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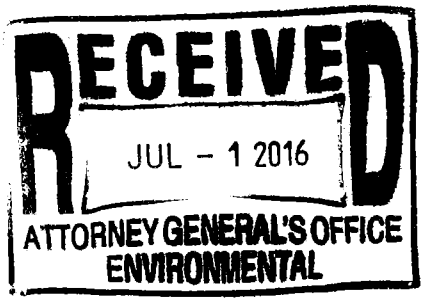
July 1, 2016



Via Hand Delivery

Donna Waters, COM
Vermont Superior Court
Washington Civil Division
65 State Street
Montpelier, VT 05602

Re: State of Vermont, et al. v. Ariel Quiros, et al.
Docket No. 217-4-16 Wncv

Dear Donna:

Enclosed please find *Defendant Ariel Quiros' Motion to Dismiss,* along with the related *Certificate of Service*, for filing with the Court in the above-referenced matter.

Please feel free to contact me should you have any questions. Thank you.

Sincerely,

DINSE, KNAPP & McANDREW, P.C.

for Ritchie E. Berger

REB/pjg
Enclosure

cc: Shannon C. Salembier, Esq. (w/enc.)
Jon T. Alexander, Esq. (w/enc.)
Scot L. Kline, Esq. (w/enc.)
David Cleary, Esq. (w/enc.)
Michael Goldberg, Esq. (w/enc.)

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STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 217-4-16 Wncv

STATE OF VERMONT,)
)
THROUGH SUSAN L. DONEGAN, IN HER)
OFFICIAL CAPACITY AS COMMISSIONER)
OF THE VERMONT DEPARTMENT OF)
FINANCIAL REGULATION,)
)
and)
)
ATTORNEY GENERAL WILLIAM SORRELL,)
)
Plaintiffs,)
v.)
)
ARIEL QUIROS; WILLIAM STENGER;)
Q RESORTS, INC.; JAY PEAK, INC.; JAY)
PEAK HOTEL SUITES L.P.; JAY PEAK)
HOTEL SUITES PHASE II L.P.; JAY PEAK)
MANAGEMENT, INC.; JAY PEAK)
PENTHOUSE SUITES L.P.; JAY PEAK GP)
SERVICES, INC.; JAY PEAK GOLF AND)
MOUNTAIN SUITES L.P.; JAY PEAK GP)
SERVICES GOLF, INC.; JAY PEAK LODGE)
AND TOWNHOUSES L.P.; JAY PEAK GP)
SERVICES LODGE, INC.; JAY PEAK SUITES)
STATESIDE L.P.; JAY PEAK GP SERVICES)
STATESIDE, INC.; JAY PEAK BIOMEDICAL)
RESEARCH PARK L.P.; and ANC BIO)
VERMONT GP SERVICES, LLC,)
)
Defendants.)

CERTIFICATE OF SERVICE

I, Ritchie E. Berger, Esq., certify that I have today caused Defendant Ariel Quiros' Motion to Dismiss to be served on counsel for Plaintiffs by hand delivery, and by first class mail to all other parties in this case.

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The names and address of the parties/lawyers to whom the mail was addressed or personal delivery was made are as follows:

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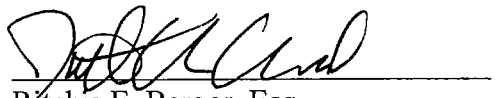
Receiver for Defendants Q Resorts, Inc.; Jay Peak, Inc.; Jay Peak Hotel Suites L.P.; Jay Peak Hotel Suites Phase II L.P.; Jay Peak Management, Inc.; Jay Peak Penthouse Suites L.P.; Jay Peak GP Services, Inc.; Jay Peak Golf and Mountain Suites L.P.; Jay Peak GP Services Golf, Inc.; Jay Peak Lodge and Townhouses L.P.; Jay Peak GP Services Lodge, Inc.; Jay Peak Suites Stateside L.P.; Jay Peak GP Services Stateside, Inc.; Jay Peak Biomedical Research Park, L.P.; and AnC Bio Vermont GP Services, LLC.

DATED at Burlington, Vermont, this 1st day of July, 2016.

DINSE, KNAPP & McANDREW, P.C.



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ATTORNEY GENERAL WILLIAM SORRELL,)
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VERMONT GP SERVICES, LLC,)
)
Defendants.)

DEFENDANT ARIEL QUIROS' MOTION TO DISMISS

NOW COMES Defendant Ariel Quiros, by and through counsel, Dinse, Knapp & McAndrew, P.C., and hereby moves to dismiss the Amended Complaint ("Complaint") pursuant to V.R.C.P. 12(b)(6) on the ground that it fails to state a claim upon which relief may be granted. Specifically, the Complaint fails to allege actionable fraud in connection with the sale of any

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security; the Complaint fails to state a claim under the Vermont Consumer Protection Act because the Act does not govern securities transactions; and the State's claims related to the Jay Peak Hotel Suites Limited Partnership are time-barred by 12 V.S.A. § 511.

MEMORANDUM

The State unveiled this lawsuit amidst great fanfare, casting it as a significant securities-enforcement case.[1] It is not. While the State's characterization of the litigation may have made for good sound bites in the news, the actual allegations of the Complaint tell a very different and less sensational story.

At issue are seven limited partnerships formed to finance specific commercial developments in Vermont through foreign investments under the federal government's EB-5 immigration program. This is indisputably *not* a case of a fraudulent scheme built on illusory investment vehicles: of the seven partnership projects, five have been completely constructed, and the remaining two were under development at the time of the State's filing. The State's primary accusation of wrongdoing against Ariel Quiros is simply that he failed to use investor funds in the manner described in the private placement memoranda for each limited partnership.

The State's allegations, if proven, would suggest little more than grounds for a potential partnership dispute between private parties. They fall far short of making out securities fraud. The sine qua non of a securities fraud claim is deceptive conduct—e.g., a misrepresentation or omission of some material fact—*in connection with the sale* of a security. The Complaint, in contrast, overwhelmingly targets conduct that is alleged to have occurred only after the relevant securities were sold. Moreover, to the extent the State has alleged any misrepresentations or

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[1] *See* Dan D'Ambrosio & April Burbank, *VT, Feds Allege 'Massive' Fraud at Jay Peak Inc.*, Burlington Free Press, Apr. 15, 2016, available at http://www.burlingtonfreepress.com/story/news/local/vermont/2016/04/14/vermont-officials-burke-update/83008162/; Press Release, Office of the Vermont Attorney General, State of Vermont v. Ariel Quiros, William Stenger et al., (Apr. 14, 2016), available at http://ago.vermont.gov/focus/news/summary-of-complaint.php.

omissions at the time of sale, they cannot possibly be ascribed to Ariel Quiros, whose alleged connection to the private placement memoranda at issue was negligible. Indeed, in one instance, the State has alleged that Mr. Quiros committed securities fraud for a set of securities that were fully marketed and sold before he even acquired Jay Peak.

To put it bluntly, the State has grossly overreached in its suit against Ariel Quiros. The allegations of the Complaint do not suffice to state claims for violation of the Vermont Uniform Securities Act. And, though the State purports to assert companion claims under the Vermont Consumer Protection Act, the vast majority of jurisdictions have held that state consumer protection and unfair trade practices statutes do not provide a remedy for securities-related claims. Because the State's claims all fail as a matter of law, Ariel Quiros respectfully requests that the Court grant his motion and dismiss the Complaint.

Background[2]

A. Jay Peak's Foreign Investment Initiative

At the center of this lawsuit is the Jay Peak Resort, a ski mountain that has been operated by Jay Peak, Inc. ("Jay Peak") since 1957. Complaint, ¶ 49. In the mid-2000s, Jay Peak—at that time owned by Mont St. Sauveur International, Inc.—sought to transform the mountain into a four-season resort by significantly expanding its accommodations and amenities. *Id.*, ¶ 53. The President and Chief Executive Officer of Jay Peak during the initiation of these expansion plans (and at all other times relevant to this suit) was William Stenger. *Id.*, ¶ 51.

The means by which Jay Peak set out to attract foreign investment was the federal EB-5 Program, administered by United States Citizenship and Immigration Services. *Id.*, ¶ 45. The EB-5 Program allows a foreign national to qualify for permanent residence in the United States

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[2] This background section is taken from the allegations of the Complaint; all facts are accepted only for the limited purposes of this Rule 12(b)(6) motion. Defendant Quiros does not agree with many of the allegations of the Complaint, and reserves his rights to deny them should this case go forward.

by making an investment in a commercial enterprise that creates or preserves a certain number of full-time jobs for U.S. workers. *Id.* The investment generally must be at least $1,000,000, or $500,000 if made in a "targeted employment area" (a high-unemployment or rural area). *Id.*, ¶ 45. A commercial enterprise becomes approved for foreign investment through the EB-5 Program by partnering with a "Regional Center" designated by the federal government—in Vermont, the State Agency of Commerce and Community Development—which will enter into memorandum of understanding with the commercial enterprise and provide support. *Id.*, ¶¶ 47-48. The enterprise, in turn, issues a private placement memorandum ("PPM") to potential foreign investors describing the particulars of the investment. *Id.*, ¶ 46.

Jay Peak initiated two EB-5 projects during the period in which it was owned by Mont St. Sauveur International. Both took the form of limited partnerships in which Jay Peak Management, Inc.—a corporation for which Stenger serves as president—was the general partner. *Id.*, ¶¶ 14-16. The first was the Jay Peak Hotel Suites Limited Partnership (the "Phase I L.P."), created to finance construction of a 57-unit hotel by raising $17.5 million. *Id.*, ¶ 54. Jay Peak obtained approval for the Phase I L.P. and entered into a memorandum of understanding with Vermont's Agency of Commerce and Community Development in 2006, *id.*, and the partnership was fully subscribed before Mont St. Sauveur International sold Jay Peak in June 2008. *Id.*, ¶ 59.

The second EB-5 Project, the Jay Peak Hotel Suites Phase II Limited Partnership ("Phase II L.P."), represented a more ambitious development project. The Phase II L.P. sought $75 million in financing for the construction of a 120-unit hotel, a water park, a golf club house, an ice rink arena, and a bowling center. *Id.*, ¶ 55. Jay Peak entered into a memorandum of understanding for the Phase II L.P. in 2008, and the PPM for the Phase II L.P. was issued before

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Mont St. Sauveur International sold Jay Peak. *See id.*, ¶¶ 55, 59. Both the Phase I L.P. and Phase II L.P. projects have been completed.

B. Ariel Quiros' Acquisition of Jay Peak and the Commencement of Additional EB-5 Projects

In 2007, William Stenger began collaborating with Ariel Quiros—a homeowner at the Jay Peak Resort who had been vacationing in the region for many years—to arrange for the acquisition of Jay Peak by Quiros. Complaint, ¶¶ 52, 57. Quiros incorporated Q Resorts, Inc. in early 2008 for the purpose of effectuating the purchase. *Id.*, ¶ 58. In June 2008, Q Resorts entered into a stock transfer agreement with Mont St. Sauveur International to acquire Jay Peak. *Id.*, ¶ 60. At the time of acquisition, the Phase I L.P. was fully subscribed and the Phase II L.P. had already raised approximately $7 million in foreign EB-5 investment *Id.*, ¶ 59.

A number of additional EB-5 Projects were initiated after the 2008 acquisition. *Id.*, ¶ 75. Of those, the following five are at issue in this suit:

- Jay Peak Penthouse Suites L.P. ("Penthouse Suites L.P."): The Penthouse Suites L.P. was created to finance a real estate project (now completed), including the construction of penthouse suites and the Mountain Learning Center (a daycare facility), through $32.5 million in foreign investment. *Id.*, ¶¶ 75, 120. The general partner for the Penthouse Suites L.P. is Jay Peak GP Services, Inc., a corporation for which Stenger serves as President. *Id.*, ¶ 18.

- Jay Peak Golf and Mountain Suites L.P. ("Golf & Mountain L.P."): The Golf & Mountain L.P. was created to finance a real estate project (now completed), including construction of "Honeymoon Cottages," the Tram Haus Building, a wedding chapel, and the Mountain Top Café Bar Sundecks, through $45 million in foreign investment. *Id.*, ¶¶ 75, 124. The general partner for the Golf & Mountain L.P. is Jay Peak GP Services Golf, Inc., a corporation for which Stenger serves as President. *Id.*, ¶ 20.

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- Jay Peak Lodge and Townhouses L.P. ("Lodge & Townhouses L.P."): The Lodge & Townhouses L.P. was created to finance a real estate project (now completed), including the construction of rental townhouses, a services center with a café, a parking garage, tennis courts, and an auditorium, through $45 million in foreign investment. *Id.*, ¶¶ 75, 130. The general partner for the Lodge & Townhouses L.P. is Jay Peak GP Services Lodge, Inc., a corporation for which Stenger serves as President. *Id.*, ¶ 22.

- Jay Peak Hotel Suites Stateside L.P. ("Stateside L.P."): The Stateside L.P. was created to finance a real estate project (still under construction at the time of the filing of the Complaint), which was to include the construction of rental cottages, hotel suites, a medical center, and guest recreational services, through $67 million in foreign investment. *Id.*, ¶¶ 75, 136. The general partner for the Stateside L.P. is Jay Peak GP Services Stateside, Inc., a corporation for which Stenger serves as President. *Id.*, ¶ 24.

- Jay Peak Biomedical Research Park L.P. ("AnC Bio L.P."): The AnC Bio L.P. was created to finance the development of a biomedical research facility (still being constructed and developed at the time of the filing of the Complaint), including the design and construction of facilities and acquisition of distribution and marketing rights for existing biomedical products, through $110 million in foreign investment. *Id.*, ¶¶ 75, 144. The general partner for the AnC Bio L.P. is AnC Bio Vermont GP Services, LLC., a limited liability company whose sole members and owners are Stenger and Quiros. *Id.*, ¶ 26.

Each of these five EB-5 Projects, like the two that preceded them, issued a PPM describing the specifics of the Project. *Id.*, ¶ 76. The PPMs included, among other things, disclosure of the legal structure of the offering, the business plan for the Project (including the sources and uses of funds and the financial projections for the project), and copies of the partnership agreement and investor subscription agreement. *Id.*, ¶ 77. The PPMs also made representations concerning the authority of the general partner, including that prior consent would be required from limited

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partners before the general partner could borrow from the partnership or commingle partnership funds with the funds of any other person. *Id.*, ¶ 105.

The Complaint alleges that Stenger had ultimate responsibility for these PPMs: he "reviewed, was responsible for, and had authority over, the contents of each of the EB-5 Project PPMs." *Id.*, ¶ 82. As to Quiros, the Complaint alleges only that he "reviewed" and "was familiar" with the contents of the PPMs, and "approved" certain portions of them. *Id.* Notably, the Complaint does not allege that Quiros reviewed the PPMs before they were distributed to investors, let alone had any role in their preparation.

C. The Alleged Misconduct

The State's allegations of wrongful conduct by the Defendants fall into three categories. Two of these relate to all seven EB-5 Projects and, the third, as described below, is limited to the AnC Bio L.P. First, the Complaint alleges that Quiros used partnership funds for the seven EB-5 Projects in a manner that "materially differed" from the descriptions of the "source and use of funds" contained in each Project's PPM. *See* Complaint, ¶¶ 111, 115, 121, 126, 132, 138, 144. This included allegedly using partnership funds to pay for the acquisition of Jay Peak, misappropriating funds for personal use, pledging funds as collateral for loans, using funds to pay for margin loan debt and interest, and using funds to paying for costs associated with other projects. *Id.* Second, the Complaint alleges that, for each of the seven Projects, the general partners exceeded their authority under the partnership agreements and PPMs by borrowing and commingling funds without the consent of investors. *Id.*

Third, the Complaint alleges that, in addition to the foregoing, the PPM for the AnC Bio contained certain material misrepresentations and omissions. These included alleged misrepresentations or omissions concerning the status and risks associated with FDA approval of the biomedical products to be manufactured at the facility, *id.*, ¶ 148, misstatements in revenue

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projections, *id.*, ¶¶ 149, 150, the past financial troubles of a South Korean biotechnology company from which the AnC Bio L.P. would be purchasing intellectual property rights and equipment, *id.*, ¶¶ 151, 152, and the value of a parcel of land purchased by the partnership, *id.*, ¶ 157.

Standard of Review

A motion to dismiss should be granted if "it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Birchwood Land Co., Inc. v. Krizan*, 2015 VT 37, ¶ 6, 115 A.3d 1009 (quoting *Dernier v. Mortg. Network, Inc.*, 2013 VT 96, ¶ 23, 195 Vt. 113, 87 A.3d 465). A court considering a Rule 12(b)(6) motion must determine "whether the bare allegations of the complaint are sufficient to state a claim." *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 7, 186 Vt. 605, 987 A.2d 258. In so doing, a court must "assume as true all facts as pleaded in the complaint, accept as true all reasonable inferences derived therefrom, and assume as false all contravening assertions in the defendant's pleadings." *Birchwood*, 2015 VT 37, ¶ 6. Overall, Vermont's pleadings rules are intended to "strike a fair balance, at the early stages of litigation, between encouraging valid, but as yet underdeveloped, causes of action and discouraging baseless or legally insufficient ones." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 13, 184 Vt. 1, 955 A.2d 1082.

Argument

The State has a defined, limited role in the regulation of investment interests that qualify as securities under Vermont law. There is no roving mandate for the State to inject itself in the midst of every dispute between investors that might crop up within its borders. Rather, the State may initiate action, through its Department of Financial Regulation, to address certain

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enumerated violations of the Uniform Securities Act, including fraud committed in connection with the sale of securities. *See* 9 V.S.A. § 5603(a).

The State's allegations against Ariel Quiros do not make out such fraud. The allegations, if true, would be the stuff of everyday private commercial disputes: broken promises and misuse of partnership funds. The foreign investors in the partnerships at issue—all wealthy enough to stake the minimum $500,000 investment in an EB-5 Project—are entirely capable of enforcing their own rights against Quiros and the other Defendants, as witnessed by the fact that more than one class action has been initiated since the State filed its Complaint. There is neither need nor authority for the State to proceed with this misguided enforcement action. Because the State's claims fail as a matter of law, Defendant Quiros respectfully asks that the Court dismiss them with prejudice.

A. The State Fails to Allege Fraud in Connection with the Sale of Securities.

The critical element of a claim for violation of the Vermont Uniform Securities Act ("VUSA") is fraudulent conduct "in connection with" the sale of a security. *See* 9 V.S.A. § 5501. While the State's Complaint alleges that Quiros misused the funds of the EB-5 Projects in violation of the PPMs and partnership agreements, it does not—with exception of the AnC Bio L.P. claims (which fail for other reasons discussed below)—allege any actionable fraud in the sale of securities to EB-5 investors. Instead, the State rests its case on misconduct alleged to have occurred *after* the partnership interests had been sold. Because VUSA does not reach such post-sale conduct, the Complaint fails to state legally sufficient claims under the Act.

VUSA makes it unlawful, "in connection with the offer to sell, . . . the sale, or the purchase of a security, . . . (1) to employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact . . . ; or (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon

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another person." 9 V.S.A. § 5501. That the fraud occurs "in connection with" the sale or offer to sell is a necessary element of a claim under § 5501. Thus, for example, misrepresentations made to investors after a sale has been completed will not constitute a violation of VUSA. *Amorim Holding Financeria, S.G.P.S., S.A. v. C.P. Baker & Co., Ltd.*, 53 F. Supp. 3d 279, 299 (D. Mass. 2014) ("Post-investment misrepresentations, unconnected to the offer or sale of a security, . . . cannot give rise to liability under the Massachusetts Securities Act, and any claims based on such misrepresentations fail as a matter of law."); *see also Carlson v. Bagley Securities, Inc.,* 972 F.2d 356, 1992 WL 180126, at *4 (10th Cir. 1992) (unpublished) (same under Utah's Uniform Securities Act).

The State's Complaint unambiguously fails to allege fraud in connection with the sale of the securities at issue.[3] Were it not otherwise clear, the fact that the Complaint asserts the exact same claims against Quiros for the Phase I L.P. securities—which were marketed and sold while Jay Peak was owned by Mont St. Sauveur International, before Quiros became involved—as it does in connection with the other EB-5 interests confirms that this is not a case premised on sale-related fraud. Rather, the logic of the State's claims is that that the PPMs for the seven EB-5 Projects made specific representations as to how the partnership funds were going to be managed and used, and Quiros and Stenger subsequently deviated from those representations. That is not securities fraud. In a similar case involving a common law fraud claim, the Vermont Supreme Court held that the breach of various representations made to investors in a partnership at the time of the partnership's formation, including that specific sums of money would be invested in the partnership's business, might "create a right to damages for breach of the partnership agreement, or for breach of fiduciary duties, but they [did] not constitute fraud." *Union Bank v. Jones*, 138 Vt. 115, 122, 411 A.2d 1338, 1343 (1980) (citations omitted). The same is true here.

[3] Again, the one possible exception is the AnC Bio L.P., the claims related to which fail for distinct reasons.

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The State may argue that Quiros' alleged deviation from the PPMs' representations regarding the use of partnership funds establishes that those representations were false at the time they were made. However, the "law is well settled that false representations or broken promises referring merely to the future do not afford the basis of actionable fraud." *Comstock v. Shannon*, 116 Vt. 245, 250, 73 A.2d 111, 113 (1950). The only circumstance in which fraud may be proven on the basis of a representation of future action is where it can be shown that the individual making the representation had a "present intention of acting contrary to the promise." *Union Bank*, 138 Vt. at 121-22, 411 A.2d at 1342. That is, "to state a securities fraud claim based on broken promises, there must be 'proof that at the time the promises were made the promisor had no intention of keeping them,' since it is 'the lack of intention to perform' which 'constitutes the fraud.'" *Thompson ex rel. Thorp Family Charitable Remainder Unitrust v. Federico*, 324 F. Supp. 2d 1152, 1162-63 (D. Or. 2004) (quoting *Keers & Co. v. Am. Steel & Pump Corp.*, 234 F. Supp. 201 203 (S.D.N.Y. 1964)).

A litigant has the burden to plead and prove each element of a fraud-related claim "with particularity." V.R.C.P. 9(b); *Felis v. Downs Rachlin Martin PLLC*, 2015 VT 129, ¶ 15, 133 A.3d 836 (Vt. 2015). While state of mind and intent may be pleaded generally, the State has not made any allegation that Quiros had no present intention of using the partnership funds as specified at the time the PPMs were issued—nor, indeed, would the State have any basis to do so. This is not a case of defendants selling investors a false bill of goods and fleeing the country with pilfered funds. Five of the seven projects at issue have been fully constructed, and, though the State may allege use of funds in a manner inconsistent with the PPMs, there is no factual allegation of an intent to misuse funds at the time the EB-5 investments were solicited, much less

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an allegation that meets the high standard of pleading fraud with particularity. Accordingly, the State has failed its burden to prove actionable fraud, and the VUSA claims must be dismissed.

B. Ariel Quiros Did Not "Make" the Alleged Misrepresentations at Issue.

The State's VUSA claims should also be dismissed on the independent ground that the Complaint fails to sufficiently allege that Ariel Quiros "made" any actionable misrepresentations or omissions.

While there is little law under the Uniform Securities Act on who can be said to "make" a statement or omission for purposes of the Act's anti-fraud provision, that provision parallels, and was expressly modeled upon, a very well-defined provision of federal securities law, Rule 10b-5.[4] *See* Uniform Law Comments to 9 V.S.A. § 5501, cmt. 1. In *Janus Capital Group v. First Derivative Traders*, 564 U.S. 135 (2011), the United States Supreme Court explained what it means to "make" a statement in the context of securities fraud. The Court held that, for purposes of Rule 10b-5, the "maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 142. Under *Janus*, even individuals or entities who are directly involved in preparing or publishing a statement will not be considered the "makers" of a statement if it is issued under another's name. *See id.* On the facts of that case—involving claims against an investment advisor, Janus Capital Management, for statements in a prospectus issued by its investment fund client, the Janus Investment Fund—the Court ruled that only the investment fund itself, which formally issued a prospectus and had the statutory obligation to file a copy with the Securities and Exchange Commission, could be said to have "made" the statements contained in the prospectus, even though the investment advisor was significantly involved in preparing the prospectus.

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[4] Rule 10b-5, like 9 V.S.A. § 5501, prohibits "mak[ing] any untrue statement of a material fact or . . . omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5.

Applying these standards, the alleged misrepresentations and omissions in the EB-5 Project PPMs cannot possibly be ascribed to Ariel Quiros for purposes of proving fraud under VUSA. To begin with, the PPMs for the Phase I L.P. and Phase II L.P. were prepared—and all interests in the former fully marketed and sold—before the June 2008 acquisition of Jay Peak. The State surely cannot suggest that Quiros had any authority, let alone "ultimate authority," over the PPMs at a time when another entity owned Jay Peak. More broadly, however, the PPMs for the seven limited partnerships are not alleged to have been issued by or on behalf of Ariel Quiros. While Quiros allegedly reviewed the PPMs and approved certain sections, that does not suffice to render him the "maker" of the PPMs under *Janus*. To the contrary, the Complaint expressly alleges that William Stenger—not Ariel Quiros—was the one who "was responsible for, and had authority over, the contents of each of the EB-5 Project PPMs." Complaint, ¶ 82. This clear, conclusive allegation attributing responsibility for the PPMs to Stenger is inconsistent with any suggestion that Quiros had "ultimate authority over the [PPMs], including [their] content and whether and how to communicate [them]." *Janus*, 564 U.S. at 142. The VUSA claims thus necessarily fail as to Quiros.

C. The State's Vermont Consumer Protection Act Claims Fail Because the Act Does Not Provide a Remedy for Allegations of Securities-Related Fraud.

Alongside its Uniform Securities Act claims, the State also alleges that Quiros violated the Vermont Consumer Protection Act ("VCPA") by engaging in unfair and deceptive acts and practices. These claims rest on *precisely* the same grounds as the State's securities claims. *See, e.g.*, Complaint, Count 8, ¶ 23 (alleging that Defendants violated the VCPA by "making or making use of material misrepresentations and/or omissions about how Defendants would use and maintain . . . investor funds, including that investor funds would be expended as set forth in the Source and Use of Investor Funds [section of the PPM] for the project"). Because VUSA

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provides the sole statutory remedy for claims of fraud and deception in connection with securities, the VCPA claims must be dismissed.

In interpreting the scope and meaning of the VCPA, courts look for guidance to the "interpretations accorded similar terms and provisions of the Federal Trade Commission Act and other state consumer protection laws." *Carter v. Gugliuzzi*, 168 Vt. 48, 52, 716 A.2d 17, 21 (1998). Vermont's courts have not yet had occasion to consider the interplay between VUSA and claims under the VCPA, but numerous courts in other jurisdictions with substantially similar statutes have. The vast majority of those have held that state consumer protection and unfair trade practices statutes do not extend to transactions involving securities. *See Shearson Lehman Bros. Inc. v. Greenberg,* 60 F.3d 834 (9th Cir. 1995) (California law) (unpublished); *Spinner Corp. v. Princeville Development Corp.,* 849 F.2d 388 (9th Cir. 1988) (Hawaii law); *Stephenson v. Paine, Webber, Jackson & Curtis, Inc.,* 839 F.2d 1095 (5th Cir. 1988) (Louisiana law); *Lindner v. Durham Hosiery Mills, Inc.,* 761 F.2d 162 (4th Cir. 1985) (North Carolina law); *Swenson v. Englestad,* 626 F.2d 421 (5th Cir. 1980) (Texas law); *United Heritage Life Ins. Co. v. First Matrix Inv. Servs. Corp.*, No. CV 06-0496-S-MHW, 2009 WL 3229374 (D. Idaho Sept. 30, 2009) (Idaho law); *Rogers v. Cisco Sys., Inc.*, 268 F. Supp. 2d 1305 (N.D. Fla. 2003) (Florida law); *Nichols v. Merrill Lynch Pierce Fenner & Smith,* 706 F. Supp. 1309 (M.D. Tenn. 1989) (Tennessee law); *In re Catanella,* 583 F. Supp. 1388 (E.D. Pa. 1984) (New Jersey law); *Taylor v. Bear Sterns,* 572 F. Supp. 667 (N.D. Ga. 1983) (Georgia law); *Bowen v. Ziasun Techs., Inc.*, 11 Cal. Rptr. 3d 522, 533 (Cal. Ct. App. 2004) (California law); *Russell v. Dean Witter Reynolds, Inc.,* 200 Conn. 172, 510 A.2d 972 (1986) (Connecticut law); *Cabot Corp. v. Baddour,* 394 Mass. 720, 477 N.E.2d 399 (1985) (Massachusetts law); *Skinner v. E.F. Hutton Co., Inc.,* 314 N.C. 267, 333 S.E.2d 236 (1985) (North Carolina law); *see also Wyman v. Prime Discount*

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Securities, 819 F. Supp. 79, 87 n.14 (D. Me. 1993) (predicting, in dicta, that Maine Unfair Trade Practices Act would not apply to securities). *But see State ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1312 (Ariz. 1983) (holding that consumer fraud act applied to securities transactions).[5]

These cases set forth several persuasive rationales for declining to extend the coverage of consumer protection and unfair trade practices statutes to securities, all applicable here. First, state consumer protection statutes are typically modeled on the Federal Trade Commission Act—and the VCPA is no exception. *Compare* 15 U.S.C. § 45(a)(1) (declaring unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce") *with* 9 V.S.A. § 2453(a) (declaring unlawful "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce"). The express purpose of the VCPA is to "complement the enforcement of federal statutes and decisions governing unfair methods of competition, unfair or deceptive acts or practices, and anti-competitive practices," 9 V.S.A. § 2451, and the statute directs courts, in construing § 2453(a), to "be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act." *Id.* § 2453(b).[6] The FTCA has historically been interpreted not to apply to securities transactions, and thus, under § 2453(b), the VCPA must be interpreted in the same manner. *See Stephenson*, 839 F.2d at 1101 (declining to extend state unfair trade practices act to securities transactions because, among other reasons, the FTCA does not reach such transactions); *Lindner*, 761 F.2d at 166-67 (same); *see also Russell*, 200 Conn. at 180, 510 A.2d

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[5] *Corbin* presented atypical circumstances, in that the consumer fraud statute at issue contained a savings clause explicitly declaring that the remedies under the statute were "in addition to all other causes of action, remedies and penalties available to this state." *Corbin*, 667 P.2d at 1307. No such savings clause is found in the VCPA. *See Spinner Corp.*, 849 F.2d at 393 n.6 (distinguishing *Corbin* on the ground that Hawaii's unfair competition statute did not contain a savings provision of the type present in *Corbin*).

[6] Similarly, § 2453(c) grants rule-making authority to the Attorney General, but expressly prohibits any rules "inconsistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting the Federal Trade Commission Act."

at 977 (finding unfair trade practices statute inapplicable to securities because the "FTC has never undertaken to adjudicate deceptive conduct in the sale and purchase of securities").

Second, the VCPA reflects a distinct legislative mandate from securities laws: the VCPA was enacted to protect consumers from unethical business practices, *see* 9 V.S.A. § 2451 (noting purpose of protecting the public and encouraging fair and honest competition), and, as the Ninth Circuit has observed, "[a]ctions involving securities . . . are not typically on the agenda of consumer advocates." *Spinner*, 849 F.2d at 391. Transactions in securities are "already subject to pervasive and intricate regulation under the [state Uniform Securities Act], as well as the Securities Act of 1933, and the Securities Exchange Act of 1934." *Lindner*, 761 F.2d at 167 (citations omitted). To conclude that the VCPA was intended to provide another remedy to purchasers of securities, beyond this existing, specific, and comprehensive set of securities laws, would be "inconsistent with a coherent legislative intent." *Spinner*, 849 F.2d at 391.

Third, there are fundamental differences in the system of remedies and enforcement under the two sets of laws. The VCPA provides for treble damages, *see* 9 V.S.A. § 2461(b), a remedy not available under either state or federal securities fraud statutes. Extending treble damage liability into the realm of securities would constitute a major change in the law, and it is thus reasonable to expect that, "[h]ad the . . . legislature intended the availability of treble damages in securities fraud cases, it would . . . have provided for such a remedy in its Blue Sky Law." *Stephenson*, 839 F.2d at 1101. Moreover, with respect to government enforcement actions, the Attorney General and State's attorneys are charged with enforcing the VCPA, *see* 9 V.S.A. § 2458, whereas enforcement of VUSA falls to the Commissioner of the Department of

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Financial Regulation, *see id.* § 5603.[7] A holding that the VCPA applies to securities transactions would "subject those involved with securities transactions to overlapping supervision and enforcement" by these two officials, a result which the legislature surely never intended. *Linder*, 761 F.2d at 167-68.

In sum, in light of the distinct purposes, remedies, and enforcement schemes of the VCPA and VUSA, the legislature's command that the VCPA be interpreted consistently with the FTCA, and the great weight of authority from other jurisdictions, the VCPA cannot be held to extend to transactions involving securities. The Court should dismiss the State's VCPA claims on that ground.

D. The State's Claims Arising from the Phase I Limited Partnership Are Time-Barred.

Lastly, the State's claims arising from the Phase I L.P. are manifestly untimely and should be dismissed.[8]

"[S]ince averments of time and place are material for testing the sufficiency of a complaint, defenses based on a failure to comply with the applicable statute of limitations are properly raised in a motion to dismiss." *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 7, 186 Vt. 605, 987 A.2d 258 (citation omitted). The State has alleged that the Phase I L.P. was approved by the Agency of Commerce and Community Development in 2006 and was "fully subscribed"—i.e., all of the partnership interests had sold—by June 2008. *See* Complaint, ¶¶ 54, 59. Thus, all of the securities transactions underlying the State's claims as to the Phase I L.P. took place eight or more years ago. The statute of limitations for the State's claims is six years

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[7] The Attorney General or State's attorneys also may recover the costs of investigation and prosecution in an action under the VCPA, *see* 9 V.S.A. § 2458(b)(3); no comparable remedy is available to the Commissioner in VUSA enforcement actions.

[8] Other claims by the State may be barred by the statute of limitations, but the allegations of the Complaint are not sufficient to make such a determination at this time. Defendant Quiros reserves his right, if this case goes forward, to move for judgment on any other time-barred claims as the facts develop.

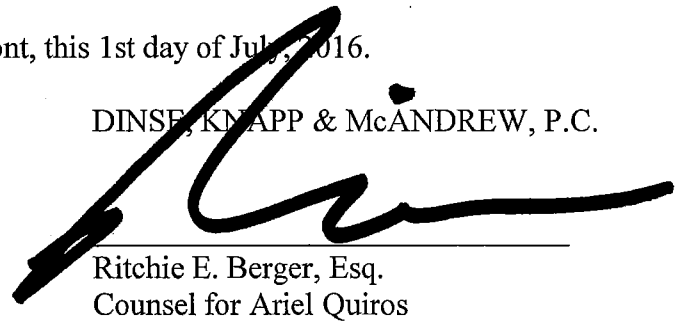
under the VCPA, *see Kaplan*, ¶¶ 6-7, and six years at most under VUSA.[9] Because the Phase I L.P. securities transactions were consummated outside of the limitations period, the State is barred from pursuing the claims that arise from them.

Conclusion

For the reasons set forth above, Defendant Ariel Quiros requests that the Court dismiss the State's Complaint with prejudice.

DATED at Burlington, Vermont, this 1st day of July, 2016.

DINSE, KNAPP & McANDREW, P.C.



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[9] While VUSA provides an express statute of limitations for fraud claims—the earlier of two years from discovery or five years from violation, *see* 9 V.S.A. § 5516(j)(2)—it is not entirely clear that this provision applies to government enforcement actions. Even if § 5516(j)(2) did not apply, though, the State would be subject to the general six-year statute of limitations for civil actions. *See* 12 V.S.A. § 511; *cf. Lodge at Bolton Valley Condo. Ass'n v. Hamilton*, 2006 VT 41, ¶ 10, 180 Vt. 497, 905 A.2d 611 (mem.) (applying general six-year limitations period to common law fraud claim).