THE UNITED STATES VIRGIN ISLANDS
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

VINCENT F. FRAZER, ESQUIRE
ATTORNEY GENERAL

October 21, 2013

The Honorable John P. de Jongh, Jr.
Governor
Office of the Governor
Government House
21-22 Kongens Gade
St. Thomas, Virgin Islands 00802

Re: Enforceability of the Fourth Amendment Agreement and Related Letter of Clarification

Dear Governor de Jongh:

You have asked for the opinion of the Office of the Attorney General on the enforceability of the Fourth Amendment Agreement dated as of April 3, 2013, by and among the Government of the U.S. Virgin Islands, HOVENSA, LLC, Hess Oil Virgin Islands Corp. ("HOVIC"), and PDVSA VI, Inc., (the "Fourth Amendment"), as clarified by the letter from HOVENSA and its owners dated October 16, 2013 (the "Clarification Letter," and together with the Fourth Amendment, the "Clarified Fourth Amendment"). I have previously advised you, and now confirm, that the Clarified Fourth Amendment is fully enforceable against HOVENSA and its owners as a matter of Virgin Islands contract law.

It is my understanding that there is no concern about the enforceability of the Fourth Amendment itself, which plainly bears the critical indicia of an enforceable contract—that is, "mutual assent to the terms and conditions of the agreement." *Gardiner v. Virgin Islands Water and Power Authority*, 896 F. Supp. 491, 497 (D.V.I. 1995) (citation omitted). By its terms, the Fourth Amendment sets forth a series of promises exchanged among the parties for mutual benefit, with all parties' assent confirmed by their duly authorized execution of the instrument as of April 3, 2013. For the avoidance of doubt, it is my opinion that upon ratification by the Legislature, the Fourth Amendment will be valid and enforceable against all parties thereto.

As I understand it, the request for this opinion was driven primarily by concerns about the enforceability of the Clarification Letter. By its terms, that letter purports to "clarify and confirm" the positions of HOVENSA, HOVIC, and PDVSA VI with respect to several aspects of the Fourth Amendment. It was executed as of October 16, 2013, by representatives of all three affiliated companies. It has not been executed by any representative of the Government; nor does it recite the exchange of any additional consideration. The question is whether in these circumstances the "clarifications" set forth in the letter are binding upon, and enforceable against, its signatories, such that they effectively are incorporated into the Fourth Amendment.

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Upon due consideration of applicable principles of contract law, I conclude that the terms of the Clarification Letter are enforceable against HOVENSA, HOVIC, and PDVSA VI in any future interpretation or enforcement of the Fourth Amendment.

It is well established that "[t]he only essential prerequisite for creation of a valid contract is that the parties mutually assent to the terms and conditions of the agreement." *Isidor Paiewonsky Assoc., Inc. v. Sharp Properties, Inc.*, 761 F. Supp. 1231, 1233 (D.V.I. 1991). The Clarification Letter establishes beyond dispute that its signatories have assented to the terms set forth therein: the Letter both describes the applicable clarifications and expressly confirms that those clarifications will be binding upon the signatories upon ratification. The Government has not signed the Letter, but written assent is not required: rather, "[t]he manifestation of assent may be made . . . by other acts," and "conduct of a party" is effective as assent if the party "intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." Restatement (Second) of Contracts, § 19. Here, the Government has amply manifested its assent to the terms of the Clarification Letter, by (1) negotiating the terms of the Letter with the signatories, (2) forwarding the Letter to the Legislature for consideration, and (3) including and incorporating the Letter in the proposed legislation ratifying the Fourth Amendment. In addition, upon ratification by the Legislature, the Governor will sign the legislation—including the Letter—into law, further confirming the Government's assent to all the terms set forth therein. In these circumstances, there is no reasonable doubt that the parties have mutually assented to the terms of the Letter.

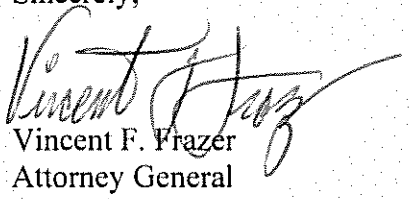
In general, an enforceable agreement also requires consideration. The Clarification Letter recites no specific consideration given in exchange for its representations, but no such recitation is required so long as it is clear there has been a bargained-for exchange. Restatement (Second) of Contracts, § 71. Here, it is implicit in the Letter and clear from the circumstances that there has been such an exchange. Specifically, the unmistakable implication of the Clarification Letter is that in exchange for the representations made therein, the Government agreed to re-submit the Fourth Amendment to the Legislature and press for ratification of the Amendment for the mutual benefit of the Government and the Letter's signatories. This the Government has now done. Such an exchange of promises, followed by performance by the Government, is more than sufficient consideration to support enforceability of the Letter's terms.

If, however, consideration were found to be lacking, the Clarification Letter would still be enforceable against its signatories as a clarifying or explanatory agreement. By its terms, the Clarification Letter purports merely to "clarify and confirm" its signatories' understanding with respect to the obligations already included in the Fourth Amendment. As a matter of the general common law of contracts, an instrument that is "intend[ed] to merely clarify or explain the terms of the original contract" is enforceable even if "no new or additional consideration" is exchanged. *Farmers Alliance Mutual Ins. Co. v. Hulstrand Constr. Inc.*, 632 N.W. 2d 473, 475 (N.D. 2001) (citing numerous authorities); *see also* 17A C.J.S. Contracts § 564 (2013).

Finally, even if the Clarification Letter were determined not to be enforceable under applicable principles of contract law, its terms would nevertheless be enforceable under principles of promissory estoppel. Section 90 of the Restatement (Second) of Contracts provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a

third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." The Letter, by making affirmative representations about its signatories' understanding of the Fourth Amendment and by committing to be bound by those representations, is plainly intended to induce reliance on those representations by both the Government and the Legislature. Having made those representations publicly, unequivocally, and with the intention to induce reliance, if the Fourth Amendment is indeed ratified by the Legislature and signed into law by the Governor, HOVENSA and its owners would necessarily be estopped from any attempt to abandon or undermine its clarifications in a future dispute over the meaning or enforcement of the Fourth Amendment, as clarified by the Letter.

Sincerely,



Vincent F. Frazer
Attorney General