

# Greenwashing Risks to Baby-boomers Abroad

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An Assessment of Available Strategies to Address  
“Green” Marketing Misrepresentation to U.S. Retiree  
Real Estate Investors Overseas



**A CENTER *for* BIOLOGICAL DIVERSITY REPORT**

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## An Assessment of Available Strategies to Address “Green” Marketing Misrepresentation to U.S. Retiree Real Estate Investors Overseas

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### Front Cover:

Protest sign at a Ngobe tribe community completely surrounded by the Red Frog Beach development, Panama.



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The Center for Biological Diversity is a national nonprofit conservation organization with more than 200,000 members and online activists dedicated to protecting endangered species and wild places. We work through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction.

# Table of Contents

<b>Introduction</b> .....	1
<b>About U.S. Law</b> .....	5
Federal Causes of Action .....	5
State Causes of Action.....	10
Arizona.....	11
California.....	12
New York.....	15
Texas.....	16
<b>About the Developments</b> .....	18
Paraiso del Mar .....	18
Red Frog Beach .....	19
<b>The Ideal Plaintiff</b> .....	26
In Federal Court .....	26
In State Courts .....	27
<b>Non-legal Options</b> .....	28
<b>Conclusion and Recommendations</b> .....	30

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## Introduction

Many countries in Central America and the Caribbean are encouraging the construction of developments in their nature-rich environments, especially along their coastlines. As a result, many developments are popping up in environmentally sensitive areas and often damaging the very resources these nations are seeking to utilize. Some of this is deliberate — the developments are meant to maximize the financial potential of their country’s natural bounty — and some of it is the result of poor planning. Making matters worse, some unscrupulous developers are marketing their projects as “eco-friendly” or “green” while actually harming the local environment and communities.<sup>1</sup>

At the same time, investors are becoming increasingly interested in investing in real estate abroad.<sup>2</sup> North American investors and tourists alike seek to enjoy the ecologically sensitive areas of Central America and the Caribbean because these sites are the most exotic and unspoiled. One of the largest groups of such investors is the baby boomers.<sup>3</sup>

While the recent downturn in the U.S. economy has led to a slow-down in real estate development in Mexico and Central America, the number of North Americans looking south of the border to retire is expected to increase as a growing number look to spend their remaining golden years living in communities where their declining baby-boomer wealth can be stretched further.<sup>4</sup>

Though baby-boomers are now among the most economically vulnerable subgroup of Americans, as a whole they engage in more leisure travel than previous generations and remain more sensitive to emerging environmental issues. A report by the research firm American LIVES recounted that 85 percent of homebuyers surveyed would pay \$2.25 more per square foot for sustainable housing, and that 73 percent reported they would

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1 Part of the problem is the lack of a standardized definition for “eco-friendly,” “eco-resort,” “eco-development,” or even “green.” The International Ecotourism Society defines eco-tourism as “responsible travel to natural areas that conserves the environment and improves the well-being of local people.” [www.ecotourism.org](http://www.ecotourism.org). While eco-tourism is not the same as eco-development, its definition is probative. At the very least, terms like “eco” and “green” connote that a development is not in violation of environmental laws, and at the most, they suggest it is doing nothing to harm the environment.

2 Maya Roney, *Affordable Homes Abroad*, Business Week, Oct. 11, 2007; Sally Stich, *Retirees Find Value, Sun in Mexico*, Denver Post, Mar. 27, 2005.

3 Baby-boomers are people born between 1946 and 1964. CESD/TIES Working Paper No. 104, Consumer Demand and Operator Support for Socially and Environmentally Responsible Tourism, revised April 2005, <http://ecotourismcesd.org/resources/reports.html>. Among emerging baby-boomers, more than 75 million will turn 60 in the next 20 years — more than 10,000 every day. Elizabeth Wilkerson, States, SEC Works to Protect Elderly Investors, Special to Stateline.org, July 11, 2006 at <http://www.stateline.org/live/details/story?contentId=125869>.

4 Joe White, *Boomer Bust: How Will the Economy Rebound Without Post-War Babies Financing Their Harleys?* Oct. 21, 2008, <http://online.wsj.com/article/SB122455140262652669.htm>. Dean Baker and David Rosnik, *The Housing Crash and the Retirement Prospects of Late Baby Boomers*, June 2008, [http://www.cepr.net/documents/publications/housing\\_crash\\_baby\\_boomers\\_2008\\_06.pdf](http://www.cepr.net/documents/publications/housing_crash_baby_boomers_2008_06.pdf).

pay \$4.50 more per square foot for sustainable housing.<sup>5</sup> Some developers, recognizing the investment potential of this generation and recognizing the current “green” trend, are marketing their developments in Latin America as eco-friendly.

A consumer who is “green” attempts to consider the environmental impacts of his or her purchase. The developers marketing their developments as green may be making unsupported claims of their developments’ greenness or taking advantage of the inherent vagueness of the term “green.” This graying of the concept of “green” is going unchecked, leading to misrepresentation of the true nature of certain developments and to potential disappointment for investors. The North American Securities Administrators Association,<sup>6</sup> the Securities Exchange Commission,<sup>7</sup> and AARP<sup>8</sup> provide information on consumer protection, but this information is generally geared toward helping senior investors identify and avoid “get-rich-quick” scams and pyramid schemes. There is no agency that has tackled the emerging area of real estate law that addresses the risk investors undertake when they purchase “green” real estate abroad. Given the growing number of American baby boomers that can be expected to emigrate from the United States out of economic necessity, there is a critical need to elevate the level of customer protection from deceptive advertising in this country targeting would-be purchasers of real estate abroad.

## Greenwashing Real Property Overseas

Part of the problem with a developer identifying a development as “green” is that while domestic green building guides exist, there are no globally recognized international standards for sustainable or green developments.<sup>9</sup> As a result, developers can convert entire swaths of ecologically significant land into retirement villas with little or no regard for federal environmental laws or municipal planning processes. Even where environmental impact statements are required, they may not be adequate, omitting issues such as the long-term availability of water or the extent of environmental impacts. The result is that an investor who pays a premium for the development being “green” may end up losing money on the investment when it turns out that not only is the development not green, it is actually harming the environment. For an investor looking at a retirement investment abroad, additional information must be disclosed, especially regarding the environmental impacts of the development. Domestically, we need to encourage the enforcement of existing applicable state and federal laws and

5 The report was referenced in *Doing the Right Thing Pays Off*, Private Air Magazine, Sept./Oct. 2006, p. 106. The report is not cited directly as it is not freely available. It costs subscribers approximately \$2.25 <http://www.americanlives.com/>.

6 <http://www.nasaa.org/home/index.cfm>.

7 <http://sec.gov/investor/seniors.shtml>.

8 Formerly the American Association of Retired Persons [http://www.aarp.org/money/wise\\_consumer/investment\\_fraud/](http://www.aarp.org/money/wise_consumer/investment_fraud/).

9 See the U.S. Green Building Council, [www.usgbc.org](http://www.usgbc.org), and EPA’s Energy Star standards, [www.energystar.gov](http://www.energystar.gov).

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push for more stringent, relevant law to combat these nontransparent practices abroad. Additionally, we need to educate investors on the impacts their investments make so they can make more fully informed decisions. Hopefully, once investors are armed with the knowledge that some of these developments can have undisclosed negative impacts on the natural environment, they will not invest in them and developers will be forced to either develop elsewhere or develop in a truly sustainable and green fashion.

## **Why the Center for Biological Diversity is Getting Involved**

The Center is dedicated to protecting the most imperiled species and the most vulnerable wild places regardless of whether they are located in the United States or abroad. Developments are being constructed throughout Latin America and are having profound effects on some ecologically and culturally significant areas. For example, Isla Bastimentos, an island off the coast of Panama that is designated as a national marine park, is home to species and populations that likely occur nowhere else on Earth. It is also slated to support a massive development that has been marketed as being “absolutely committed to preserving the pristine environment,” but in reality has been plagued by allegations that the developers are doing anything but that.<sup>10</sup> Some Center members have also expressed concern about a mega-development in La Paz, Mexico. Paraíso del Mar is a development project that touts itself as being fully sustainable; however, the project remains in litigation over inadequate environmental impact statements, damage to mangroves, and overreliance on local water resources.

We have been working with Panamanian activists to petition the Panamanian government to halt the project, and have experienced limited success pursuing this narrow avenue, including the revocation of the approval of Phase II of the development. The Center recognizes that more needs to be done by not just targeting the developments, but also by addressing the demand for them.

The Center is highly adept at using a combination of science, policy analysis and advocacy, and environmental law to protect nature’s most precious resources. We are experienced in carefully assessing the environmental and biodiversity impacts of projects and strategizing ways to address them. While we typically work on a wide range of federal and state projects, we possess the tools to analyze projects abroad and are prepared to take the necessary steps to protect these areas.

## **Recommendations**

This paper investigates the potential domestic causes of action available to fight misrepresentation of “green” real estate in foreign countries. It identifies the existing laws and policies prohibiting fraud and regulating marketing and sale of green

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10 [www.redfrogbeach.com/environmentplan.html](http://www.redfrogbeach.com/environmentplan.html).



products and services.<sup>11</sup> In identifying existing laws, we discovered there is a lack of relevant domestic law and regulation governing the green marketing of real estate abroad. Therefore, we recommend several actions that are key to helping investors who are not currently receiving all the information they need to make an informed decision.

There has been an increased consumer demand for responsible retirement investment options abroad. This interest has prompted some developers to employ green marketing strategies to cash in on consumers concerned with the environmental impacts of their investments. The result is a need for standards defining green development abroad, enforcement mechanisms to stop unscrupulous developers, and outreach to educate investors.

The Center recommends launching a strategic campaign that will:

- Use this report to educate potential investors and policy-makers about potential problems with investing abroad and the absence of domestic state and federal laws protecting U.S. investors from foreign real estate actively marketed in the United States;
- Collaborate with existing groups, such as state attorneys general, real estate and corporate commissions, and Seniors Against Investment Fraud programs in each state to educate the public about deceptive marketing of development projects overseas, including misrepresentations made about the greenness of such projects;
- Draft guidelines for evaluating environmental claims that can be used to inform U.S. investors as they invest in real estate abroad, as well as decision-makers in fashioning appropriate regulations and laws; and
- Develop a report that investigates and analyzes the precise impact these developments are having on the environment and local communities.

This report provides information about the law and is designed to help readers understand their legal needs. However, legal information differs from legal advice, as legal advice refers to the application of law to an individual's specific circumstances. Therefore, this report should not be construed as providing specific legal advice for a particular person's case or situation.

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11 "Fraud" is used here to describe deception through the misrepresentation of facts or opinions.

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# About U.S. Law

## General Considerations

**I**n order to bring a lawsuit, a plaintiff must have standing. Simply put, this means that the plaintiff has an injury, which was caused by the defendant and can be redressed by the court. Generally, one cannot assert the rights of others to obtain standing. Some states may allow a claimant with standing in her own right to assert the rights of a third party if it is difficult for the third party to assert her own rights, or if a special relationship exists between the claimant and the third party. Additionally, some courts will allow organizations to be third-party plaintiffs, but typically only if the organizations' members could be plaintiffs themselves and the members' injuries are closely linked to the mission of the organization. For example, the Center for Biological Diversity likely would not have third-party standing for any potential plaintiff because the mission of the Center does not directly involve protecting the rights of investors or homeowners.<sup>12</sup>

Even if a plaintiff has standing, a court may still be unable to hear a case if it does not have jurisdiction over the defendant. Personal jurisdiction refers to a court's ability to exercise power over a particular defendant. The federal and state courts have differing standards for achieving personal jurisdiction, with the primary limitations set out in the U.S. Constitution. At a minimum, courts require that a potential defendant have sufficient contact

with the forum state — for example, be a resident of that state or do business in that state. If a potential defendant does not have these minimum contacts with the state, a plaintiff cannot hail him into court.

Finally, the misrepresentation of a development as green can likely be characterized as a contract or tort issue. In cases involving a breach of contract, the remedy is typically money damages. In these cases, a court will likely not order specific performance — make the breaching party do what he contracted to do — unless money damages are somehow insufficient and enforcement of the order is feasible. Therefore, a court will likely not require that a developer make his development eco-friendly in a lawsuit in which a plaintiff alleges breach of contract based on the developer promising an eco-friendly development and not delivering one. And in a tort action, a court will likely only award money damages sufficient to put the injured party in the position he would have been in but for the tortious act of the defendant.

## Federal Causes of Action

Currently, there are no federal laws directly aimed at consumer protection in real estate transactions abroad and there are no such protections against deceptive green marketing for real estate purchased overseas. However, there are a few existing federal laws that may be used by investors, competing legitimate developers, and aliens affected by the developments to seek relief in U.S. federal court.

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<sup>12</sup> An organization like Seniors Against Investment Fraud or AARP might have standing to bring a lawsuit on behalf of its members if its members could be plaintiffs themselves. The Center could have standing in a situation in which a project was funded, approved, or carried out by the U.S. government.



*Federal Trade Commission — Guides for the Use of Environmental Marketing Claims*<sup>13</sup>

The Federal Trade Commission Act (“FTC Act”) gives the Federal Trade Commission (“Commission”) the authority to regulate the market by prohibiting unfair methods of competition, unfair or deceptive acts, and practices in or affecting commerce. This includes the regulation of land sales.

The FTC Guides for the Use of Environmental Marketing Claims are the administrative interpretation of laws administered by the Commission. They specifically address the application of Section 5 of the FTC Act to environmental advertising and marketing practices. The guides are not legislative rules, so they do not have the force of law, but conduct inconsistent with the guidelines may result in corrective action by the Commission under Section 5 of the FTC. Section 5 prohibits unfair or deceptive acts or practices, including advertising or labeling that is false or misleading. Therefore, while the Commission cannot enforce the guidelines themselves, they can use them in identifying a situation in which someone has engaged in deceptive acts or practices under Section 5. Additionally, upon the official adoption of the final guidelines, which should be released sometime in 2009, many state attorneys general will likely apply the guidelines to anti-fraud laws in their respective states.<sup>14</sup>

<sup>13</sup> Available at <http://www.ftc.gov/bcp/gnrule/guides980427.htm>.

<sup>14</sup> Andrew C. Schneider, *Revised Green Guides Will Be More Stringent*, Kiplinger Business Resource Center, June 5, 2008 at [http://www.kiplinger.com/businessresource/forecast/archive/revised\\_green\\_guides\\_more\\_stringent\\_080605.html](http://www.kiplinger.com/businessresource/forecast/archive/revised_green_guides_more_stringent_080605.html).

The guidelines apply to environmental claims’ labeling, advertising, promotional materials, and all other forms of marketing. They apply to any claim about the environmental attributes of a product, package, or service in connection with its sale, offering for sale, or marketing. It is unclear whether and how they apply to the marketing and sale of real property.

The guidelines state that any qualifications or disclosures should be sufficiently clear, prominent, and understandable to prevent deception. It lists and defines prohibited marketing techniques, including overstating environmental attributes, making comparative claims, and making claims about the ecological benefit of a good or service.

While these guidelines may not be used to bring developers into compliance, they may be useful to ensure that any services offered at these developments come into compliance. Investors, or potentially anyone, may alert the Commission of developer practices they believe do not come into compliance with the guidelines, and the Commission can take corrective action under Section 5 of the FTC as stated above. This is not a remedy for money damages, and it is unclear how successful this type of action would be in actually stopping the misrepresentation of foreign real estate as green, as the guidelines appear to be geared more toward regulating products than regulating property.

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## ***Federal Interstate Land Sales Full Disclosure Act<sup>15</sup>***

The Federal Interstate Land Sales Full Disclosure Act (“Federal Act”) regulates the domestic marketing and sale of real estate, regardless of whether the property is located in the United States or abroad.<sup>16</sup> It makes it unlawful for any developer or agent to directly or indirectly make use of communication in interstate commerce or mail (including e-mail) with respect to the sale or lease of any lot, unless the lot is exempt from registration under the Federal Act or is registered with HUD pursuant to the Federal Act.<sup>17</sup> Further, it prohibits the employment of any device, scheme, or artifice to defraud; obtaining money or property by means of an untrue statement of a material fact or any omission to state a material fact; engaging in any transaction, practice, or course of business that operates or would operate as a fraud or deceit upon a purchaser; or representing that roads, sewers, water, gas, electric services, or recreational amenities will be provided or completed by the developer without stipulating in the contract of sale or lease that such services or amenities will be provided or completed.

The Federal Act could be used by investors who have been defrauded

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<sup>15</sup> *Public Law 90-448; 82 Stat. 590; 15 U.S.C. 1701 and C.F.R. 17001.1, et. seq. 1991.*

<sup>16</sup> M. Maxine Hicks and Linda E. Regan, *U.S. Land Sales Laws: Complying with the Federal Interstate Land Sales Full Disclosure Act*, The Metropolitan Corporate Counsel available at <http://www.metrocorpccounsel.com/current.php?artType=view&artMonth=April&artYear=2006&EntryNo=4780>.

<sup>17</sup> I.e., fewer than 25 lots, improved lots, sales to builders, zoned or restricted real estate, real estate investment trust securities, and government sellers/lessors.

by developers’ claims that their developments are green. The critical element would be proving the fraud. It should not be difficult to prove that the developer made claims about a development’s greenness, but what may be difficult is (1) defining “green”; and (2) proving that the investor was defrauded by the claim. First, it may be difficult to establish in a U.S. court what “green,” “eco-friendly,” or “sustainable” means in a foreign development context, since no standards exist for such developments. Also, in many cases, the investor will need to prove that she was defrauded by that representation. The developers have quite descriptive Web sites, with plenty of photographs and information regarding the development.<sup>18</sup> In fact, investors seek these types of investment opportunities because they offer modern, luxury living in beautiful and exotic places.<sup>19</sup> It may be difficult to prove that an investor relied on the developer’s claim that the development was going to be green.

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<sup>18</sup> Failure to disclose pending lawsuits regarding the failure to comply with local environmental laws would likely be one of the factors the court would take into consideration.

<sup>19</sup> Richard Sine, *Don’t Dream. Own. 14 Places to Buy a Second Home...Now!*, *Men’s Health*, Winter/Spring 2008; Stacie Standifer, *Tequila Sunrise: For an Ideal Second Home Location, Look to the Baja Coast of Mexico for the Most Spectacular New Options*, *At Home*, Winter 2006; Ann Brenoff, *Expat Villages Spring Up as Construction Booms*, *Los Angeles Times*, Oct. 22, 2006; Pamela Dittmer McKuen, *A Home Away from Home: Americans Finding it Easier to Buy in Some Foreign Countries*, *Chicago Tribune*, May 7, 2006; Jenny Hontz, *Friendlier Footprints: Improving Relations with the Locals*, *Newsweek*, Apr. 10-17, 2006; Julie Bennett, *The Ritzy Route to Condo Ownership*, *Wall Street Journal*, Feb. 1, 2006; Elizabeth Armstrong, *Discoveries, Where to Retire*, Nov/Dec 2004; Chris Woodyard, *Business Travelers Invest in Their Own Hotel Rooms*, *USA Today*, Nov. 8, 2004.

Further, it may be difficult to prove that the investor was actually defrauded by the claim (in other words, was unaware that the investment would not be green when the investor commissioned the developer to build a luxury home in an ecologically sensitive area).<sup>20</sup>

### *Home Owners' Loan Act*<sup>21</sup>

This statute makes it a crime to knowingly make any false statement or willfully overvalue any land or property for the purpose of influencing the action of any Federal Reserve bank, small business investment company, federal credit union, insured state-chartered credit union, federal home loan bank, or a branch or agency of a foreign bank (plus a long list of other entities). The penalty for this crime is up to \$1,000,000 or 30 years in prison.

This statute does not provide a private remedy, meaning that a victim of fraud could not sue the wrongdoer personally and receive damages. However, a victim of fraud could seek enforcement of this law through the U.S. attorney general. The attorney general will only enforce the law if the information provided by the

<sup>20</sup> For example, in *Trouble In Paradise: Red Frog Investor Felt Misled*, May 1, 2007, available at <http://wcco.com/consumer/Red.Frog.Beach.2.367100.html>, investor Eric Johnson states he feels misled because he is stuck in a design dispute, and other investors feel the Red Frog Beach developers have broken promises like not creating a golf course designed by Arnold Palmer (which the Panamanian government prohibited due to its ecological effects). Another investor, Dave Gramling, expressed disappointment with not having a golf course, but was “thrilled” with his investment because of “the spas, the restaurants, [and] the two marinas.”

<sup>21</sup> 18 USCS § 1014.

defrauder influenced the decision of the lender.

### *Wire Fraud Statute*<sup>22</sup>

The Wire Fraud Statute makes it a crime for any person having devised or intending to devise any scheme or artifice to defraud or obtain money by false or fraudulent pretenses, using radio or television to execute such fraud. This is punishable with imprisonment for up to 20 years.

Again, this does not provide a civil remedy, but a victim of fraud could seek enforcement of this law with the Federal Communications Commission if the defrauder used the phone or mail to communicate with the victim regarding the property.

### *Lanham Act*<sup>23</sup>

The Lanham Act mostly deals with trademark regulation; however, section 43(a) addresses false advertising. It allows business competitors to sue one another for false or misleading descriptions or representations in commercial advertising that misrepresent the nature, characteristics, qualities, or geographic origin of goods, services, or commercial activities. To prove one's case in court, a claimant must satisfy four elements: that the plaintiff and defendant are business competitors, that there was a false or misleading statement made, that the statement was used in commercial advertising or promotion, and that the

<sup>22</sup> 18 USCS § 1343.

<sup>23</sup> 15 USC § 1125(a).

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statement creates a likelihood of harm to the plaintiff.

The Lanham Act only applies to goods and services, therefore, it could not be used by developers to sue regarding statements made about real property. However, it could be used in a trademark case in which one developer sues another for the use or misrepresentation of his company's name or if certain services are promised and not fulfilled, such as the creation of a sewer system or the employment of local laborers.<sup>24</sup> It is possible that the creation and maintenance of a golf course could be considered a service, but any action would need to be brought by the competing developer or service provider. Similarly, a company that promotes environmental stewardship may have a claim under this act against another company with a similar name that has endorsed activities that harm the environment.

### *Alien Tort Statute*<sup>25</sup>

The Alien Tort Statute ("ATS") is available to aliens to sue in U.S. federal district court. The defendant can be any government or corporation in violation of customary international law or a treaty

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<sup>24</sup> See *Pillar Panama v. DeLape*, CA H-07-1922, 2008 U.S. Dist. LEXIS 31504, \*11-12 (S. Dist. Tex. Apr. 16, 2008) (holding that the essence of the Lanham's ban is on goods and services — not land — that are counterfeit, not adversely claimed); see also *Ditri v. Coldwell Banker Residential Affiliates*, 954 F.2d 869 (3<sup>rd</sup> Cir. 1992) (holding that the alleged misrepresentation about maintenance of a private road is not misrepresentation involving products or services).

<sup>25</sup> 28 U.S.C. § 1350, also known as the Alien Tort Claims Act.

to which the United States is a party. The action alleged must be a tort. Typically, the tort is one involving a human rights

abuse, though some plaintiffs have attempted to bring "environmental justice" suits under the ATS. To date, plaintiffs using the ATS have been unsuccessful against corporate defendants in court (although plaintiffs have been successful in getting corporate defendants to settle out of court). And no plaintiff has succeeded on a strictly environmental claim.

It is unlikely that a plaintiff could prove a violation of international customary law, but it may be possible, depending on the circumstances, to prove violations of treaties. The United States is party to the following potentially applicable treaties:

- Convention on Biodiversity
- International Convention on Civil and Political Rights
- Declaration on the Rights of Indigenous People
- Convention for the Protection of the World Cultural and Natural Heritage

A plaintiff would need to be an alien, prove that the defendant has committed a tort in violation of a treaty, and that the United States is a party to the treaty. It is unlikely that aliens residing near these developments could bring a suit under ATS without egregious human rights abuses.

## State Causes of Action

Different courts employ different methods of determining which states' law to apply. A court's choice of law may depend on the type of violation alleged — tort or contract. Additionally, the law that the court chooses to apply will be based on an analysis that is heavily fact dependent. With that in mind, the following analysis of Arizona, California, New York, and Texas law is only viable where the specific state court has applied its own state law. These states were chosen because they all have a high percentage of retirees and people approaching retirement age. And in the cases of all but New York, these states share a border with Mexico, a popular tourist and investor destination.

There are no state statutes that deal directly with green marketing of real estate abroad, though some governors, attorneys general, and state agencies have established applicable administrative procedures and policies. Additionally, some states are joining with the Securities and Exchange Commission and the National Association of Securities Dealers to protect seniors from predatory sales tactics and investment fraud generally.

Because the widespread investment in green developments abroad is a relatively new phenomenon, and few laws have been created to regulate it, the application of common law in state or federal court may be the best option for victims of misrepresentation. Common law refers to the law that has been created by courts (in contrast to law found in statutes). Common laws exist as avenues for relief in the absence of statutes directly on point. Some examples of common law laws that may be available

to victims of fraud include negligence, negligent misrepresentation, intentional misrepresentation, fraud/deceit, breach of contract, and breach of the covenant of good faith and fair dealings. The precise elements of each may vary slightly from state to state, but generally can be described as follows:

### *Negligence*

In a claim for negligence, the plaintiff will need to prove that the defendant owed the plaintiff a duty of care, and that the defendant breached that duty by falling below the standard of care. Additionally, the plaintiff will need to prove that the defendant's breach was both the actual and proximate cause of the plaintiff's harm, and that the plaintiff suffered damages.

### *Negligent Misrepresentation*

Here, the plaintiff will need to prove that the defendant misrepresented a material fact and that the defendant owed the plaintiff a duty of care that was breached by the misrepresentation. The plaintiff will need to prove causation as well as damages.

### *Intentional Misrepresentation or Fraud/Deceit*

In common law, a broker is not liable to a third party for innocent misrepresentations or for failing to disclose material information he makes on behalf of his principal.<sup>26</sup> However, if the broker intends to defraud — knowingly

26 *Hauser v. Lista*, 201 A.D.2d 873 (NY 1994).



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making false misrepresentations — he will be liable.<sup>27</sup>

Fraud in common law is the false representation of a material fact, made with the knowledge of its falsity, that causes another to rely on it to his detriment. However, a constructive fraud claim may be available when there was no intent to defraud. In either case, the plaintiff will need to prove damages.

### ***Breach of Contract***

Breach of contract is a viable claim where there is a valid contract and one party has failed to properly perform her part of the contract. Any breach of contract can give rise to damages, but only a material breach of contract permits the non-breaching party to not perform her part. Therefore, where a party has substantially performed her part (e.g., built a development), but has still somehow breached the contract (e.g., built streets wider than 12 feet), the non-breaching party must still perform (pay the agreed-upon purchase price) but can seek damages.

### ***Breach of the Covenant of Good Faith and Fair Dealings***

The implied covenant of good faith and fair dealings refers to the mutual expectation that parties to a contract will attempt to complete a contract in good faith and that their dealings with each other will be fair. A plaintiff will need to show that there was a valid contract

and that the defendant has breached the covenant by not acting in good faith.

### ***State Statutes***

In addition to the aforementioned common-law remedies, Arizona, California, New York, and Texas have state statutes that may be applicable in a suit regarding the green marketing of foreign real estate.

#### ***Arizona***<sup>28</sup>

Arizona applies the 2<sup>nd</sup> Restatement Choice of Law for torts and contracts actions. This means that an Arizona court will apply the law of the state with the most significant relationship to the action alleged, which is not necessarily Arizona law.

When the parties have contractually designated a forum for litigation, an Arizona court will enforce the forum selection clause so long as it is fairly bargained for, is not the result of fraud, and does not deprive a litigant of his day in court.<sup>29</sup> The burden of invalidating the clause falls on the party challenging it, and that party must show more than mere inconvenience and increased costs.<sup>30</sup>

*A.R.S. § 44-1522 Consumer Fraud* makes it unlawful for any person to use deception, fraud, false pretense, false promise,

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<sup>27</sup> *Houlihan/Lawrence, Inc. v. Duval*, 228 A.D.2d 560 (NY 1996).

<sup>28</sup> Arizona was home to nearly 800,000 people 65 years of age or older as of 2006, see <http://quickfacts.census.gov/qfd/states/04000.html>.

<sup>29</sup> *Societe Jean Nicolas et Fils v. Mousseux*, 123 Ariz. 59, 61 (AZ 1979).

<sup>30</sup> *Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, 377 (AZ 2001).



misrepresentation, or concealment; or suppress or omit any material fact with the intent that others rely upon it. This law pertains to the sale or advertisement of real estate whether or not any person has been misled, deceived, or damaged.

This statute gives the Arizona attorney general the authority to investigate alleged violations. Under this statute, a court may issue an injunction preventing the use of the unlawful practice, restore monies or property to persons, and prohibit persons in violation of the statute from engaging in specified trades or occupations. Additionally, if the court determines that the person willfully violated the statute, then the court may recover up to \$10,000 per violation.

*A.R.S. § 13-2320 Residential mortgage fraud* occurs when a person intends to knowingly make any deliberate misstatement, misrepresentation, or material omission during the mortgage lending process that is relied on by a mortgage lender, borrower, or other party to the mortgage lending process. It also applies when one knowingly uses or facilitates the use of any deliberate misstatement, misrepresentation, or material omission during the mortgage lending process that is relied on by a mortgage lender, borrower, or other party to the mortgage lending process. A person who violates the statute is guilty of a class 4 felony. A person engaged in a pattern of residential mortgage fraud or conspiracy is guilty of a class 2 felony. This law does not provide a private cause of action, and only the Arizona attorney general or a district attorney can enforce this law.

*A.R.S. § 44-1481* makes it a class 3 misdemeanor to knowingly make and publish an advertisement containing any false, fraudulent, deceptive, or misleading representations in respect to such property, with the intent to sell real property, or to induce the public to acquire an interest therein. It also covers statements or assertions of fact concerning real estate that are known to the advertiser to be untrue and that are made or disseminated with the intention of misleading. This statute does not provide a private cause of action, leaving enforcement up to the Arizona attorney general or a district attorney.

*A.R.S. § 13-2203 False Advertising* makes it a class 1 misdemeanor to recklessly cause to be made or make false or misleading statements in any advertisement. Again, this does not create a private remedy and would need to be enforced by the Arizona attorney general or a district attorney.

### *California*<sup>31</sup>

In determining choice of law, California courts use an interest analysis for suits involving torts and a combined modern analysis for suits involving contracts issues. For actions arising in tort law, California courts choose which law to apply based on whether the policy underlying the rule would be advanced by its application. For actions in contract law, California essentially applies the law of the state with the most significant contacts to the alleged action.

<sup>31</sup> Nearly 4 million Americans older than 65 made their home in California as of 2006, see <http://quickfacts.census.gov/qfd/states/06000.html>.

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In situations where the parties have contracted which state's law they want to have applied in the event of litigation, that contract provision will not automatically be honored by the court. A California court has the authority to not enforce a choice-of-law provision in a contract.<sup>32</sup> The court considers whether the chosen state has a substantial relationship to the parties or their transaction, or whether there is any other reasonable basis for the parties' choice of law. If either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is a fundamental conflict with California law, and California has a materially greater interest than the chosen state in the determination of the particular issue, the choice-of-law provision need not be enforced.

There are myriad factors that a court considers in deciding whether there is a conflict with California law and whether California has a materially greater interest in the outcome of an issue. For example, in a lawsuit against a project in Baja California, where the parties have contracted that they want Mexican law to apply to any litigation, a California court will take into consideration the fact that the developers claim to have their primary place of business in Mexico and that the property in dispute is located in Mexico. These are compelling reasons for a California court to enforce the contract's choice of Mexican law. However, these factors are not dispositive. The court can also consider whether California has a greater interest in applying its law (for policy reasons) than the law of Mexico.

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<sup>32</sup> California applies 2<sup>nd</sup> Restatement § 187, see *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4<sup>th</sup> 459, 465 (CA 1992).

A California court will likely take into consideration the number of California investors who may be impacted by the litigation or protected by the enforcement of California law.<sup>33</sup>

Where parties have contracted the forum in which litigation shall be brought, California courts will give such forum-selection clauses effect unless the challenging party establishes that enforcement would be unreasonable. Mere inconvenience is not unreasonable. The forum selected must be unable to accomplish substantial justice.<sup>34</sup> Again, a California court will not automatically enforce a forum selection clause in a contract; however, a plaintiff will need to provide evidence that litigation in the forum selected will not provide the plaintiff with access to substantial justice.

*California Business and Professions Code 10140* provides a cause of action against officers, agents, or employees of any company who knowingly put forward any false statement or representation concerning any land. This offense is punishable by a fine of \$1,000 or imprisonment of less than one year, as well as suspension. It is unclear whether "any land" includes land abroad.

An investor would not be able to sue under this statute but could seek its enforcement against a violator through the local district attorney.

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<sup>33</sup> A winter 2008 *Paraíso del Mar* newsletter *Tiempos del Paraíso* reported that 154 of the 454 *Paraíso del Mar* property owners are California residents.

<sup>34</sup> *Smith, Valentino & Smith, Inc. v. Superior Court of Los Angeles*, 17 Cal. 3d 491, 494 (Cal. 1976).

*California Civil Code § 2079 on duty of real estate broker to make visual inspection and disclosure of material facts* states that real estate brokers and salespeople licensed under division 4 have a duty to prospective purchasers of real estate to conduct a competent and diligent visual inspection of the property and disclose all facts materially affecting the value or desirability of the property. In order for an injured investor to take advantage of this law, the defendant must be licensed under division 4. This law only applies where the broker has made a visual inspection of an actual unit. Therefore, it does not apply to units that are not yet in existence. Also, it does not require the broker to disclose ongoing litigation regarding the construction of the units.<sup>35</sup>

*California Civil Code § 1709-10 on fraudulent deceit* provides a cause of action against one who willfully deceives with the intent to induce him to alter his position to his injury or risk. Under the code, deceit is the suggestion of a fact, that is not true, by one who does not believe it to be true, or has no reasonable ground to believe it is true; the suppression of a fact or misleading representation of a fact; or a promise made without any intention of performing it. This code requires the intent to defraud and does not protect against opinions made (as opposed to facts).

*Cal. Bus. & Prof. Code § 17500 on false advertising in general* makes it unlawful for any person with the intent to dispose of real property to make statements that are untrue or misleading and that are known, or should be known, to be untrue or misleading. Violations of the statute

are punishable by imprisonment up to six months and a fine of up to \$2,500. This law does not provide a private cause of action and would be enforced by the California attorney general or a local district attorney.

*Cal. Civ. Code § 1770 on deceptive practices* makes it unlawful to use unfair methods of competition and unfair or deceptive acts or practices in a transaction intended to result in the sale or lease of goods or services. Such unlawful actions include passing off goods as those of another; misrepresenting the source, sponsorship, approval, or certification of goods; misrepresenting the affiliation, connection, or association with another; using deceptive representations or designations of geographic origin in connection with goods; representing that goods have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities they do not have; representing that goods are original or new if they have deteriorated unreasonably or are not new; representing that goods are of a particular standard if they are not; disparaging the goods of another by false or misleading representation of fact; advertising goods with the intent not to sell them as advertised; plus many others. It is unclear how this statute could be used, as real property is not a good or service. It would likely be used in a manner similar to the *Lanham Act*.

<sup>35</sup> *Padgett v. Phariss*, 54 Cal. App. 4<sup>th</sup> 1270 (1997).

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## *New York*<sup>36</sup>

New York uses a combined modern approach for determining choice of law for both tort and contract actions. Essentially, a New York court will apply the law of the state with the most significant contacts.

New York courts enforce forum-selection clauses unless enforcement would be unreasonable or unjust, or where the clause is invalid because of fraud or overreaching.<sup>37</sup>

*New York CLS, General Business § 349* prohibits deceptive acts and practices and *New York CLS, General Business § 350* makes false advertising in the conduct of any business, trade, or commerce unlawful. The New York attorney general is authorized to bring action against any person engaged in such unlawful acts. This is not a law that provides for a private cause of action, but a court may allow victim compensation.

*New York CLS, General Business § 349-c* provides an additional cause of action when the victim is a person older than 65. Persons guilty of such violations may be liable for an additional civil penalty up to \$10,000. Whether or not the additional liability is imposed may depend on whether the defendant knew that his conduct was directed at an elderly person, whether his conduct was in willful disregard to the rights of the elderly person, and whether the conduct

caused the person to suffer severe loss or encumbrance of a primary residence. This law might be applicable in a situation in which a retiree sold a home in New York and made a new primary residence in a development abroad.<sup>38</sup>

*New York CLS Penal § 190.20* defines false advertising as the intent to promote the sale or increase the consumption of property or services when the seller makes or causes to be made a false or misleading statement in any advertisement in violation of chapter three of the Truth in Lending Act. The conduct must be intentional or reckless and imposes a criminal penalty of a class A misdemeanor. This law is enforced by the New York attorney general and local district attorneys.

*New York CLS Penal § 190.65* defines a scheme to defraud as engaging in a scheme constituting ongoing course of conduct with intent to defraud 10 or more persons by false or fraudulent pretenses, representations, or promises; or engaging in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person by false or fraudulent pretenses, representations, or promises, with a value in excess of \$1,000. This law is enforced by the New York attorney general and local district attorneys and does not provide a private cause of action.

*New York CLS, Real Property Law, § 441-c* gives the New York Department of State the authority to revoke or suspend

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<sup>36</sup> More than 2.5 million Americans older than 65 lived in New York as of 2006, see <http://quickfacts.census.gov/qfd/states/36000.html>.

<sup>37</sup> *British West Indies Guaranty Trust Co. v. Banque Internationale*, 171 A.D.2d 234, 234 (NY 1991).

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<sup>38</sup> However, this hypothetical potential plaintiff may face some additional challenges having New York law applied if he is no longer domiciled in New York.

the license of a real estate broker or salesperson who has been found guilty of fraud or dishonest advertising.

### Texas<sup>39</sup>

Texas uses the 2<sup>nd</sup> restatement of choice of law for torts and contracts. This means that the law that the Texas court applies will be the law of the state that has the most significant relationship.

Texas courts enforce forum-selection clauses unless the opposing party proves that: (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons such as fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the contractually selected forum would be seriously inconvenient for trial.<sup>40</sup>

*Texas Business & Commercial Code* § 27.01 specifically deals with fraud in real estate. It provides a remedy for false representation and false promise. False representation is the untrue representation as to a past or existing material fact, made to a person for the purpose of inducing that person to enter into a contract, and relied on by the person entering in the contract. False promise is an untrue promise to do an act when the promise is material, made with the intention of not fulfilling it, made for the purpose of inducing the promise to enter into a contract, and relied on by the promise in entering into a contract.

<sup>39</sup> About 2.3 million Americans older than 65 lived in Texas as of 2006, see <http://quickfacts.census.gov/qfd/states/48000.html>.

<sup>40</sup> *In re AutoNation, Inc.*, 228 S.W.3d 663, 669 (Tex. 2006).

To receive compensatory damages, the plaintiff need not prove the defendant intended to defraud. To receive exemplary damages, the plaintiff must prove the defendant intended to defraud. The statute also provides for vicarious liability, meaning that one who knows of the fraud and benefits from it may be liable as well.

In addition to this statute, Texas provides a common-law remedy for fraud actions in real estate. It fills the gap left by the statute for misleading *opinions* made regarding real estate (§ 27.01 only addresses misrepresented *facts*).<sup>41</sup>

*Texas Deceptive Trade Practices-Consumer Protection Act*, *Tex. Bus. & Com. Code* § 17.41 provides consumers with a cause of action against real estate agents and developers. It prohibits false, deceptive, or misleading acts, as well as breaches of express or implied warranties and any unconscionable action or course of action by any person. The statute does not require that the consumer prove intent to deceive. Furthermore, this statute captures misleading statements of facts and opinions.<sup>42</sup> The definition of goods includes real property and the services of a real estate agent and developer fit within the definition of services for the purpose of this law.

A consumer can bring an action and recover actual damages, court costs, and reasonable attorney's fees, plus an additional award if the violation was committed knowingly.

<sup>41</sup> Neither cause of action is exclusive — both may be used for the same set of facts. 1-14 Texas Torts and Remedies § 14.02, Matthew Bender & Company, Inc.

<sup>42</sup> 1-14 Texas Torts and Remedies § 14.03, Matthew Bender & Company, Inc.

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*The Real Estate License Act, Tex. Occ. Code § 1101.001* applies to people acting as real estate brokers or salespersons within Texas, regardless of the location of the real estate or residence of the client. The purpose of the License Act is to eliminate fraud in the lease and sale of real estate by unlicensed or unscrupulous persons. To combat fraud, the state licenses persons who receive money for the service of selling, purchasing, or leasing real property on behalf of another, then regulates those who are regulated. As such, those who receive such moneys must be licensed by the state. An unlicensed broker may be prosecuted for a misdemeanor. Note, however, that the owner of property need not be licensed to sell or lease his own real estate to another. The Commission may reprimand or suspend or revoke the license of a person who engages in false or misleading advertising.<sup>43</sup>

An investor could report false or misleading advertising by a broker to the Commission. However, the broker would need to be the one falsely advertising, not simply acting as the agent of a developer who falsely advertised. This law does not provide a private cause of action. It would be enforced by the Texas Real Estate Commission.

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<sup>43</sup> Texas Administrative Code, Title 22, Part 23, Chapter 535, Subchapter R, Rule § 535.221.



## About the Developments

**P**araíso del Mar in La Paz, Baja California Sur, Mexico and Red Frog Beach Development, a project in Panama, are the two developments analyzed in this paper. These two developments were chosen because they provide good case studies due to existing litigation involving the sites and the accessibility of information regarding the developments.



Map by Curtis Bradley

Sites of Paraíso del Mar, La Paz, Mexico, and Red Frog Beach Development, Panama.

### Paraíso del Mar

Paraíso del Mar, “Paradise of the Sea,” is a resort-style neighborhood in La Paz, Mexico. A recent newsletter produced by Paraíso del Mar reported that there are 454 property owners.<sup>44</sup> As of this writing, developers report that 409 of the owners are U.S. citizens, with eight from Arizona, 154 from California, five from New York, and three from Texas. It is situated on the tip of a peninsula across the bay from La Paz and comprises about 1,700 acres, with five miles of beach frontage on the Sea of Cortez. Some of the remarkable features of Paraíso del Mar include a mangrove ecosystem on the south side of the development, a wildlife sanctuary, planned open space of about 1,000 acres, and a desalinization plant.<sup>45</sup> Additionally,

it is near Isla Espíritus Santo, an uninhabited sanctuary protected as a UNESCO World Heritage Site. According to the Paraíso del Mar Web site, the neighborhoods in the development are “fully sustainable.”<sup>46</sup>

Paraíso del Mar is being developed by John Fair and Luis Cano, the developers of Esperanza Resort in Cabo San Lucas, Mexico.<sup>47</sup> They claim that their place of incorporation is the United States, but that their place of domicile is Mexico, potentially making the latter the most suitable forum for litigation. John Fair is the president of Fair Resort Development & Fair Companies. He reported in 2007 that he had secured a \$250 million construction loan for the Paraíso del Mar

44 *Tiempos del Paraíso*, Volume III, Issue I, Winter 2008.

45 La Paz Coast Keeper has been monitoring the water quality near the project and to date reports that the water “is clean” (personal communication September 8, 2008).

46 [http://www.paradiseofthesea.com/en/project\\_info\\_community.html](http://www.paradiseofthesea.com/en/project_info_community.html).

47 John Fair is based out of Colorado. Other members of the development team include: land planner, edsaplan.com; landscape architect, egroupinc.com; architect, gvarguitectos.com.

development.<sup>48</sup> The partner title company of the development is Stewart Title Company, based in Houston, Texas. Paraíso del Mar is also partnered with the real estate company ReMax out of the La Paz, Mexico office. Paraíso del Mar recommends several financial institutions to help investors obtain funding, including: Finance North America, San Diego, California; M&I Bank, Las Vegas, Nevada; ConfiCasa Mortgage International, Houston, Texas; Alpha Mortgage Team, Eugene, Oregon; and Innovative Lending Solutions, Colorado. It is unclear where Paraíso del Mar developers are marketing in the United States; however, Paraíso del Mar has been featured in numerous magazine and newspaper articles published throughout the country over the last few years.<sup>49</sup> Additionally, they offer residents who refer three people who ultimately invest in property in Paraíso del Mar free use of electric cars they provide on the property.<sup>50</sup>



Marina construction, Paraíso del Mar.

Paraíso del Mar is located in Mexico's Restricted Zone.<sup>51</sup> Foreigners are not allowed to own property outright in the Restricted Zone. They may, however, use a bank trust deed as a proxy for owning the land. This is known as *fideicomiso*: The deed is in the name of a Mexican bank, held in trust for the foreign investor. The beneficiary has all ownership rights and responsibilities and pays the bank as trust holder about \$350 to \$450 a year.

The most remarkable difference between the Mexican court system and the U.S. court system is that Mexico's is a civil law system and the U.S. applies common law. Civil law is a system based on codes and statutes. There is relatively little use of case law, and courts are not required to follow the holding of previous decisions. Common law, on the other hand, is a system based almost exclusively on *stare decisis*, applying the rule of law developed by preceding cases and higher courts. Litigation in Mexico may be a less attractive option for American plaintiffs because Mexico does not allow punitive damages, it requires that each party pay for their attorney fees, there is no right to a jury trial, and the litigation process is lengthy and expensive.

However, there is ongoing litigation in Mexico involving the development. Over the past three years, local environmental groups, in particular Centro Mexicano de Derecho Ambiental and Guardianes de la Agua, A.C., brought suit against Paraíso del Mar alleging that it carried out a variety of development-related

48 Jan Buchholz, *Denver Developers Active in Mexico*, Denver Business Journal, Feb. 9, 2007.

49 [http://www.paradiseofthesea.com/en/news\\_press\\_releases.html](http://www.paradiseofthesea.com/en/news_press_releases.html).

50 [http://www.paradiseofthesea.com/en/becoming\\_a\\_founder\\_referral\\_form.html](http://www.paradiseofthesea.com/en/becoming_a_founder_referral_form.html).

51 This refers to a Mexican law that applies to land within 62 miles of an international border or within 31 miles of the Mexican coastline, including Baja.



Paraiso del Mar photos courtesy badwishtobuyparaiso.org

### Paradise or paradise marred? Construction on the sand dunes at Paraíso del Mar.

activities without authorization.<sup>52</sup> They allege that Paraíso del Mar dredged to install electric wiring that resulted in the deposit of material into the water, conducted construction within 100 meters of the mangrove forests, and destroyed one hectare of mangroves. The groups are challenging the adequacy of the environmental impact statement, claiming that the proposed activities violate Norma Oficial Mexicana 022 — which establishes specifications for the preservation, conservation, and restoration of coastal wetland zones of mangroves — and that it does not consider the impacts of the development on the whale shark and dolphin.

The developers of Paraíso del Mar have promised that they have title to the property and can legally transfer that title to the investors. Additionally, they promise that 15 days prior to closing, Stewart Title Guaranty Company will provide investors with a title insurance commitment that insures the title to the house in the name of the purchaser for the full amount of the purchase price.

Paraíso del Mar claims to be “Mexico’s only Audubon International Signature Development,” but there are several misleading things about that claim.<sup>53</sup>

<sup>52</sup> [www.badwishtobuyparaiso.org](http://www.badwishtobuyparaiso.org).

<sup>53</sup> [http://www.paradiseofthesea.com/en/project\\_info\\_project\\_summary.html](http://www.paradiseofthesea.com/en/project_info_project_summary.html).

First, there are two other signature development members in Mexico.<sup>54</sup> Second, Paraíso del Mar merely became a silver *member*, and has yet to complete the necessary steps to become *certified*.<sup>55</sup> The silver certification program provides resource management and education assistance to foster more sustainable development.

Most importantly, Audubon International is not at all affiliated with the National Audubon Society, nor any other familiar state or regional Audubon society. It was created in 1996 for the stated purpose of engaging people in good environmental stewardship through education and certification programs. Audubon International’s main function is to provide certificates for developments that conform to certain standards — especially standards for golf courses. One of Audubon International’s principal sponsors is the United States Golf Association.<sup>56</sup>

According to Audubon International’s Web site, developments can become certified after an initial site assessment

<sup>54</sup> Tabora, Chamela (silver member since 10/01/07) and Entre Mares, La Paz (gold member since 10/15/07) — neither are certified.

<sup>55</sup> <http://www.auduboninternational.org/programs/signature/sigmembers.asp>.

<sup>56</sup> <http://www.auduboninternational.org/aboutus/supporters/sponsors.htm>.



is conducted by the Audubon International staff and a Natural Resources Management Plan, which serves as a construction and operations manual for the property, is developed and implemented. There are site visits during the major phases of the project, training and education for construction and operational personnel, and an on-site environmental audit to assess compliance with program and site-specific requirements. The result is certification as an Audubon Signature Sanctuary, subject to long-term management in accordance with Audubon Signature standards.

Program certification fees start at \$9,500, with additional expenses varying among gold, silver, and bronze programs. It is unclear at this time how much the developers of Paraíso del Mar have done to become certified, and whether Audubon International is aware that Paraíso del Mar is representing itself as Mexico's only signature development.

The National Audubon Society has spoken out against the development and against the notion that it might have endorsed the development. Graham Chisholm, deputy director of National Audubon's California office, has issued a statement claiming, "Paraíso del Mar has no endorsement from the National Audubon Society, its members, or its chapters. We don't endorse golf courses or developments, and no one should allow confusion to prompt their support."<sup>57</sup>

<sup>57</sup> <http://www.badwishtobuyparaiso.org/falsacertificacion.php>.



Photo by Anne McEnany

Billboard advertising Red Frog Beach Resort.

## Red Frog Beach

Red Frog Beach is located on Isla Bastimentos, in Bocas del Toro, Panama. Twenty-nine percent of Panama's national territory is protected by 15 national parks, seven forest preserves, and 10 wildlife refuges. Additionally, there are four UNESCO World Heritage Sites in Panama, including the colonial district, Casco Viejo, where the development is situated.<sup>58</sup> Isla Bastimentos and two cays of Bocas del Toro, where Red Frog Beach is located, are within the protection of the marine Parque Nacional Bastimentos. Within the province where Red Frog Beach is located, there are lagoons, mangroves, estuaries, coral reefs, and ocean coastal waters. Leatherback, hawksbill, green, and loggerhead sea turtles have been known to nest in the area. The area is also popular to birdwatchers, who can see trogons,

<sup>58</sup> The United Nations Educational Scientific and Cultural Organization, through the World Heritage Convention, appoints a committee to review applications for World Heritage Site designation. Designation as a site does not necessarily give rise to any legal entitlements; rather, it acknowledges an area as culturally significant and may call for the allocation of funding toward its preservation.

antbirds, forest wrens, puffbirds, tanagers, parrots, and mot-mots. Finally, Red Frog Beach is home to its namesake, the red poison-dart frog.

The project area covers 1,500 acres with three miles of beachfront.<sup>59</sup> It is planned to provide 250 single-family lots and 550 condominium units, and comprises 9 percent of Bastimentos Island. Currently, developed area occupies 3 percent of the island. Like Paraíso del Mar, Red Frog Beach was seeking Audubon International approval; however, Panama's National Environmental Authority rejected the development's plans to build a golf course and it appears Audubon International's approval is no longer relevant.<sup>60</sup>

Project developers have made the following claims:<sup>61</sup>

- They will maintain preserves that will never be altered on more than 60 percent of the entire property.
- They will reforest more than 100 acres of previously decimated rainforest with more than 10,000 trees.
- They will maintain an on-site team of environmental scientists.
- They will create culverts under the roads for the red frogs.
- They will implement strict preservation efforts to protect the frogs during construction.
- The buildings will be set back at least 150 feet from the beach to preserve the pristine beach setting.
- The developers will keep all roads narrower than 12 feet to preserve the rainforest.
- They will create a turtle nesting zone to protect turtles during nesting season.
- They will create walking trails within the preserves for environmental education.
- They will create a museum to highlight archeological findings on Isla Bastimentos.
- There will be a trash-removal system for the entire town of Bastimentos.
- The developers will use the highest-tech sewer treatment systems and

<sup>59</sup> Some of the key people are: Carmen Vincente Serrano, LLM, Legal Director; Kevin Canary, Vice President of Development; Pillar Panama, the developer; RSA Design Group, Master Planners and Architectural Partners; Cocige, Construction Partner; Marta Sosa, Financial Consultant; Dan Cranney, Sales Manager; Sina Pfau, Executive of Client Services; and Miranda Bussing, Material and Logistics Manager.

<sup>60</sup> [http://www.thepanamanews.com/pn/v\\_12/issue\\_16/community\\_01.html](http://www.thepanamanews.com/pn/v_12/issue_16/community_01.html).

<sup>61</sup> <http://www.redfrogbeach.com/environmentplan.html>.



Photo by Anne McEnany

**A red poison-dart frog, namesake of a beach development in its habitat.**

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follow standards four times stricter than “normal” standards.

- They will use low-noise power augmented with renewable energy from solar power.
- The development will employ more than 1,000 local people.
- They will train all local employees in new development management standards and construction practices.

In addition to the aforementioned claims, Red Frog Beach developers report that a certain percentage of the funds generated by the project will go to the Red Frog Foundation. The stated purpose of the foundation is to improve the quality of life of the Bocas del Toro community. The exact amount donated, the services provided, and the actual status of the foundation is unknown.<sup>62</sup>

Pillar Panama, the development company behind Red Frog Beach, recently sued another developer in U.S. district court for telling its potential customers that Pillar Panama did not own the land subject to development.<sup>63</sup> Pillar Panama claimed that the other developer had slandered it, interfered with current and prospective contracts, falsely designated

its lands as theirs, and unfairly competed. The judge dismissed the suit for lack of jurisdiction, determining that the basis of the causes of action involved unsettled title disputes in Panama.

Pillar Panama also had to defend a separate civil suit in the United States brought by Ana M. Menjivar. The case was filed April 28, 2008 and involved a variety of issues.<sup>64</sup> In her complaint, Menjivar alleged that Pillar Panama was in breach of contract for failing to complete the units in 30 months. She also alleged that Pillar Panama was liable for fraud and deceit, citing misrepresentations of the project’s financial health, the project size, the project’s timely completion, the fact that Arnold Palmer had been contracted to design a golf course, and that Pillar Panama would help investors secure financing. She also claimed Pillar Panama was liable for negligent misrepresentation, conversion, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and negligent infliction of emotional distress. Pillar Panama never filed a response to the claim with the court, Menjivar and Pillar Panama ultimately reached a settlement agreement, and the suit was dismissed with prejudice.<sup>65</sup>

Several blogs about Red Frog Beach mention potential or threatened suits against the developers regarding title and finance issues, as well as the land

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62 *The Visitor* reported that the Red Frog Foundation has donated more than \$40,000 in medical supplies, computers, and vaccines for a local hospital; see [http://www.focuspublicationsint.com/New\\_Site/Visitor12-14/tourist\\_visitor.html](http://www.focuspublicationsint.com/New_Site/Visitor12-14/tourist_visitor.html). Red Frog Foundation is recorded as a nonprofit in Utah; see <http://www.taxexemptworld.com/organization.asp?tn=1581484>.

63 *Pillar Panama, S.A. v. DeLape*, Civ. CA H-07-1922, 2008 U.S. Dist. LEXIS 35848 (S. Dist. Tex. May 1, 2008).

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64 [http://dockets.justia.com/docket/court-candce/case\\_no-4:2008cv02169/case\\_id-203286/](http://dockets.justia.com/docket/court-candce/case_no-4:2008cv02169/case_id-203286/).

65 *Ana M. Menjivar v. Pillar Panama, S.A., et. al.*, Case No. CV 08-02169 CW, Notice of Dismissal With Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1) (A)(i), Sept. 17, 2008.





Photos by Anne McEnany

**In 2008, the Environmental Impact Center (“CIAM”) went to court on behalf of members of the Ngobe community (top) and successfully challenged approval of Phase II of Red Frog Beach development, due to disregard for community interests and impacts on the environment and tourism. Bottom: Ngobe community completely surrounded by Red Frog Beach.**

dispute discussed above.<sup>66</sup> There are several applicable Panamanian laws available to the investors at Red Frog Beach. For example, Law 6 is aimed at preventing fraud in advertising. It prevents developers and promoters from advertising or selling properties before a

<sup>66</sup> <http://redfrogblog.blogspot.com/>.

project’s Master Plan has been approved. This law was passed in 2007 and it is unclear whether it can be applied retroactively. Another law, Law 8, may not necessarily provide direct relief to investors, but investors could report developers’ violations. Law 8 provides incentives for developers in the form of exoneration from import duties, taxes, and levies for up to 20 years. Obligations under Law 8 include starting construction within six months of being approved under Law 8, hiring Panamanians to build and manage the property, and providing technical capacity and scholarships for training Panamanians. Sanctions under Law 8 include cancellation of registration, forfeiture of a bond, and a fine of up to 5 times the value of the benefit the developers attempted to obtain by registering under Law 8. Finally, investors can submit complaints to Panama’s Consumer Protection Agency, which investigates complaints against developers and real estate agents regarding false advertising and breach of contract.

Phase I of the development has been approved despite local protest. Though in September 2007, the Red Frog Beach developers were fined \$130,000 and required to create a 25-hectare forest buffer to mitigate for uncontrolled erosion from construction activities.<sup>67</sup> On November 27, 2008, the Environmental Impact Center (“CIAM”)

<sup>67</sup> *Panama News*, V. 13, N. 17, September 9-22, 2007, [www.panamanews.com](http://www.panamanews.com).

successfully challenged the National Environmental Authority's ("ANAM") decision to approve the environmental impact assessment ("EIA") for Phase II of the development.<sup>68</sup> Panama's Third Division of the Supreme Court held that ANAM's resolution approving the EIA was illegal, as ANAM had ignored community interests and the development's impacts on the environment and tourism. Additionally, according to local sources, the project has been at a standstill for about two years, due to a labor union strike and financing issues.<sup>69</sup>



**No more lies: Protest sign against Red Frog Beach development.**

Pillar Panama, S.A. is a Panamanian company. Pillar Panama, U.S., LLC is a company based out of Minnesota, though it is possible it may have moved to New York. It is not clear who the true owners of the development are. Pillar Solutions appears to be the company outsourced for investors' closing needs, i.e., title insurance and mortgage processing. It is uncertain where Pillar Solutions is based and how closely it is associated with the people behind Pillar Panama, S.A. and Pillar Panama, U.S. Additionally, one investor's contract stated that Pardini y Asociados would be responsible for closings. Pardini y Asociados is a Panamanian law firm. It is unknown where exactly Pillar Panama is marketing Red Frog Beach development, though at least one investor claims that she went to a real estate seminar in San Francisco in January 2004 where Red Frog Beach representatives told her about the development in which she subsequently invested.

<sup>68</sup> Lead by local group, Centro de Incidencia Ambiental.

<sup>69</sup> Confidential source (personal communication, Sept. 7, 2008).

## The Ideal Plaintiff

A successful plaintiff challenging a project such as Paraíso del Mar or Red Frog Beach in a court in Arizona, California, New York, or Texas will be a resident of one of those states who entered into an agreement to own property in one of the developments. A plaintiff will need to prove she was promised that the development would be eco-friendly and that she relied on that representation when agreeing to purchase the property. She will then need to prove that the defendant has not made good on the promise. Further, the plaintiff ideally will have not contracted away any litigation rights, though some of those obstacles could be overcome, depending on the circumstances.

In order to hail a defendant into court, it will be necessary in most cases for the defendant to have either some contact with or some influence on the forum state (e.g., the place of business or advertising). It is ideal that the defendant have some significant contacts with the forum state, like being incorporated there, having its principal place of business there, or having engaged in advertising or direct solicitation in the forum state.

A prevailing plaintiff will most likely not be able to get specific performance in any jurisdiction — in other words, the court will not compel the defendant to make the development eco-friendly. Also, a court may not be able to enjoin the defendant from injuring others. Rather, a court may be limited to restoring the plaintiff financially.

### In Federal Court

The best federal cause of action for a private plaintiff appears to be under

the Federal Interstate Land Sales Full Disclosure Act. An ideal plaintiff would be able to prove that the developer made fraudulent representations using interstate commerce or mail, and that the plaintiff relied on those representations. A representation made by a developer while seated next to a plaintiff on a plane would likely not be actionable under this statute. The defendant must have used interstate commerce or mail.<sup>70</sup> Furthermore, the plaintiff would need to prove that he relied on the defendant's misrepresentation. Proof of reliance may be difficult in this type of case, in which the plaintiff was aware that the development was being built in an ecologically significant area.

If advertising through a Web site constitutes interstate commerce or mail, then a plaintiff may have a claim if he can show that one of the promises made on the Web site was not fulfilled. For example, an ideal Red Frog Beach plaintiff would be able to prove that Red Frog Beach developers represented that they would keep roads to narrower than 12 feet in order to preserve the rainforest,<sup>71</sup> that the developers did not keep their promise to do so,<sup>72</sup> and that the plaintiff had relied on the promise in purchasing the land. Such a Red Frog Beach plaintiff, if successful, may be able to recover some damages. It is unclear how much a plaintiff could recover or whether a court would be able to order the developer to fulfill the broken promises.

<sup>70</sup> It is unclear whether a blog or Web site would qualify.

<sup>71</sup> They do promise this in their development plan, <http://www.redfrogbeach.com/environmentplan.html>.

<sup>72</sup> There is currently no evidence that the developers have failed to do so. This is purely a hypothetical example of what would be actionable if it occurred.

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## In State Courts

The common law remedies described above, in particular negligent misrepresentation, intentional misrepresentation, and breach of contract, appear to be the best causes of action in state court.<sup>73</sup>

To prove negligent misrepresentation, an ideal plaintiff will be able to prove that the defendant misrepresented a material fact, for example, that houses would be built using eco-friendly design guidelines. Further, an ideal plaintiff will be able to demonstrate that the defendant owed the plaintiff a duty of care that was breached by the misrepresentation. The plaintiff will need to prove that it was the misrepresentation that caused her harm, but not that the defendant intended to cause her harm. If she prevails, she will be entitled to damages.

To prove intentional misrepresentation, an ideal plaintiff will be able to prove that the defendant intended to deceive the plaintiff by making a false statement — for example, that the defendant promised that a certain percentage of the rainforest would remain intact when he knew the construction plans would not permit that. The plaintiff will also need to prove that she was in fact deceived by the misrepresentation and relied on it in making her decision to purchase the property. A successful plaintiff will likely be awarded compensatory damages and may be awarded punitive damages as well.

To prove breach of contract, an ideal plaintiff will be able to demonstrate that

there was a valid contract. An ideal plaintiff will be able to prove that the defendant failed to perform his part of the contract somehow — for example, that the developer promised the development would only contain 100 units and then constructed 500 units. A successful plaintiff will be awarded expectation damages — which means she will receive the value of what she originally bargained for. Courts rarely order specific performance because of the difficulty of enforcement, and this would especially be true in a case where the property is located abroad.

While common law remedies appear to offer the most adequate relief in state courts, a few of the state statutes may be used to address misrepresentations using green marketing of developments abroad, for example:

- Arizona Revised Statute § 44-1522 *on Consumer Fraud*: Even though this law does not provide a private cause of action, it allows the Arizona attorney general to pursue enforcement on a victim's behalf. Under this law, an Arizona court can grant injunctive relief — requiring the developer to stop the deceptive advertising — and the court may be able to recover up to \$10,000 on behalf of the victim. Most importantly, the language of the law does not require that the victim rely on the misrepresentations, which is significant, as reliance in these situations may be difficult to prove.
- California Civil Code § 2079 and § 1709-10: An ideal plaintiff suing under these provisions will be able to prove that the defendant knowingly misrepresented a material fact, not that the defendant merely failed to

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73 One would also apply state common law in a federal diversity case filed in federal court.



fulfill a promise. For example, an ideal plaintiff will be able to prove that the defendant claimed that no mangroves would be destroyed in the construction of the development, when the defendant knew that the construction plans called for the destruction of mangroves.

- New York CLS General Business § 349-c: The victim of the misrepresentation must be older than 65 and the government must be able to prove that the defendant knew he was defrauding an elderly person.
- Texas Business & Commercial Code § 27.01 and the Texas Deceptive Trade Practices-Consumer Protection Act: To get the maximum award, a successful plaintiff will be able to demonstrate that the defendant intended to defraud the plaintiff by making the false promise or misrepresentation. For example, a Texas plaintiff may argue that developers of Paraíso del Mar intended to deceive when they boasted that they were Mexico's only Audubon International Signature development, when they are not even certified under the program.

## Non-legal Options

In addition to the federal and state causes of action described above, there are alternative non-legal avenues available to investors and investor advocates.

*Seniors Against Investment Fraud Program* is an outreach program headed by the California Department of Corporations.<sup>74</sup> It is designed to alert and educate Californians older than 50 about investment fraud crimes and how to avoid being a victim of such scams. However, the program currently does not provide information about green investing or investing in real estate abroad. The group conducts outreach across the state to educate Californians, giving workshops and presentations on how to recognize fraud and avoid being a victim. An advocate could become an education and outreach partner with the group and work to incorporate awareness about the green marketing of real estate abroad.<sup>75</sup>

*The Offices of the Attorneys General* may provide an option for advocates and investors. An advocate could contact a local or state public official and encourage him or her to request a legal advisory opinion from the attorney general. Technically, a government official cannot ask a legal question on behalf of someone else, and obvious attempts to do so will be denied by the attorney general.<sup>76</sup>

<sup>74</sup> Arizona, New York, and Texas do not appear to have similar organizations.

<sup>75</sup> [http://www.corp.ca.gov/Education\\_Outreach/partners.asp](http://www.corp.ca.gov/Education_Outreach/partners.asp).

<sup>76</sup> Arizona, California, New York, and Texas all follow this practice, see <http://www.azag.gov/opinions/index.html>; <http://ag.ca.gov/opinions/index.php>; <http://www.oag.state.ny.us/lawyers/>

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However, if a government official — a constitutional officer, legislator, state agency, state board or commission, district attorney, city prosecutor, or judge — were to submit a genuine legal question, the attorney general could issue an advisory opinion. The opinions do not carry the force of law, but they are treated with great respect and weight by the courts and could have a powerful deterrent effect on developers. Additionally, investors who have been defrauded by green marketing misrepresentations should seek the assistance of their attorneys general in enforcing some of the aforementioned laws.

Enforcement of state law by attorneys general could result in fines, imprisonment, and possibly an order enjoining the developer from engaging in further fraudulent behavior. The attorneys general will not act as the victim's private attorney; however, in some cases damages may be awarded to the victim. If the attorneys general have jurisdiction and agree with the complainant that there is a problem, it could lead to the issuance of a warning or taking other preventative action.

*The Secretaries of State* may provide an initiative process for their citizens. This tool allows citizens to draft and propose legislation. The citizen first drafts the text of the proposed law, or may seek the assistance of the legislative council.<sup>77</sup> Next, the proponent submits the draft to the attorney general with a request that a title and summary of the draft be prepared. The attorney general passes the

title and summary on to the secretary of state. The proponent is then allowed to circulate a petition and collect signatures in support of the initiative being placed on the ballot. Both California and Arizona permit initiatives. Texas and New York do not.<sup>78</sup>

*Real Estate Commissions and Corporate Commissions* generally only have control over individuals registered, licensed, or practicing in the state. To the extent that a developer is registered in a state, these boards should have a regulatory effect. These agencies may also be able to issue alerts to the general public or request that their attorneys general do so. Many state corporate commissions conduct education and outreach, either independently or in conjunction with the NASAA or SEC. Investor advocates could try to contact the outreach coordinators of these agencies and work with them to ensure that information about green marketing of real estate is disseminated at public events.

Additionally, some real estate commissions have been engaged in educating investors about the dangers in investing in real estate abroad.<sup>79</sup> However, the nuanced area of the green marketing of real estate abroad has yet to be fully addressed by these agencies. These agencies should be contacted directly to determine how to go about working with them to help inform the public.

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opinions/opinion.html; <http://www.oag.state.tx.us/opin/>.

<sup>77</sup> [http://www.sos.ca.gov/elections/initiative\\_guide.htm](http://www.sos.ca.gov/elections/initiative_guide.htm).

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<sup>78</sup> [http://www.iandrinstute.org/statewide\\_i%26r.htm](http://www.iandrinstute.org/statewide_i%26r.htm).

<sup>79</sup> <http://www.re.state.az.us/AZ-MEX/AZ-MEX.html>.



## Conclusions and Recommendations

Investing in green real estate is an emerging area of investing abroad. There are few laws directly on point that protect investors' interests. A victim of green marketing misrepresentations can pursue her claims either in federal or state court or in the court where the property is located. Unfortunately, cases in U.S. courts may be difficult to pursue due to several factors, including a lack of standardized international green development standards, the plaintiff's difficulty in proving reliance on claims that the development would be green, the lack of statutes directly on point, foreign defendants with no or little contact with the United States, and the fact that the property is located outside the United States. Lawsuits in the country where the property is located may also be difficult to pursue due to unfavorable law, unfamiliarity with foreign courts, additional expenses, and slow-moving court systems. Currently, a plaintiff's best option is to pursue common law claims under tort and contracts laws in U.S. courts. Meanwhile, investor advocates would be best served by engaging commissions and legislators capable of instituting new regulations and laws.

We recommend launching a strategic campaign to educate investors and mobilize policy makers. The campaign would be driven by a dedicated full-time Center staff attorney to work with advocacy groups, such as Seniors Against Investment Fraud and AARP, to reach out to investors and educate them about some of the hidden pitfalls of investing in foreign real estate marketed as green. The campaign would mobilize state attorneys general and real estate and corporate commissions to educate the public and move toward establishing green guidelines that apply to these developments, or at the very least toward issuing a warning or advisory to the public. The findings of this report would be used to inform that dialogue.

We also recommend that as part of this campaign, objective guidelines for evaluating environmental claims be drafted.<sup>80</sup> The draft would be used in the campaign to inform investors as well as decision-makers in fashioning appropriate regulations and laws. It would provide legitimacy to developers who are developing truly sustainable or green developments and would combat the misleading use of the Audubon International certificate of approval.

Finally, as the cornerstone of the campaign, we recommend developing a report that investigates and analyzes the precise impacts these developments are having on the environment and local communities. There are various local environmental nonprofits and human-rights groups monitoring assorted aspects of the developments; however, there is no clearinghouse of information or cumulative analysis of the effects the developments are having on the environment. A report on precise impacts will help lawmakers and investors understand just how devastating the developments can be and how manipulative certain developers are in marketing their developments as green. A report detailing the damage that these developments inflict will illustrate the need to regulate the developers and create sustainable development standards that can be enforced in U.S. courts.

<sup>80</sup> Such guidelines would be a product of collaboration with groups such as the Center for Ecotourism and Sustainable Development and the International Tourism Society.