

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

| | | |
|---|---|----------------------------|
| GREAT BAY CONDOMINIUM OWNERS |) | CIVIL NO. 2017- |
| ASSOCIATION, INC; TIMOTHY O'BRIEN, |) | |
| KEITH CHEATHAM, |) | |
| |) | |
| Plaintiffs, |) | VIOLATION OF EQUAL |
| |) | PROTECTION, DUE PROCESS, |
| v. |) | COMMERCE CLAUSE; FIFTH |
| |) | AMENDMENT TAKING; |
| |) | 5 V.I.C. § 80 TAXPAYER |
| GOVERNMENT OF THE VIRGIN ISLANDS; |) | ACTION; DECLARATORY |
| MARVIN L. PICKERING, Director of the |) | JUDGMENT |
| Bureau of Internal revenue, in his official |) | |
| capacity. |) | |
| |) | |
| Defendants. |) | JURY TRIAL DEMANDED |

COMPLAINT

COMES NOW the Plaintiff, **GREAT BAY CONDOMINIUM OWNERS ASSOCIATION, INC.** ("GBCOA"), **TIMOTHY O'BRIEN**, and **KEITH CHEATHAM**, by and through their undersigned counsel, the LAW OFFICE OF W. MARK WILCZYNSKI, P.C., and for their Complaint state as follows:

PARTIES

1. Plaintiff GREAT BAY CONDOMINIUM OWNERS ASSOCIATION, INC. ("GBCOA") is a not for profit corporation organized and existing under the laws of the United States Virgin Islands, with the capacity to sue and be sued in its own name. GBCOA is the duly organized association of owners of fractional interests at the Ritz-Carlton Club on St. Thomas pursuant to its Declaration and By-Laws.

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2. Plaintiff TIMOTHY O'BRIEN ("O'Brien") is an adult resident of the State of Maryland and is the owner of a fractional interest at the Ritz-Carlton Club on St. Thomas.

3. Plaintiff KEITH CHEATHAM ("Cheatham") is an adult resident of the State of New York and is the owner of a fractional interest at the Ritz-Carlton Club on St. Thomas.

4. Defendant GOVERNMENT OF THE VIRGIN ISLANDS ("Government") is an instrumentality organized and existing under the Revised Organic Act for the Virgin Islands, 68 Stat. 497, 48 U.S.C.A. § 1541 *et seq.*

5. Defendant MARVIN L. PICKERING ("Pickering") is the Director of the Bureau of Internal Revenue and is the person directly responsible for collection of internal revenue taxes and enforcement of the internal revenue tax laws of the Virgin Islands.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of the instant action pursuant to 28 U.S.C. § 1331, in that Plaintiffs' claims arise under the Constitution and laws of the United States, and more specifically, the Fourteenth Amendment to the Constitution of the United States of America, as made applicable to the Virgin Islands pursuant to the Revised Organic Act of 1954, and 42 U.S.C. § 1983. The Court also has jurisdiction over the subject matter of the instant action pursuant to 28 U.S.C. § 1343(3) in that this is an action seeking redress for the deprivation, under color of law, of rights,

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privileges or immunities secured by the Constitution of the United States and an Act of Congress providing for equal rights of all persons within the jurisdiction of the United States. The Court has supplemental jurisdiction over Plaintiffs' claims arising under the laws of the Virgin Islands, and specifically, 5 V.I.C. § 80, pursuant to 28 U.S.C. § 1367(a) in that said claims are so related to the claims in the action within the original jurisdiction of this Court that they form part of the same case or controversy under Article III of the United States Constitution.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) in that defendants reside in this judicial district, and a substantial part of the events or omissions giving rise to the claim occurred within this judicial district.

8. Plaintiffs are taxpayers in the Virgin Islands, and bring this action individually, and on behalf of all taxpayers of the Virgin Islands to restrain illegal or unauthorized acts by a territorial officer or employee, pursuant to 5 V.I.C. § 80.

FACTS COMMON TO ALL CAUSES OF ACTION

9. Bill No. 32-0005 ("Bill") was passed by the Virgin Islands Legislature and signed into law by Governor Kenneth Mapp on March 22, 2017 as Act No. 7987 ("Act"). True and correct copies of the Bill, the Bill Summary, and the Act are attached hereto collectively as **Exhibit A** and incorporated herein by reference. Title II of said Act is titled "Deletion of Timeshare Room Tax; Establishment of an Environmental/Infrastructure Impact Fee for Timeshares." The term "Environmental/Infrastructure Impact Fee" ("Environmental Impact Fee") is defined as

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“the new occupancy lodging fee that is levied on timeshare owners/users by the Virgin Islands Government per night of occupancy described in paragraph (d).” The fee is set at \$25.00 per day of occupancy, and the Act does not differentiate between owner occupancy and guest occupancy. In fact, the foregoing quote clearly demonstrates that it is intended to apply to both owners of timeshare interests and renters of said timeshare interests. The timeshare plan manager is responsible for collection of the fee, filing tax returns, and paying the fees to the Bureau of Internal Revenue. However, the Act provides that “the timeshare *association* is responsible for any and all assessments or liens.” (emphasis added).

10. The Act requires that 15% of the revenues from the Impact Fee be allocated to the V.I. Tourism Advertising Revolving Fund. The Bill Summary for Bill No. 32-0005 states that this money is for the “express purpose of partnering with the timeshare industry to promote timeshare or vacation club sales in the U.S. Virgin Islands.”

11. For fiscal years 2017 through 2021, the remaining 85% of revenue from the Impact Fee is allocated to the General Fund. For fiscal years 2018 and 2019, \$4,000,000 of the monies deposited in the General Fund is required to be allocated equally between the Roy Lester Schneider Medical Center and the Juan Luis Hospital and Medical Center. For fiscal years 2022 and 2023, 40% of the Impact Fee revenue goes to the General Fund, and 45% to the “VIESA Contingency Reserve Account.” That reserve account is established to fund a negotiated settlement between the Government

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of the Virgin Islands and certain union and non-union employees in two District Court cases.

12. For fiscal years 2024 and after, 85% of the revenue from the Environmental Impact Fee must be allocated to the General Fund. The Act also requires the Bureau of Economic Research to “conduct a study on the impact of timeshare activities and components in the Virgin Islands within two years of implementation.” There is no indication that any study of the “impact of timeshare activities and components in the Virgin Islands” was ever conducted prior to passage of the Act. Timeshare owners have significantly less impact on the infrastructure of the Virgin Islands than local residents. For example, they make significantly less use of the roads, do not use governmental services such as hospitals and fire service. In fact, by supporting local businesses such as restaurants, shops, watersports operators and the like, timeshare owners contribute significantly to the local economy.

13. As set out more particularly in Paragraphs 9 through 11, inclusive, none of the revenue from the Environmental Impact Fee is earmarked for maintenance and repair of the infrastructure of the Virgin Islands.

14. On January 9, 2017, in his letter to Senate President Neville James transmitting the Bill, Governor Kenneth Mapp stated:

“It is important to emphasize that the new revenues we are seeking are not from the usual source—the business community or the backs of the working people and retirees of the Virgin Islands. Rather, we are seeking these new revenues from external sources who we are now asking to make a reasonable contribution to the upkeep of our infrastructure and the preservation of our pristine environment, which they enjoy. Simply put, this

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bill seeks a reasonable contribution from visitors to our shores and a slight burden on our business community to collect these revenues.”

A true and correct copy of said transmittal letter, which was posted on Governor Mapp’s official website is attached hereto as **Exhibit B** and is incorporated herein by reference.

15. In said transmittal letter, Governor Mapp further stated:

“Importantly, the new revenues generated by the Environmental/Infrastructure Impact Fee will address the contingent obligations resulting from negotiated settlement related to the U.S. Court of Appeals for the Third Circuit in the VIESA Case, which I have directed the Attorney General not to appeal. Additionally, it will restore lost wages to our hard-working Government employees, whether in or out of government, and help generate financial stability without impacting the revenue initiatives included in the Plan. These measures will provide confidence in the government’s commitment to financial stability and therefore ensure that the Government will have continued access to the capital markets at reasonable rates for its essential infrastructure and capital project purposes.”

16. Plaintiffs are informed and believe, and based thereon allege that the Governor and other members of the executive branch have made other public statements to the effect that the Environmental Impact Fee was intended to apply primarily to non-residents and would have no effect on residents of the Virgin Islands.

17. GBCOA is the association of owners of fractional interests at the Club at Great Bay. Plaintiffs Timothy O’Brien and Keith Cheatham are the owners of a fractional interest at the Club at Great Bay. Fractional interest ownership is different from timeshare ownership in several important respects. Most significantly, there are far fewer owners of fractional interests in any unit in the development. There could be as

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many as 52 owners of timeshare interests in a specific unit, whereas there are commonly 10 to 12 owners of fractional interests in a unit. However, 33 V.I.C. § 2301(c)(4) provides “‘Timeshare real property’ means any real property that is owned or leased by several persons jointly and in which the ownership or leasehold interests are for fixed periods of time.” Thus, for purposes of the Act, timeshare interests and fractional interest ownership are treated as being equal. For purposes of clarity, this Complaint will use the term “timeshare” to include fractional interest ownership.

18. Plaintiffs are informed and believe, and based thereon allege that more than 99% of the timeshare interests in the Virgin Islands are owned by non-residents, and that the majority of those non-residents are citizens and residents of various States in the United States.

19. GBCOA does not own any timeshare interests, but is simply the association of timeshare owners.

20. Prior to March 8, 2008, all real property in the Virgin Islands was taxed at the same rate, which was set at 0.0125% of 60% of the fair market value of the property. This is the equivalent of 0.0075% of the full fair market value of the property. On March 8, 2008, the Legislature enacted a new tax schedule, which is codified at 33 V.I.C. § 2301, which now provides:

“(a) All real property in the Virgin Islands subject to taxation must be assessed at 100 percent of its fair market value as calculated by using the assessment methods set forth in sections 2403 and 2404 of this chapter;

“(b) The Tax Assessor shall levy and collect on real property a tax at the mil rates for each classification of real property specified in this

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subsection as follows:

- (1) unimproved non-commercial real property, at .004946;
- (2) residential real property, at .003770;
- (3) commercial real property, at .007110; and
- (4) timeshare real property at .014070.

“(c) As used in this section

(1) ‘Unimproved non-commercial real property’ means any real property that is unimproved and is located in any residential or agricultural zoning district as set forth in title 29 Virgin Islands Code, chapter 3.

(2) ‘Residential real property’ means any real property on which a residence is located, including apartments, condominiums, cooperatives, but excluding timeshare real property.

(3) ‘Commercial real property’ means any real property that has on it improvements designed or intended for income production, or unimproved real property that is located in any business, commercial, gaming, industrial, public, special, or waterfront zoning district, as set forth in title 29 Virgin Islands Code, chapter 3.

(4) ‘Timeshare real property’ means any real property that is owned or leased by several persons jointly and in which the ownership or leasehold interests are for fixed periods of time.”

21. As set out in 33 V.I.C. § 2301, condominiums, which are classified as residential real property, are taxed at approximately one-half of the earlier rate, whereas timeshares, which are substantially identical to condominiums in all relevant respects,

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are taxed at nearly four times the earlier rate. Timeshares and condominiums are both created pursuant to the Virgin Islands Condominium Act, 28 V.I.C. § 901, *et seq.*, and are governed by the terms of said Act. Following enactment of 33 V.I.C. § 2301, timeshares pay property taxes at a rate 400% greater than condominiums.

**FIRST CAUSE OF ACTION
(Violation of the Equal Protection Clause of
the United States Constitution)**

22. Plaintiffs repeat and replead the allegations contained in Paragraphs 1 through 20, inclusive, of this Complaint and replead them as though set out in full at this place.

23. The Equal Protection Clause of the United States Constitution is applicable to the Virgin Islands by virtue of Section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561, *et seq.*

24. The Equal Protection Clause of the United States Constitution forbids a governmental entity from discriminating in favor of its own residents solely by burdening the residents of other States.

25. Act 7987 and 33 V.I.C. § 2301 both unreasonably discriminate against non-resident visitors to the Virgin Islands in favor of residents and do not further any legitimate governmental interest.

26. The Environmental Impact Fee is an additional charge that is not imposed on owners of other types of real property. Owners of single family residences, condominiums, vacation homes, or other types of residences or real estate interests are

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not subject to the Environmental Impact Fee. Additionally, 33 V.I.C. § 2301 unreasonably discriminates against non-resident timeshare owners by forcing them to pay a property tax 400% higher than that paid by owners of single family residences and condominiums.

27. The Environmental Impact Fee also unreasonably discriminates against short term timeshare rentals in favor of short term rentals of residential real property and condominiums, in violation of the Equal Protection Clause.

**SECOND CAUSE OF ACTION
(Violation of the Privileges and Immunities Clause
of the United States Constitution and 42 U.S.C. § 1983)**

28. Plaintiff repeats and repleads the allegations contained in Paragraphs 1 through 27, inclusive, of this Complaint and repleads them as if set out in full herein.

29. The Privileges and Immunities Clause of the United States Constitution, Article IV. § 2, applies to the Virgin Islands, and provides that “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” The Privileges and Immunities Clause is made applicable to the Virgin Islands pursuant to the Revised Organic Act of 1954.

30. Title 42 U.S.C. § 1983 prohibits “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States.

31. While apparently neutral on their fact, and while apparently applying to both residents and non-residents, in fact, the Act and 33 V.I.C. § 2301 disproportionately - indeed, almost exclusively - both unreasonably discriminate against

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non-residents by the mere fact that they are not residents of the Virgin Islands. The intent of the Act to impose a disproportionate burden on non-residents is confirmed by Governor Mapp's statement previously quoted above:

"It is important to emphasize that the new revenues we are seeking are not from the usual source-the business community or the backs of the working people and retirees of the Virgin Islands. Rather, we are seeking these new revenues from external sources who we are now asking to make a reasonable contribution to the upkeep of our infrastructure and the preservation of our pristine environment, which they enjoy. Simply put, this bill seeks a reasonable contribution from visitors to our shores and a slight burden on our business community to collect these revenues." (emphasis added).

Even though apparently facially neutral, as applied, the Act and 33 V.I.C. 2301 disproportionately impact non-residents and force them to bear a burden and cost not born by residents of the Virgin Islands and owners of timeshares.

32. Neither the Act , the Bill, or the Bill Summary discuss what infrastructure of the Virgin Islands is impacted, or how use of that infrastructure by timeshare owners is quantitatively or qualitatively different from use of the infrastructure by local businesses, residential owners, or condominium owners. In fact, none of the revenue anticipated from the Environmental Impact Fee is dedicated to maintenance or repair to the

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infrastructure of the Virgin Islands. The purported differential impact on the infrastructure is simply an excuse for forcing owners of timeshares to support local residents, who also equally share the benefits and enjoyment from the use of the infrastructure of the Virgin Islands. It singles out non-residents and treats them differently from residents.

33. The actions of Defendants, and each of them, constitute violations of the Privileges and Immunities Clause and 42 U.S.C. § 1983.

**THIRD CAUSE OF ACTION
(Violation of Commerce Clause of the
United States Constitution)**

34. Plaintiffs repeat and replead the allegations contained in Paragraphs 1 through 32, inclusive, of this Complaint and replead them as though set out in full at this place.

35. The Commerce Clause, Article 1, § 8 of the Constitution, authorizes Congress “to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.” The Clause also prohibits states from imposing undue burdens on or interfering with interstate commerce.

36. Neither the Act nor 33 V.I.C. § 2301 are rationally related to a legitimate governmental interest supposedly furthered by each. Specifically, none of the funds generated by the Environmental Impact Fee are dedicated to repair or maintenance of the infrastructure. Rather, those revenues are dedicated to other, more political

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purposes such as supporting the two hospitals in the Virgin Islands and paying a settlement to settle a lawsuit over the Government's failure to pay teachers and other union members amounts they were contractually owed. Revenues derived from property taxes pursuant to 33 V.I.C. § 2301 are pledged as security for government bonds, with the balance paid into the General Fund, with no specific limitation on their use.

37. Additionally, both statutes place non-resident owners of timeshares and non-resident visitors planning to stay in timeshares at a competitive monetary disadvantage. Visitors must pay more to stay in a timeshare than they would pay to stay in a comparable condominium, directly affecting the revenues received by non-resident owners and transmitted back to the United States. Additionally, the added cost will have a deterrent effect on visitors traveling to the Virgin Islands.

38. The actions of Defendants, and each of them, violate the Commerce Clause.

**FOURTH CAUSE OF ACTION
(Violation of Right to Due Process on Behalf
of GBCOA)**

39. Plaintiff repeats and repleads the allegations contained in Paragraphs 1 through 38, inclusive, of this Complaint and repleads them as though set out in full at this place.

40. The Act provides that "the timeshare *association* is responsible for any

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and all assessments or liens.” (emphasis added).

41. The Act, by its plain language, impermissibly delegates the Government’s enforcement powers to timeshare associations by making them responsible for enforcing an owner’s obligation to pay the Environmental Impact Fee. Additionally, the plain language of the statute makes the association responsible for any uncollected or unpaid liens and assessments.

42. The Act deprives GBCOA of its right to substantive and procedural due process under the law by unreasonably and illegally forcing it to collect unpaid liens and assessments on behalf of the Government, and by making it responsible for any delinquent amounts from timeshare owners.

43. The Act also deprives GBCOA of its right to substantive and procedural due process by failing to provide any type of mechanism or procedure whereby GBCOA could enforce the obligations forced on it by the Act.

44. The Act further deprives GBCOA of its right to substantive and procedural due process by making it financially liable to the Government for the debts of third parties over whom it has no direct, enforceable control.

45. Additionally, GBCOA will suffer additional costs and damages including, without limitation, costs of hiring a company to track occupancy, collect fees, and develop some mechanism for enforcing non-payment of the Fee by fractional owners. GBCOA is a not-for-profit corporation and is not structured in such a way that it could

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engage in commercial activities such as collecting debts of owners to the Government.

**FIFTH CAUSE OF ACTION
(Fifth Amendment Taking)**

46. Plaintiffs repeat and replead the allegations contained in Paragraphs 1 through 45, inclusive, of this Complaint and replead them as though set out in full at this place.

47. The Act purports to require timeshare owners, including Plaintiffs Timothy O'Brien and Keith Cheatham, to pay \$25 per night for each night they occupy their own timeshare unit. Imposition of the Environmental Impact Fee constitutes a cloud on title to each timeshare unit.

48. The Act also has resulted, and will result in a decrease in the fair market value of Plaintiffs O'Brien's and Cheatham's timeshare interest, and of other timeshare owners.

49. The actions of Defendants, and each of them, as set forth herein, constitute a taking, in whole or in part, of Plaintiff's protected interests in real property without just compensation, in violation of the Fifth Amendment to the Constitution of the United States, made applicable to the Virgin Islands by the Revised Organic Act of 1954.

50. The Government of the Virgin Islands is liable to Plaintiffs Timothy O'Brien and Keith Cheatham, and similarly situated owners of timeshare interests for the fair value of the taking, all in a sum according to proof.

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**SIXTH CAUSE OF ACTION
(5 V.I.C. § 80 claim)**

51. Plaintiffs repeat and replead the allegations contained in Paragraphs 1 through 50, inclusive, of this Complaint and replead them as though set out in full at this place.

52. Title 5 V.I.C. § 80 provides that “A taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds.”

53. Plaintiffs are each taxpayers to the Government of the Virgin Islands.

54. The actions of Defendants, and each of them, as set out in more detail herein, constitute illegal and unauthorized acts by territorial officers or employees.

55. Plaintiffs are entitled to injunctive relief prohibiting Defendants, and all persons acting by, through or in concert with them, from enforcing any portions of the Act pertaining to the Environmental Impact Fee, or from taxing the property of timeshare owners in the Virgin Islands at a rate different from that charged for condominiums and other residential properties.

**SEVENTH CAUSE OF ACTION
(Declaratory Judgment)**

56. Plaintiffs repeat and replead the allegations contained in Paragraphs 1 through 55, inclusive, of this Complaint and repleads them as though set out in full at this place.

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57. Pursuant to 28 U.S.C. § 2201, Plaintiffs seek a judicial declaration of the respective rights and liabilities of the parties based on the facts set out herein, and on such other and further facts as may appear as the result of discovery in this matter.

WHEREFORE, Plaintiffs pray for entry of judgment in favor of Plaintiffs and against Defendants as follows:

1. For temporary, preliminary and permanent injunctive relief enjoining Defendants, and all persons acting by, through or in concert with them, from enforcing any portions of the Act pertaining to the Environmental Impact Fee, or from taxing the property of timeshare owners in the Virgin Islands at a rate different from that charged for condominiums and other residential properties; and,

2. For a declaration that the Act and 33 V.I.C. § 2301 violate the rights of all timeshare owners to rights guaranteed under the Constitution of the United States and applicable laws, all as set out more particularly herein; and,

3. For compensation for all damages caused to Plaintiffs by Defendants' unlawful actions, in a sum according to proof; and,

4. For judgment in favor of Plaintiffs Timothy O'Brien and Keith Cheatham, and all others similarly situated, for the fair value of the uncompensated taking, in whole or in part, of their timeshare residence interests, all in a sum according to proof; and,

5. For a judicial declaration of the respective rights and liabilities of the parties; and,

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6. For costs of suit incurred herein, including reasonable attorney's fees;
and,
7. For such other and further relief as the Court deems appropriate.

Respectfully submitted,

DATED: May 3, 2017

/s/ W. MARK WILCZYNSKI
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