SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

SAVE CORAL BAY, INC., **PLAINTIFF,** **VS.** **ALBERT BRYAN, JR. IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE VIRGIN ISLANDS AND SUMMERS END GROUP, LLC** **DEFENDANTS.**	**CIV. NO. ST-2020-CV-00298** **ACTION FOR PRELIMINARY INJUNCTION, INJUNCTION AND DECLARATORY RELIEF**

OPPOSITION TO DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS

"Oh! What a tangled web we weave, when first we practice to deceive."[1] SEG's motion to supplement begs an essential question: Once the Governor made an admittedly misleading disclosure to the Legislature, can the Governor satisfy *his* duty of *full* disclosure by standing pat on the misleading disclosure in the face of a citizen claiming that his disclosure was wrong? In other words, doesn't "full disclosure" to the Legislature require that the Governor acknowledge that his disclosure was inaccurate and deceptive so that the Legislature is not left to resolve a he-said-she-said dispute between the head of the Executive Branch and citizens?

SEG's Supplemental Motion is an attempt to somehow persuade the court that

[1] Sir Walter Scott, *Marmion: A Tale of Flodden Field*, canto VI, XVII (1808).

because citizens challenged the Governor's disclosure in *one* legislative hearing[2] this somehow absolved the Governor of his duty to make full disclosure to the Legislature. But, not only did the Governor not correct his material misstatements, Plaintiff is entitled to show that the Governor failed to make a *full* disclosure of all material facts regarding the environmental impact of the modification by the Governor or SEG. Because the misleading statement by the Governor was never acknowledged as such by the Governor and because other material facts were not disclosed, the Legislature could not have adequately ratified the 911(g) modification. And no amount of supplementation to show that opponents *raised* an issue regarding the accuracy of the Governor's assertions will overcome the fact that the individual with the duty to make full disclosure—the Governor—never disclosed that the proposal was removing a major portion of the SEG's environmental mitigation program and never informed the Legislature that his statement that "[t]he removal of the two properties. Parcels 13A and 13B is actually a reduction of project impacts" was a materially false statement.

ARGUMENT

SEG argues that the record should be supplemented to show that at a single legislative hearing (not two as claimed by SEG), project opponents *raised* the fact that (1) removal of Parcel 13A would adversely affect the environmental damage mitigation

[2] In an effort to make it seem as if the Legislature had multiple opportunities to consider the deceptive submission by the Governor, SEG claims that there were two such hearings. While the Legislature did hold two hearings on SEG's permit application, one was held before the Governor's modification existed and thus could not possibly be considered to be a part of the ratification process.

plan proposed by SEG and approved by CZM and (2) the modification added a boardwalk that had undergone no environmental review. The Court should deny supplementation because these arguments are red herrings.

THE INACCURATE DISCLOSURE

In considering a ratification issue, the focus is upon whether the party with the duty to disclose made *full* disclosure. Where the party with that duty (the Governor) has made a misleading or inaccurate disclosure, there cannot be full disclosure until that party has corrected the record. On the record before the Legislature, despite claims by citizens that the Governor's letter to the Legislature was inaccurate, the Governor did not correct his letter. Thus, the Legislature was left with two competing versions of the environmental impact with the person with the duty to disclose failing to correct his incorrect statements. That other parties brought forth the information may constitute disclosure, but it does not constitute *full* disclosure. SEG's proposed supplement (attempting to show that citizens disclosed what the Governor should have disclosed) does nothing to demonstrate that the Governor corrected his inaccurate disclosure.

THE LACK OF FULL DISCLOSURE OF MATERIAL FACTS

In addition to the failure to fully disclose that a statement the Governor made was false (failure to disclose by an act of commission), there are at least three material facts that were not disclosed by acts of omission that the proposed supplement fails to address. First, the Governor never disclosed that SEG had come up with a new plan to mitigate the environmental damage to supposedly offset the loss of the mitigation

plan caused by the removal of Parcel 13A. The *first*, and only, disclosure of this information came in the oral argument conducted on the pending motion to dismiss, when SEG's counsel claimed that the runoff to the catchment basins would now flow across a different parcel.[3] However, this information was not disclosed by either the Governor or anyone else (it was unknown by the opponents of the project) and thus was not discussed at the Legislature's hearing. Because there was no disclosure, the Legislature could not even inquire as to the environmental impact of this new mitigation concept or determine whether the new concept would even accomplish what SEG claims.

Second, the revised marina plans approved by the Governor's modification *reduce* the marina's strength from what was approved by CZM. As modified, the marina is now designed to withstand wind speeds of no greater than 96 miles per hour. This change was never disclosed to the Legislature by anyone. SEG's proposed supplement does not address this.

Third, the fact that opponents noted that the boardwalk had not gone through environmental review does not solve the lack of full disclosure of what the environmental impact would be from the addition of the boardwalk. The Governor's modification letter to the Legislature makes *no* disclosure about the environmental impact of the boardwalk and instead simply calls it a "community benefit." There was

[3] Undersigned counsel believes that counsel for SEG represented that the runoff would flow across Remainder of Parcel 10-41 but does not have a transcript of the oral argument.

also no disclosure of the strength of this boardwalk or its ability to withstand hurricane winds or storm surge—or the corresponding potential for a hurricane-damaged boardwalk to block the sole access road to the south side of Coral Bay.

An Environmental Assessment Report ("EAR") is required by the CZM Act for a modified permit. 12 V.I. R. & R §§910-3 and 910-14.[4] There was no EAR done, and thus no disclosure of the environmental impacts caused by the addition of the boardwalk (or the rerouting of runoff across a different parcel of land). Without an EAR, the legislature couldn't possibly be fully informed as to the environmental impacts of the modifications proposed by SEG and adopted by the Governor.

FULL DISCLOSURE OF MATERIAL FACTS IS REQUIRED FOR RATIFICATION.

There is no precedent in the Virgin Islands addressing full disclosure and legislative ratification to what would otherwise be an illegal act as in the present case. But regardless of whether ratification is by a Legislature, Congress or shareholders, courts inquire as to the type and quality of information in the [ratifier's] hands prior

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[4] The CZM Commission's regulations requires that:

> Major Coastal Zone Permit applications *shall* include and Environmental Assessment Report. 12 V.I. R. & R §910-3(d)(5)(B).
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> An **application for modification** of the provisions of a Coastal Zone Permit shall be treated as a **new application** for a Coastal Zone Permit unless the Commissioner determines that such modification would not substantially alter or modify the scope, nature, or characteristics of the existing permit or approved development.

12 V.I. R. & R §910-14(a) (emphasis added).

to a vote. Indeed, that requirement is expressly recognized in Virgin Islands corporate law. *See, e.g.*, 13 V.I.C. § 1104(b)(2)(ii) (allowing disinterested company managers to ratify a transaction "after full disclosure of all material facts"). *See also Solomon v. Armstrong*, 747 A.2d 1098, 1127 (Del. Ch. 1999) (whether shareholders are "fully informed" turns upon whether directors have complied with their duty "when seeking the affirmative vote of shareholders . . . to disclose all material information."); *Stevens v. Anesthesiology Consultants of Cheyenne, LLC*, 2018 WY 45, ¶ 33, 415 P.3d 1270, 1283 (Wyo. 2018) (stating that the doctrine of ratifying an unauthorized act is not unique and has recognized requirements, one of which is that there be full disclosure of all relevant facts); *Hill v. Tennessee Valley Authority*, 549 F.2d 1064, 1072–73 (6th Cir. 1977) (the court was confronted with an argument that the TVA's non-compliance with the Endangered Species Act when building the Tellico Dam was ratified by Congress because it approved appropriations for the construction of the dam *after "full disclosure*" of the impact upon the snail darter (an endangered fish) (emphasis added). *Extremely Clean Cleaning Servs., LLC v. CAAT, Inc.*, No. 1:18-cv-02968, 2019 U.S. Dist. LEXIS 30149, at *14 (S.D. Ind. Feb. 25, 2019) ("Knowledge of all the material facts by the person to be charged with the unauthorized acts of another is an indispensable element of ratification.").

The standard of materiality, while analyzed in light of specific allegations brought in each case, is well settled: A "fact is material if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how

to vote." *Solomon*, 747 A.2d at 1127. Would the Legislature consider it important to know not just that citizens *claimed* the Governor's statement about the environmental impact was wrong but that the Governor acknowledged that his statement was wrong? The information provided by the Office of the Governor to the Legislature in "support" of the changes made by the Governor did not fully disclose any factual basis for his conclusion that the changes "reduced" environmental impacts nor did it disclose that the Governor had no factual basis for making such claims. The proposed supplementation by SEG does not cure this defect.

CONCLUSION

The Governor misinformed the Legislature and failed to disclose material facts to the Legislature. The proposed supplement does nothing to address these issues and is therefore futile. Wherefore, Plaintiff prays that the Court will deny the Defendants' Motion to Supplement, deny the Motion to Dismiss and issue a scheduling order for discovery and the advancement of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document complies with the page limitations and font requirements of V.I.R.Civ.P. 6-1(e) and that a true copy of the document was served via email on April 21, 2021 to the following at the email addresses shown:

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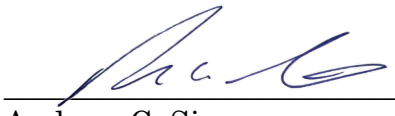

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