitled to a Presumption of Juridical Separateness.**

Plaintiffs argue that the Dominican Republic exercises complete control over INDRHI such that they are not entitled to a presumption of juridical separateness under the FSIA.

"The FSIA presumes that a foreign state and its instrumentalities are separate legal entities." *Architectural*, 788 F.3d at 1342. Here, the Court of Appeals for the Eleventh Circuit, based on its review of the record, held that Plaintiffs failed to overcome the presumption that INDRHI is separate from the Dominican Republic. *Id.* The Court of Appeals thus concluded that the Dominican Republic is not amenable to suit in federal court for the foreign nation's alleged breach of documents under the FSIA's commercial-activity exception. *Id.* at 1343.

Following the bench trial, the Court similarly concludes that Plaintiffs have not met their burden of overcoming the presumption of juridical separateness. Plaintiffs failed to present any compelling evidence that the Dominican Republic exercises complete control over INDRHI.

**C. INDRHI's Performance Under the Contract.**

1. Force Majeure Did Not Justify INDRHI's Termination.

The Court has already found that INDRHI breached the notice provision of the Contract relating to force majeure. *See* Order on Summary Judgment (ECF No. 160.) However, INDRHI argues that its termination of the Contract was justified because of Sun Land's prior material

breach. Specifically, INDRHI argues that Sun Land's failure to secure the requisite funding and failing to pay Architectural's invoices for work performed were material breaches and force majeure. On summary judgment, the Court found issues of fact remained as to whether there was an event majeure justifying termination.

Section 32 of the Purchase Agreement, entitled "Force Majeure," reads:

> a) All parties shall be excused for the period of delay in the performance of any obligations hereunder when prevented from so doing by cause or causes beyond their absolute control which shall include, without limitation, all labor disputes, civil commotion, civil disorder, riot, civil disturbance, war, war-like operations, invasions, national or local emergency, acts of omission by government authorities, rebellion hostilities, military or usurped power, sabotage, governmental regulations, orders, moratoriums, or controls, fire or other casualty, inability to obtain any material, services of financing or through Acts of God.
>
> b) Without prejudice to their respective rights under this Contract none of the Parties hereto shall be held responsible nor be liable to pay any form of compensation to the other Parties hereto, should performance hereunder be delayed or prevented by circumstances of Force Majeure which shall include but not be limited to lock-out, strike, riot, mutiny, civil commotion, fire, accident, Act of God, war, Government action or other cause beyond their reasonable control, of which the parties were not aware at the time of signature of Contract not responsible for at the time of its occurrence and which the parties could not reasonably have foreseen and guarded against.
>
> c) In the event of Force Majeure as defined above, any party shall notify the other parties hereto, in writing, within fourteen (14) days of its first occurring, and should it continue for a period exceeding six (6) months from the date of such notification either INDRHI or SL & RGITC shall be entitled to terminate the Contract, by notice in writing.
>
> d) Under the Clause the right to terminate the Contract shall only apply to that part or parts subject to Force Majeure.

Purchase Agreement, § 32 (ECF No. 129-6).

Article 20 of the Protocol, entitled "Force Majeure, Delays and Time Extensions," reads in relevant part:

> **20.1** All PARTIES shall be excused for the period of delay in the performance of any obligations hereunder when prevented from so doing by cause or causes beyond their absolute control, which shall include, without limitation, all labor disputes, civil commotion, civil disorder, riot, civil disturbance, war, war-like operations, invasions, national or local emergency, acts of omission or inaction by government authorities, rebellion hostilities, military or usurped power, sabotage, governmental regulations, orders, moratoriums, or controls, fire or other casualty, inability to obtain any material, "Services" or financing or through Acts of God.
>
> **20.2** Without prejudice to their respective rights under this PROTOCOL none of THE PARTIES hereto shall be held responsible nor be liable to pay any form of compensation to the other PARTIES hereto, should performance hereunder be delayed or prevented by circumstances of Force Majeure which shall include, but not be limited to lock-out, strike, riot, mutiny, civil commotion, fire, accident, Act of God, war, Government action or other cause beyond their reasonable control, of which THE PARTIES were not aware at the time of signature of Contract nor were responsible for it at the time of its occurrence and which THE PARTIES could not reasonably have guarded against.
>
> **20.3** In the event of Force Majeure as defined above, any PARTY shall notify the other PARTY hereto, in writing, within seven (7) days of its first occurrence, and should it continue for a period exceeding six (6) months from the date of such notification, THE INDRHI shall be entitled to terminate this PROTOCOL, by providing written notice to all other PARTIES.

Protocol, Art. 20 (ECF No. 132-4).

There is no evidence that events of Force Majeure related to inability to obtain financing justified INDRHI's termination of the Contract. This is further corroborated by INDRHI's own statement that Sun Land's and Architectural's performance under the Contract was satisfactory and by INDRHI's own failure to comply with the Contract's notice provision related to Force Majeure.

2. <u>INDRHI's Termination of the Contract Was Not Justified by Prior Material Breaches.</u>

Nothing in the record supports the conclusion that INDRHI's termination of the Contract was justified by a prior material breach.

"[T]he materiality of a breach is relevant when a party seeks to terminate or rescind a contractual relationship." *Burger King Corp. v.* Mason, 710 F.2d 1480, 1490 (11th Cir. 1983). A material breach is one that goes "'to the essence of the contract,' as opposed to the mere failure to perform some minor part of the contract." *Hamilton v. SunTrust Mortg. Inc.*, 6 F. Supp. 3d 1300, 1309 (S.D. Fla. 2014) (quoting *Covelli Family, LP v. ABG5, LLP*, 977 So. 2d 749, 752 (Fla. 4th DCA 2008)). Generally, a material breach "permits the non-breaching party to treat the breach as a discharge of his contractual liability." *Bradley v. Health Coal, Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997).

The record is clear that 100% financing of the Project was unavailable for most of the life of this Project. However, the record does not support a finding that it was due to actions or inactions of Sun Land. Further, INDRHI's account of Sun Land's alleged breaches is inconsistent with the October 28, 2008, letter sent on behalf of INDRHI to the Dominican Republic, wherein INDRHI stated that both Sun Land and Architectural performed satisfactorily. (Pls.' Trial Ex. 10.)

In essence, Defendants argue that Sun Land had the duty to *obtain* financing, not just *attempt* to obtain financing. As such, Defendants characterize SunTrust's withdrawal as a failure on the part of Sun Land. The evidence supports a finding that Sun Land obtained the requisite funding through the Credit Agreement.

3. The Statute of Limitations Does Not Bar Plaintiffs' Claims Prior to February 13, 2009.

This action was filed on February 13, 2009. Defendants argue that the alleged breaches that took place in 2004 through 2006, specifically the delays, are barred by the statute of limitations. Under Florida law, the limitations period begins to run when "the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. (1997). "A cause of action for

breach of contract accrues at the time of the breach, 'not from the time when consequential damages result or become ascertained." *Medical Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So. 2d 576, 578 (Fla. 4th DCA 2006).

INDRHI breached the Contract on February 13, 2009, when it first notified Plaintiffs of termination in violation of the notice provisions within the Contract. Plaintiffs' claims are not barred by the Statute of Limitations.

**D. The Dominican Republic Did Not Breach the Contract.**

Because the Court concludes that INDRHI's breaches cannot be imputed to the Dominican Republic, the Court turns to the Dominican Republic's actions and inactions as potential sources of liability. Plaintiffs allege that the Dominican Republic breached the Contract in four different ways—the same alleged breaches as INDRHI: (1) failing and refusing to pay money due under the Contract; (2) engaging in an unnecessary and improper "start and stop" approach toward the Project; (3) unjustifiably terminating the Contract; and (d) otherwise violating the covenant of good faith and fair dealing. (ECF No. 88 at ¶ 56.)

There is no evidence in the record that the Dominican Republic failed and refused to pay money due to Plaintiffs under the Contract. The Dominican Republic's role in payment of Cubicaciones was limited to approval of those Cubicaciones—not remitting payment to either Architectural or Sun Land. (Protocol, § 19.3.5.) The evidence demonstrated that the Dominican Republic approved each of Architectural's Cubicaciones nor is there an argument to the contrary. As detailed above, the Azua II Project did not proceed as the Parties intended. However, there is no evidence that this "start and stop" approach to the Project was the result of the Dominican Republic's actions or inactions. The availability of funding is the crux of the matter here. But for the challenges in obtaining consistent funding, the facts indicate that the Parties could have and

would have proceeded with the planning and construction of the Azua II Project. Plaintiffs argue that the Dominican Republic failed to secure approval of the Credit Agreement or Amendment No. 3 in a timely manner and was an improper "start and stop." As an initial matter, there is no evidence that the Dominican Republic had any control over Congressional ratification of the Credit Agreement or the amendments thereto.

The Dominican Republic did, however, have control over when it submitted the Credit Agreement and the Amendments for approval. As late as June 25, 2008, the Minister of Finance was given authority to execute Amendment No.3 and ultimately did so on September 4, 2008. On September 30, 2008, the Secretary of the Treasury sent a "case file for purposes of requesting approval by the National Congress of Amendment No. 3 signed on September 4th, 2008, to Dr. Leonel Fernandez Reyna, the Constitutional President of the Republic Office. (Defs.' Trial Ex. 170.) These facts also indicate that the Dominican Republic fulfilled its obligations pursuant to the Contract. Finally, Plaintiffs assert that it was the President, Leonel Fernandez, who terminated the Contract. The Court has already found that the Dominican Republic did not terminate the Contract.

For the foregoing reasons, the Court concludes that the Dominican Republic did not breach the Contract nor cause it to be breached.

1. Breach of the Covenant of Good Faith and Fair Dealing Does Not Provide an Independent Cause of Action.

Pursuant to Florida law, every contract contains an implied covenant of good faith and fair dealing. *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11th Cir. 1999) (citing *County of Brevard v. Morelli Eng'g, Inc.*, 703 So.2d 1049, 1050 (Fla. 1997)). However, breach of the implied covenant of good faith and fair dealing does not provide an independent cause of action. *Id.* at 1317. "[A] cause of action for breach of the implied covenant cannot be maintained (a) in

derogation of the express terms of the underlying contract or (b) in the absence of breach of an express term of the underlying contract." *Id.* at 1317–1318. Thus, "if a party cannot prove a breach of contract, its claims for breach of the implied covenant of fair dealing" must fail. *Validsa, Inc. v. PDVSA Services, Inc.*, 424 F. App'x 862, 870 (11th Cir. 2011).

Because the Court finds that the Dominican Republic has not breached an express contractual provision, Plaintiffs' claim for breach of the implied covenant fails as a matter of law.

## V. DAMAGES

Plaintiffs argue that they are entitled to recover damages that (1) naturally and proximately resulted from INDRHI's beaches and (2) may reasonably be supposed to have been within the contemplation of the parties at the time they made the contract as the probable result of the breach of it. Essentially Plaintiffs seek damages that would put them in as good a position as they would have been if not for INDRHI's breach. *Capital Environmental Svcs., Inc. v. Earth Tech. Inc.*, 25 So.3d 593, 596 (Fla. 1st DA 2009); Florida Standard Jury Instructions, Contract and Business Cases, 504.2).

Upon concluding that the scope of the Contract was not modified, the Court looks to the Contract itself to determine what damages would put Plaintiffs in as good a position as they would have been if not for INDRHI's breach.

### A. Lost Profits

In some cases, if the breaching conduct of defendants "causes the non-breaching party to lose profits, the defendant can be required to compensate the plaintiff for the *lost profits*." *Burger King Corp. v. Mason*, 710 F.2d at 1494 (citing *Sampley Enterprises, Inc. v. Laurilla*, 404 So.2d 841 (Fla. Dist. Ct. App. 1981) (emphasis in original). Lost profits are calculated as a

portion of the Total Contract Price—not a speculative anticipated cost of completion of the Project as a "turnkey" project. Architectural was entitled to payments they should have received under the Total Contract Price.

1. Architectural's Lost Profits

Under the Protocol, Architectural was to receive a gross sum of $42,231,275, which is the portion of the Total Contract Price allocated to design and build the approved and funded Project. In December 2009, INDRHI prepared an "Analysis of Situation at Closing." ("Analysis at Closing" (Pls.' Trial Ex. 17.)) The Analysis at Closing reflects a "Project Execution Budget" of $42,231,275 with the following sub-categories:

(1) $38,323,315 for products and services (Architectural)
(2) $2,557,110 for the management commission (Sun Land); and
(3) $1,350,850 supervision fee (Utah State University).

(*Id.*)

Architectural submitted its final payment application (Cubicacion 22) on March 26, 2009, for the period ending December 31, 2008. Plaintiffs' expert stated that "work at the project site is deemed to have ceased on or about December 31, 2008." (Pls.' Trial Ex. 170 at 14.)

Architectural billed a total of $12,398,044 for equipment and services, as reflected on Cubicaciones 1 through 22. INDRHI approved Cubicaciones 18(a), 18(b), and 18(c). (Defs.' Trial Ex. 183 at 1.) But Architectural was not paid in full on Cubicaciones 18(c) through 22. Architectural received $10,892,461 from Sun Land, which includes $1,868,150 of a $2,966,416 advance payment that was retained by Architectural. This left an unpaid balance owed to Architectural of $975,645. This unpaid balance, however, is the responsibility of Sun Land because Sun Land received the funds to cover those expenses from SunTrust but failed to remit them. Additionally, for Cubicaciones 11 through 18(b), Sun Land, with INDRHI's

authorization, withheld 2% of the Sun Land portion of each payment made to Architectural. This retention, plus interest, totaled $168,521. Accordingly, Architectural is owed $1,054,906,-- the sum of the remaining unpaid invoices plus the withheld amount plus interest. But not from Defendants. Sun Land should have paid this amount from funds in its possession from the sale of the notes. This amount would have been sufficient to pay the $975,645 owed to Architectural for unpaid Cubicaciones.

Based upon INDRHI's Analysis at Closing, Architectural's apportioned budget under the Contract was $38,323,315. The total estimated profit Architectural would have received from the Project if it had been completed on schedule would have been $3,229,600. Architectural's gross profits on the project from inception until work concluded on December 31, 2008, totaled $2,593,566. The difference between the anticipated gross profit of $3,229,600 and the gross profit actually earned is $636,044. Defendants' expert reviewed Architectural's 2006 and 2007 Income Statements to calculate Architectural's operating expenses as averaging approximately 9.31% of its 2006 and 2007 gross profit. (Defs.' Trial Ex. 292 at 5.) Based upon these calculations, the Court concludes that Architectural would have earned an additional $576,842. (*Id.* at 6.)

2. Sun Land's Lost Profits

On May 29, 2003, Sun Land informed Banco Central De La Republica Dominicana that it would be the lender for the "commitment made by the Dominican Government on December 7, 2001 in the amount of USD $8,114,128." Article 19.1 of the Protocol required Sun Land to pay Architectural a lump sum of $2,999,416 (the "Article 19.1 Down Payment"). Architectural received that payment on June 20, 2007. Article 19.4 of the Protocol required that this payment be "recovered" through an amortization process whereby 15% would be withheld from

Architectural's invoices until it was recovered in full. By the end of the Project, $1,098,266 had been amortized and applied against the Article 19.1 Down Payment. This left a balance remaining of $1,868,150 (the "Unamortized Amount"), which Architectural kept. Sun Land contends that Defendants owe Sun Land the Unamortized Amount because Sun Land paid the Article 19.1 Down Payment from its own funds. However, there is no evidence that Sun Land paid this from its own funds.

Defendants' expert did not consider Sun Land a lender for purposes of his analysis because Sun Land purchased the notes from money it received from Southwest Bank of Texas and in return Southwest Bank of Texas received a promise to be paid in the future a certain amount that included interest. (Day 8 Trial Tr. 42:5–13.)

Pursuant to Paragraph 5.2.4 of the Protocol, Sun Land was to "be responsible for the payment of the 15% down payment for all the products and services to be authorized and provided under the Acquisition List." Sun Land received ten notes issued from the Dominican Republic. The face value of the ten notes totaled $9,461,972. The notes did not contain a provision for interest. The proceeds from the sale of the notes totaled $6,864,382, plus $1,250,792 in exposure fees. In total, Sun Land received $8,118,733 from the sale of the notes.

Sun Land prepared invoices to send to SunTrust for payment of the 85% of the amounts owed to vendors providing goods and services for the Project. Sun Land received $8,721,584 from SunTrust for payment to Architectural. In total, Sun Land received $21,928,307.[12] Sun Land made total payments as follows:

a. $10,892,461 to Architectural;
b. $395,622 for Vehicles and Other Equipment;
c. $767,436 for Contract Inspection;

[12] This amount is derived by calculating the total received from SunTrust ($13,809,574) plus the amount received as a result of the sale of the notes ($8,118,733).

d. $238,582 for Ancillary Fees; and
e. $213,275 for Consulting Services.

Pursuant to the June 29, 2007 Project Acquisition List, Sun Land was entitled to Project related fees of $5,580,836, broken down as follows:

a. $3,023,726 in Administrative Fees;
b. $2,301,399 in Facilitation Fees; and
c. $255,711 in Acquisition Fees.

Bearing in mind the Total Project Cost, the total fees that Sun Land could have potentially earned amount to $6,831,628. Sun Land received net payments of $9,402,931—exceeding the total anticipated fees. Accordingly, Sun Land has not suffered any damages as a result of the termination of the Contract.

B. Delay Damages

Under Florida law, the party seeking damages has an affirmative burden "to present a reasonable basis for apportioning fault between the parties." *Hartford Casualty Ins. Co. v. City of Marathon*, 117 F.Supp.3d 1374, 1382 (S.D. Fla. 2015). "However, this burden is not absolute. If the defendant is responsible for all of the delay, there is no requirement that the plaintiff present a reasonable basis for apportionment." *Id.*

Plaintiffs have failed to provide evidence of a sustained loss due to INDRHI's delay. Architectural alleges that incurred additional expenses as a result of the delay caused by INDRHI. However, all of Architectural's Project-related costs were included in the invoices that were submitted to INDRHI for approval. (Defs.' Trial Ex. 133.) Accordingly, additional expenses were already factored into the Cubicaciones submitted by Architectural. Sun Land admits its own failings regarding documentary evidence as to expenses incurred. The Court concludes that neither Architectural nor Sun Land is entitled to delay damages.

C. Prejudgment Interest

"Under Florida law, prejudgment interest is merely another element of pecuniary damages[,] to be awarded from the date of loss once a finder of fact has determined the amount of damages and defendant's liability therefor." *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 472 F.3d 1329, 1331 (11th Cir. 2006) (citing *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 215 (Fla. 1985) (internal quotations omitted)). "[N]either the merit of the defense nor the certainty of the amount of loss affects the award of prejudgment interest. Rather, the loss itself is a wrongful deprivation by the defendant of plaintiff's property." *Argonaut*, 474 So. 2d at 215. A plaintiff should be "made whole from the date of the loss once a finder of fact has determined the amount of damages." *Id.*

## VI. CONCLUSION

Accordingly, the Court concludes that Architectural is entitled to recover $576,842, plus prejudgment interest from INDRHI.

Plaintiffs shall file any claim for attorneys' fees and costs within thirty (days) of the date of this Order. Upon the Court's determination of the attorneys' fees and costs, the Court shall enter an appropriate final judgment in favor of Plaintiffs.

The Clerk of Court is directed to ADMINISTRATIVELY CLOSE this matter. Any pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of September, 2017.

Kevin Michael Moore

Digitally signed by Kevin Michael Moore
DN: o=Administrative Office of the US Courts, email=k_michael_moore@flsd.uscourts.gov, cn=Kevin Michael Moore
Date: 2017.09.30 19:52:26 -04'00'

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE