

5. Venue is proper in this Court pursuant to 4 V.I.C. § 78, as the District of St. Thomas & St. John is the judicial division where the cause of action arose and where Defendants may be served.

FACTS

The Settlement Agreement

6. GSJ is the owner of the island known as Great St. James, located within the U.S. Virgin Islands, which is the site of activity in issue.
7. In April of 2016, DPNR issued Notice of Violation identified as NOVA-04-16-STT (“Notice of Violation”) to GSJ seeking an exorbitant, unprecedented, and unjustified assessment of Two Hundred Eighty Thousand Dollars (\$280,000.00) for what DPNR alleged were violations of the Coastal Zone Management Act on the island of Great St. James. **[EXHIBIT A]**
8. GSJ vehemently contested both the alleged violations and the outrageous assessment as unjustified and well outside the scope of DPNR’s authority, and negotiations between the parties ensued.
9. On August 4, 2016, in an attempt to expeditiously resolve the Notice of Violation and move on with its plans for Great St. James, GSJ entered into a Settlement Agreement with DPNR regarding the challenged violations and assessment asserted in the Notice of Violation (the “Settlement Agreement”). **[EXHIBIT B]**
10. As part of the Settlement Agreement, GSJ agreed to refrain from further CZM violations, to pay DPNR a fee in mitigation for the disputed violations claimed by DPNR and to pay DPNR the balance of the initial Two Hundred Eighty Thousand Dollar (\$280,000.00) assessment, after deduction of the mitigation fee, in the event of future CZM violations by GSJ.

11. Additionally, because DPNR made inaccurate factual and legal determinations and exceeded the scope of its assessment authority in connection with the Notice of Violation, and GSJ was therefore determined to protect itself from DPNR's unreasonable practices going forward, GSJ would not enter into the Settlement Agreement without certain essential protections.
12. Accordingly, the Settlement Agreement provides that in the event DPNR were to seek to claim any violations against GSJ in the future, GSJ could not be assessed for such violations with the balance of the original assessment unless GSJ was first given prior notice and an opportunity to cure any and all such claimed violations. *See EXHIBIT B at Item 3(d).*
13. The notice and the opportunity to cure provision was and is a material component of GSJ's bargained for consideration in the Settlement Agreement.
14. So important was this provision to GSJ that GSJ was willing to agree to and did pay a mitigation fee of Seventy Thousand Dollars (\$70,000.00) under the Settlement Agreement in order to ensure that GSJ would be entitled to these necessary protections from future overreaching by DPNR. In GSJ's estimation, this mitigation fee was much higher than that which ought reasonably be, or in fact was ever, imposed previously under similar circumstances, but was well worth the price if it protected GSJ from further DPNR overreaching in the future.
15. As is explained below, GSJ's concerns regarding the need for protection from DPNR overreaching were well founded.

The Unauthorized and Unlawful Entry

16. On October 28, 2016, three (3) DPNR representatives, including an armed enforcement officer, Officer Mercer, Jean-Pierre Oriol, Director of Coastal Zone

- Management, and Attorney Michele Baker, DPNR Legal Counsel, entered upon Great St. James without prior notice to or approval from GSJ, and outside of project working hours and demanded access to the entire island.
17. DPNR's representatives were met at the only dock on Great St. James, which effectively serves as the owner's front door, by GSJ personnel, who specifically advised the DPNR representatives that the owner was not on the island and that the GSJ personnel present had no authority to grant access to the island, and directed DPNR to GSJ's office in Red Hook.
18. Nevertheless, over the protests of GSJ personnel, and lacking any legal authority whatsoever, DPNR entered onto the premises of Great St. James and traversed the entire island without restriction, allegedly to conduct a "site inspection" of Great St. James, and verbally instructed workers to cease and desist from further activity on Great St. James.
19. This unauthorized entry and search was particularly egregious in this case because it was conducted with the approval and participation of DPNR's legal counsel. DPNR's Counsel is ethically prohibited from communicating with another party or its representatives without the prior permission of that party's attorney when, as here, DPNR's Counsel knows that party to be represented by legal counsel. Counsel for DPNR made no attempt whatsoever to contact the undersigned legal counsel for prior approval or to notify GSJ before the unauthorized entry on Great St. James, the communication with GSJ personnel without permission, and the unlawful search.
20. As a result of the unauthorized entry and unlawful search of Great St. James, DPNR caused a written cease and desist order, [REDACTED]-02-16-STT, dated October 28, 2016, to

be served on counsel for GSJ via email and delivered to GSJ's Red Hook office on October 31, 2016 (the "Cease and Desist Order"). [EXHIBIT C]

Erroneous Notice to Cure & the Arbitrary and Unreasonable Cure Period

21. On Friday, November 4, 2016, based on inaccurate observations, unfounded assumptions, and erroneous conclusions of fact and law made during DPNR's unauthorized entry and unlawful search of Great St. James on October 28, 2016, Defendants issued a Notice to Cure Breach of Settlement Agreement (the "Notice to Cure") [EXHIBIT D].
22. In response to GSJ's request for an opportunity to review the numerous deficiencies in the Notice to Cure with DPNR, Counsel for DPNR proposed by email that GSJ and DPNR conduct an informal meeting with respect to the Notice to Cure to be held on November 16, 2016, which proposal was agreed to by GSJ.
23. The Notice to Cure was and is deficient because, among other deficiencies, it improperly attributed violations to Plaintiff where none had occurred and as to matters for which it was readily apparent that GSJ bore absolutely no responsibility, failed to adequately specify the basis and nature of the violations claimed or to provide any reasonable description of allowable cures that DPNR required, and provided an arbitrary and unreasonably short cure period, all in clear violation of DPNR's obligations and GSJ's rights under the Settlement Agreement.
24. Emblematic, though not an exhaustive list, of alleged violations DPNR improperly asserted against GSJ in the Notice to Cure were the following:
 - a. Alleged violations against GSJ with respect to four (4) moorings in waters off the shores of Great St. James which for decades or more prior to GSJ's acquisition have served as a popular public recreation spot for boaters. These

moorings were affixed to submerged land which is not part of Great St. James, and were neither installed nor maintained by GSJ, and as such, GSJ can in no way be held responsible for them.

- b. Alleged violations with respect to what DPNR claimed was the excavation of approximately three thousand five hundred (3500) square feet to four thousand (4000) square feet of land, which DPNR inaccurately asserted was being prepared for future development. As is well known by DPNR representatives who had visited Great St. James previously, the area in question was an old garbage dump site created by the prior owner as to which GSJ had previously advised DPNR it required heavy machinery to clean. The site in question appeared to be clear because by the time of DPNR's unauthorized entry and unlawful search of Great St. James, GSJ made substantial progress in removing the debris from the garage dump. This site presented no violation and GSJ was obviously perplexed as to what cure could possibly be required in respect of this site.
- c. Alleged violations against GSJ with respect to a non-permanent, movable Tiki Bar of which DPNR representatives had been made aware during a prior visit to Great St. James, in fact, using it as a resting place, and had correctly not found it to constitute any violation. Under the circumstances, GSJ had no idea what violation the Tiki Bar could possibly present and no idea as to what cure DPNR expected with respect to the Tiki Bar.

25. The Notice to Cure unreasonably and arbitrarily demanded that Plaintiff cure the mix of non-existent, inadequately described, and improperly assessed violations alleged in the Notice to Cure within ten (10) calendars days of its receipt, which included five

- (5) days of weekends and holidays that fell during that ten (10) day cure period, and unilaterally imposed a cure deadline of November 14, 2016 with which it was impossible for GSI to comply.
26. On Monday, November 7, 2016, Plaintiff notified Defendants in writing of the deficiencies in the Notice to Cure, including the arbitrarily and unreasonably short ten (10) day cure period, which writing was followed by an email communication on November 11, 2016 **[EXHIBITS E & F]**.
27. Despite the extremely short cure period imposed by DPNR, no response to GSI's communications was received from DPNR until Friday, November 11, 2016, a federal and Virgin Islands holiday on which businesses in the Virgin Islands were closed for the weekend.
28. By email on that date, DPNR, acting outside of the scope of its obligations under the Settlement Agreement, unreasonably refused to grant any extension of time, leaving GSI without an opportunity to review with DPNR the erroneous claims and determine jointly with DPNR a proper course and reasonable timeline in which to proceed. **[EXHIBIT G]**
29. Although it was a local and federal holiday, counsel for GSI responded on that same date with additional valid reasons to support an extension. **[EXHIBIT H]**
30. After the holiday weekend had passed and the cure deadline was upon them, DPNR grudgingly extended its unilateral cure period by a mere four (4) days to November 18, 2016, only two (2) days after the scheduled informal meeting with DPNR on November 16, 2016. **[EXHIBIT I]**
31. Even with the slight extension, the cure period spanned only fourteen (14) days, from November 5, 2016 to November 18, 2016, leaving only nine (9) working days for

GSJ to complete the vague cures DPNR ultimately demanded, and giving GSJ only two (2) days after the scheduled November 16, 2016 meeting with DPNR, during which GSJ hoped to receive from DPNR the clarification regarding the Notice to Cure it so desperately needed in order to properly comply.

32. On November 15, 2016, DPNR denied GSJ the opportunity for that clarification needed to effectuate any cure during even that impossibly short two (2) day cure window when it advised GSJ that the informal meeting scheduled for November 16th would have to be rescheduled to November 22nd or 23rd, well past the cure deadline.

GSJ's Cures and Efforts to Mollify DPNR's Unreasonable Demands

33. In correspondence dated November 17, 2016, counsel for GSJ advised DPNR of the steps that had been taken with respect to curing the more readily decipherable violations claimed, albeit without any clarification from DPNR. **[EXHIBIT J]**
34. GSJ further advised DPNR that the other claimed violations could not and should not be addressed without clarification or input from DPNR, which up to this point DPNR had been unwilling to provide.
35. During the November 22nd meeting, so as to avoid further discord with DPNR, cause DPNR to lift its cease and desist order and continue to review GSJ's permits and the requests of GSJ for additional work on Great St. James, which DPNR refused to do while the Notice to Cure remained outstanding, GSJ:
- a. Advised DPNR of the significant remedial steps taken by GSJ prior to the meeting with regard to claimed violations, even though disputed;
 - b. Resolved with DPNR inaccurately asserted violations and DPNR's improperly demanded cures; and

- c. Developed a plan and a reasonable timeframe within which to timely address areas of continuing concern to DPNR, whether or not GSJ agreed that such matters were within the scope of DPNR's authority.
36. During that meeting, as part of the plan of action jointly developed by GSJ and DPNR, the parties also specifically agreed on a deadline by which GSJ was to address the only two remaining items of concern to DPNR: (1) the transport of a non-permanent, movable Tiki Bar away from its then current location on Great St. James to a remote staging area on Great St. James; and (2) the removal of a stretch of hand-laid stone from a pre-existing driveway on Great St. James.
 37. Both the Tiki Bar and the hand-laid stone were removed by the agreed upon deadline of December 1, 2016, which date was less than thirty (30) days after GSJ's receipt of the original Notice to Cure and undoubtedly constituted a reasonable cure period.
 38. Despite GSJ's cures on such short notice and its substantial and successful efforts to satisfy DPNR's vague, unjustified, and unreasonable demands, on December 15, 2016, DPNR caused a Notice of Failure to Cure Breach of Settlement Agreement & Enforcement (the "Notice of Failure to Cure") to be served on GSJ. **[EXHIBIT K]**
 39. None of the items asserted in the original Notice to Cure were included in the Notice of Failure to Cure with the exception of the Tiki Bar and the hand-laid stone in the pre-existing driveway, both of which were fully addressed before the Notice of Failure to Cure was issued.
 40. These two (2) items, which were timely cured, in the manner and within the timeframe jointly established by GSJ and DPNR at their November 22, 2016 meeting, provided the sole basis for DPNR's Notice of Failure to Cure.

41. Although Defendants blatantly violated DPNR's obligations and GSI's rights under the Settlement Agreement by providing a wholly deficient Notice to Cure, unilaterally and arbitrarily imposing unreasonable cure deadlines, refusing to meet with GSI or to even discuss the rampant deficiencies in the Notice to Cure with GSI prior to the expiration of the unreasonable cure deadlines, and, in the end asserting as failures to cure items which in fact had been timely cured, as a justification for the outrageous, unjustified and unprecedented assessment of Two Hundred Ten Thousand Dollars (\$210,000.00) provided in the Notice of Failure to Cure, Defendants improperly invoked the remedy provisions of the very Settlement Agreement Defendants so clearly violated in issuing the Notice to Cure and the Notice of Failure to Cure and by their conduct in connection therewith.¹

COUNT I: BREACH OF CONTRACT

42. Plaintiff repeats and re-alleges the foregoing paragraphs of the Complaint as if fully set forth herein.
43. The parties negotiated and entered into the Settlement Agreement, a binding and valid contract, wherein Defendants agreed to provide written notice and a cure period in the event Defendants believed Plaintiff was not complying with the terms of the Settlement Agreement.
44. As the Settlement Agreement does not specify the content of the contractually required notice or a duration for the contractually required cure period, the Settlement Agreement must be reasonably interpreted to require a cure period of a reasonable duration after proper and adequate notice of any alleged violation to be cured.

¹ On January 17, 2017, GSI appealed the Notice of Failure to the Board of Land Use Appeals. This action, however, raises entirely separate causes of action derived from the Settlement Agreement provisions.

45. Defendants breached the Settlement Agreement by failing to provide both proper and adequate notice of alleged violations and appropriate cures and a reasonable cure period, as required by the Settlement Agreement.
46. Despite Defendants' breach of contract, and Plaintiff's timely cure, under the Settlement Agreement, Defendants have improperly imposed a Two Hundred Ten Thousand Dollar (\$210,000.00) penalty against the Plaintiff.
47. Defendants' breach harmed Plaintiff because it caused, among other things, a penalty of Two Hundred Ten Thousand Dollars (\$210,000.00) to be improperly and wrongfully assessed against Plaintiff.
48. Plaintiff has been harmed by the improper assessment of the Two Hundred Ten Thousand Dollar (\$210,000.00) penalty and has suffered other harmful consequences as a result of Defendants' violations of the Settlement Agreement, including DPNR's refusal to process or even consider any applications for permits submitted by GSI, in a total amount to be proven at trial.

COUNT II: VIOLATION OF GOOD FAITH AND FAIR DEALING COVENANT

49. Plaintiff repeats and re-alleges the foregoing paragraphs of the Complaint as if fully set forth herein.
50. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
51. Defendants breached DPNR's duty of good faith and fair dealing by providing a wholly deficient Notice to Cure, unilaterally imposing an arbitrary and unreasonably short cure period on GSI, refusing to review, discuss and clarify with GSI the deficiencies in the Notice to Cure before the expiration of that improper cure period, including by cancelling a meeting with GSI scheduled to take place prior to the

expiration of that cure period, imposing a Two Hundred Ten Thousand Dollar (\$210,000.00) penalty on GSJ for alleged violations that had been already cured or were committed by parties other than GSJ, and refusing to process or even consider applications for permits submitted by GSJ.

52. Plaintiff has been harmed by Defendants' breach of DPNR's duty of good faith and fair dealing in an amount to be shown at trial.

COUNT III: ACTION FOR DECLARATORY JUDGMENT

53. Plaintiff repeats and re-alleges the foregoing paragraphs of the Complaint as if fully set forth herein.

54. The parties negotiated and entered into the Settlement Agreement, a binding and valid contract, wherein Defendants agreed to provide written notice and a cure period in the event Defendants believed Plaintiff was not complying with the terms of the Settlement Agreement.

55. As the Settlement Agreement does not specify the content of the contractually required notice or a duration for the contractually required cure period, the Settlement Agreement must be interpreted to require a cure period of a reasonable duration after proper and adequate notice of any alleged violation to be cured.

56. Defendants breached the Settlement Agreement by failing to provide both proper and adequate notice of alleged violations and appropriate cures and a reasonable cure period, as required by the Settlement Agreement.

57. Plaintiff timely cured all violations alleged in the Notice of Failure to Cure within the reasonable cure period permitted under the Settlement Agreement.

58. Despite Defendants' breach of contract, and Plaintiff's timely cure, under the Settlement Agreement, Defendants have improperly imposed a Two Hundred Ten Thousand Dollar (\$210,000.00) penalty against Plaintiff.
59. Furthermore, DPNR's refusal to process or even consider any applications of permits submitted by GSJ is causing GSJ further damages by indefinitely delaying the progress of construction and improvements on Great St. James.
60. Accordingly, pursuant to V.I. CODE ANN. tit. 5, §§ 1261-1272, Plaintiff seeks a judgment declaring that Plaintiff is entitled under the Settlement Agreement to adequate notice of any violations of the Settlement Agreement asserted by DPNR and a reasonable opportunity to cure the same after receiving such notice, that Defendants provided neither adequate notice of asserted violations of the Settlement Agreement nor a reasonable opportunity to cure the asserted violations and that, as a result of the same, Defendants violated the Settlement Agreement.
61. Additionally, Plaintiff further seeks a judgment declaring that the Notice of Failure to Cure, being based upon and itself constituting a breach of the Settlement Agreement by Defendants, is outside the scope of and an unlawful exercise of Defendants' authority, as is the demand thereunder for GSJ to make payment of the Two Hundred Ten Thousand Dollar (\$210,000.00) penalty improperly imposed therein.
62. Additionally, Plaintiff further seeks a judgment declaring that DPNR's refusal to process or even consider any applications for permits submitted by GSJ, asserted by Defendants as being justified based on the unresolved Notice of Failure to Cure and non-payment of the Two Hundred Ten Thousand Dollar (\$210,000.00) assessment imposed therein, is also outside the scope of and an unlawful exercise of Defendants'

authority, and directing DPNR to consider and process GSI's applications for permits.

WHEREFORE, Plaintiff seeks all damages to which it is entitled, including contractual, compensatory, punitive and equitable damages, and declaratory relief, as well as an award of its costs and reasonable attorneys' fees, and any pre and post judgment interest to which it is entitled.

Respectfully,

Dated: March 8, 2017

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