

**From:** [Rowntree, Laura](#)  
**To:** [akeays@vtdigger.org](mailto:akeays@vtdigger.org)  
**Subject:** Public Records Act Request  
**Date:** Thursday, September 28, 2023 4:22:33 PM  
**Attachments:** [PRA - Alan Keays VTDigger - Rowntree Response Ltr.pdf](#)  
[PRA - Alan Keays VTDigger - Responsive Documents.zip](#)

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Mr. Keays,

Please see the attached.

Regards,

Laura C. Rowntree  
Assistant Attorney General  
Vermont Attorney General's Office  
109 State Street  
Montpelier, VT 05609  
E-mail: [laura.rowntree@vermont.gov](mailto:laura.rowntree@vermont.gov)  
Phone: (802) 595-3717  
Pronouns: she/her/hers

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CHARITY R. CLARK  
ATTORNEY GENERAL

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[www.ago.vermont.gov](http://www.ago.vermont.gov)



STATE OF VERMONT  
OFFICE OF THE ATTORNEY GENERAL  
109 STATE STREET  
MONTPELIER, VT  
05609-1001

September 28, 2023

**VIA E-MAIL:**

Alan J. Keays  
VTDigger.org  
P.O. Box 1374  
Montpelier, VT 05601  
akeays@vtdigger.org

Re: *Public Records Request*

Dear Mr. Keays:

I write in response to your Public Records Act request submitted on September 25, 2023, seeking “communications and documents between the Vermont Attorney General’s Office and the insurance carrier AIG regarding coverage for EB-5 litigation.” Although your request did not include a temporal scope, the Office has searched for records from 2017 to present. Please advise if you are requesting another timeframe. Moreover, your request seeks communications or documents involving “the Vermont Attorney General’s Office” rather than its approximately 150 employees. The Office has construed your request to be seeking communications or documents held by the AGO personnel who were involved with the EB-5 litigation. Likewise, your request seeks communications or documents involving “insurance carrier AIG.” The Office has interpreted the request to include AIG’s counsel as well.

Responsive records are attached. Other responsive records that are protected by the attorney-client privilege and work product protections, or as confidential settlement negotiations, have been withheld pursuant to 1 V.S.A. § 317(c)(1) and (4).

There is no charge for your request because the work done to respond to it took 30 minutes or less.

If you feel information or records have been withheld in error, you may appeal in writing to Benjamin D. Battles, the Chief of the General Counsel and Administrative Law Division, at [benjamin.battles@vermont.gov](mailto:benjamin.battles@vermont.gov).

Sincerely,

*/s/ Laura C. Rowntree*

Laura C. Rowntree  
Assistant Attorney General

THOMAS J. DONOVAN, JR.  
ATTORNEY GENERAL

JOSHUA R. DIAMOND  
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON  
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STATE OF VERMONT  
OFFICE OF THE ATTORNEY GENERAL  
109 STATE STREET  
MONTPELIER, VT  
05609-1001

February 11, 2020

James Destefano, Senior Analyst  
AIG Property Casualty  
P.O. Box 10006  
Shawnee Mission, KS 66235

VIA EMAIL AND REGULAR MAIL

Re: *Claim No. 0800547450US*  
*Insured: State of Vermont*  
*Wei Wang, et al. v. The Vermont Regional Center, et al.*

Dear Mr. Destefano:

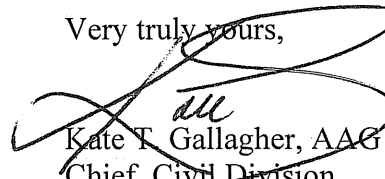
The State of Vermont has received AIG Property Casualty's ("AIG") January 30, 2020 coverage letter in connection with the above-referenced claim. We respectfully request a meeting to discuss your decision and update you on new developments in this matter. While the State is prepared to litigate, exploration of settlement discussions is warranted in part to minimize potential damages and resolve this matter globally. It is important to us that we meet to discuss AIG's analysis of coverage as risk to the State could increase over time.

The Vermont Attorney General would like to meet with AIG's decision makers to discuss its current position. If a meeting can be scheduled with the next two weeks, we are prepared to travel to New York or elsewhere for such a meeting.

Please contact me at your earliest convenience to arrange this meeting.

Thank you for your consideration.

Very truly yours,

  
Kate T. Gallagher, AAG  
Chief, Civil Division  
Vermont Attorney General's Office

KTG/mg

cc: Rebecca White, Office of Risk Management



February 26, 2020

AIG Property Casualty  
PO Box 10006  
Shawnee Mission, KS 66225  
www.aig.com

James Destefano  
Senior Analyst  
T 212-458-5513  
James.Destefano@aig.com

**Via E-Mail: (Kate.Gallagher@vermont.gov)**  
Attorney General Kate Gallagher  
Chief, Civil Division  
State of Vermont  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609

Re: Insured: State of Vermont (“Vermont”)  
Claimants: Wei Wang and Anthony Sutton, individually and on behalf of a class of  
similarly situated persons  
Wei Wang, et al. v. The Vermont Regional Center, et al., Civil Action No.  
100-5-17, pending in the Superior Court for the State of Vermont (the “*Wang  
Action*”)  
Policy Nos.: 014180745; 014180746; 4203-3033; 4205-3034; 8766864; 8766868;  
5686696; 5686697  
Our Claim: 0800547450US

Dear Assistant Attorney General Gallagher:

I am in receipt of your February 11, 2020 letter in which you request a meeting to discuss AIG’s coverage position as well as recent developments in the *Wang Action*. While I share your belief that such a meeting is important, AIG respectfully requests that the State of Vermont first provide it with a letter setting forth its position on coverage for the *Wang Action*. Additionally, we ask that you also provide us with any deposition transcripts, interrogatories, or any other discovery, pleadings and/or documents from the *Wang Action* which you believe supports your coverage position. Doing so will allow us to have a productive and informed conversation. Once we receive the State of Vermont’s position and review it, I will be happy to schedule a meeting at a time and location convenient to all.

AIG continues to reserve all of its rights under the policies and at law. Additionally, despite the present disagreement, I wish to reiterate that AIG values the State of Vermont as a customer. Please do not hesitate to contact me with any questions or to discuss any aspect of this matter further.

Thank you for your cooperation in this matter.

Very truly yours,

James Destefano  
Senior Analyst

cc: Rebecca M. White (Rebecca.White@vermont.gov)  
Ruth Hooker (Ruth.Hooker@vermont.gov)  
Charles Daniels (cdaniels@rkinsurance.com)  
Jody White (jwhite@rkinsurance.com)

# ANDERSON KILL P.C.

Attorneys and Counselors at Law

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617-221-5445  
212-278-1513

By E-mail

April 16, 2020

Mr. James Destefano  
Senior Analyst  
AIG Property Casualty  
PO Box 10006  
Shawnee Mission, KS 66225  
[James.Destefano@aig.com](mailto:James.Destefano@aig.com)

Re: State of Vermont – EB-5 Litigation  
Your Claim No.08005474450US

Dear Mr. Destefano:

This firm has been retained by the State of Vermont (the "State") regarding the above-referenced insurance claim (the "Claim"), arising out of underlying litigation bearing the caption *Sutton, et al. v. The Vermont Regional Center, et al.*, Docket No. 100-5-17 Lecv (the "Sutton Action"), which Claim was presented to the Insurance Company of the State of Pennsylvania ("ICSOP") and Lexington Insurance Company ("Lexington") (collectively, "AIG") for coverage under a number of liability insurance policies sold to the State since 2005 (the "Policies").

AIG was given timely notice of the Sutton Action in June 2017, when the State was served with the First Amended Complaint. (The original complaint was filed with the court in May 2017, but was never served on the defendants.) On August 21, 2017, AIG wrote to the State and acknowledged receipt of the June 2017 notice. Over two and a half years the defense of the Sutton Action was led by the Vermont Attorney General's Office. During that time, the Plaintiffs filed three more Amended Complaints, asserting some combination of up to sixteen causes of action, including various overlapping claims for securities law violations, fraud, breach of fiduciary duty, breach of contract and negligence. The State provided regular updates to AIG regarding the defense of the Sutton Action.

On April 20, 2018, the Superior Court granted the State's Motion to Dismiss all of Plaintiffs' causes of action. Plaintiffs appealed, and on October 4, 2019, the Vermont Supreme Court affirmed the dismissal of most causes of action, but reversed and remanded the dismissal of the following five causes of action: (1) Negligence against ACCD; (2) Negligent Misrepresentation against ACCD; (3) Gross Negligence against Raymond and Candido; (4) Breach of Contract against ACCD; and

New York, NY ■ Los Angeles, CA ■ Stamford, CT ■ Washington, DC ■ Newark, NJ ■ Philadelphia, PA

docs-100243689.4

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(5) Breach of Implied Covenant of Good Faith and Fair Dealing against ACCD. On October 10, 2019, the State notified AIG that the Action had been remanded to the trial court.

All of the reinstated causes of action had been part of the Sutton Action either from the outset in June 2017, or since the filing of the Fourth Amended Complaint in April 2018. AIG never raised any coverage defenses with respect to the Claim or any of those causes of action during the defense of the Sutton Action in 2017, 2018 and 2019. On January 30, 2020, AIG reversed course and sent a letter to the State purportedly denying coverage for the Claim.

In correspondence dated February 11, 2020, the State requested that AIG meet to discuss the coverage for the Claim and developments in the Sutton Action. On February 26, 2020, you replied and acknowledged the importance of such a meeting, but asked that the State first provide a letter explaining why the Claim is covered under the Policies.

Please accept this letter in response to that request. The State reserves its rights to obtain coverage for the Claim under all of the Policies, and respectfully asks that AIG reconsider and reverse its attempt to deny coverage as indicated in AIG's January 30, 2020 letter. The State specifically directs AIG's attention to the coverage provided under Policy Nos. 4205-3033, 8766864 and 5686696, sold by ISCOP on an occurrence basis during policy years 2005-06, 2006-07 and 2007-08, respectively (the "ISCOP Policies"); under Policy No. 014180746 sold by Lexington on an occurrence basis during the 2015-16 policy year (the "46 Policy"); and under Policy No. 014180745 sold by Lexington on a claims-made basis during the 2016-17 policy year (the "45 Policy"). For the reasons discussed in detail below, the Claim is covered under one or more of these policies.

### Analysis

#### A. Various Policies Cover the Claim

As noted above, the State reserves its right to seek coverage under all of the Policies. In preparation for a meeting with the State, we suggest that AIG focus specifically on the coverage provided under the specific Policies discussed below.

##### 1. The ICSOP Policies

Although AIG's denial letter relegates its analysis of the ICSOP Policies to footnotes, those policies provide coverage for the Claim. Each of the ICSOP Policies provides Errors and Omissions Liability coverage for the "ultimate net loss" that the State becomes legally obligated to pay arising out of a "wrongful act" that takes place in the policy periods from 2005-2008. Each of the ICSOP Policies provides \$10,000,000

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in coverage, excess of a retained limit of \$250,000. Each policy also provides coverage for defense costs outside of policy limits.

AIG does not dispute that the Sutton Action includes allegations of “wrongful acts” during 2005-2008 that trigger coverage under each of the ICSOP Policies. AIG’s defenses to coverage under the ICSOP Policies rest entirely on the purported applicability of Exclusions L, N and O in those policies.<sup>1</sup> As discussed in Section B below, none of those exclusions limit coverage for the Claim. Accordingly, AIG’s coverage obligation for the Claim is up to \$10,000,000 under each of the three ICSOP Policies, with defense costs covered outside of and in addition to those limits.

### 2. The 45 Policy for 2016-17

AIG acknowledges that the 45 Policy sold for 2016-17 generally applies to the Sutton Action, in that it is the claims-made policy that provided Errors and Omissions Liability coverage at the time that the Sutton Action was asserted against the State. That policy provides \$1,500,000 in coverage, excess of a retained limit of \$500,000.

AIG’s defenses to coverage under the 45 Policy rest on the purported applicability of Exclusions O, R and S, which limit coverage on the same basis as the exclusions raised with respect to the ICSOP Policies. Again, none of those exclusions limit coverage for the Claim, as discussed in Section B below. Accordingly, AIG’s coverage obligation under the 45 Policy is up to \$1,500,000.

### 3. The 46 Policy for 2015-16

AIG’s January 30, 2020 letter states that there is no coverage under the 46 Policy sold for the 2016-17 policy period because the wrongful acts alleged in the Sutton Action occurred prior to the 2016-17 policy period and based on the “Exclusion for Claims Where No Vermont Immunity Granted” added via endorsement to the 46 Policy for 2016-17. But AIG fails to analyze whether there is coverage under a 46 Policy sold for any prior policy year.

Like the 2016-17 policy, the 46 Policy sold for policy year 2015-16 was written on an occurrence basis, and AIG acknowledges that the Sutton Action includes allegations of wrongful acts during the 2015-16 policy period (see January 30, 2020 denial letter, at p. 2). Moreover, unlike the 46 Policy for 2016-17, AIG did not include an “Exclusion for Claims Where No Vermont Immunity Granted” as part of the 46 Policy in 2015-16. Accordingly, to the extent that the 45 Policy does not cover the Claim, then

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<sup>1</sup> Although the January 30, 2020 denial letter refers to Exclusions L, N and O in all of the ICSOP Policies, the exclusions are lettered M, O and P in ICSOP Policy #5686696.



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the 46 Policy for 2015-16 would – up to its policy limits of \$10,500,000, excess of the \$500,000 retention.

### B. AIG's Purported Coverage Defenses Are Invalid

As noted above, AIG's denial is based on exclusions for claims for liability against the State arising out of: (1) the willful commission of a crime or other dishonest, fraudulent, or malicious acts (the "Fraudulent Acts Exclusion"); (2) the purchase, sale, or offer of sale of any security, debt, or financial interest or instrument (the "Sale of Securities Exclusion"); and (3) representations made in relation to the price or value of a security, debt, financial interest or instrument (the "Representations of Value Exclusion"). None of these exclusions apply or restrict coverage for the Claim here.

First, the Fraudulent Acts Exclusion does not apply because the State did not engage in any "willful" commission of a crime or other dishonest, fraudulent or malicious acts. Perhaps some of the claims initially pled in the Sutton Action alleged such things against certain individual defendants (e.g., the various fraud-based claims), but such claims were dismissed by the Superior Court and that dismissal was affirmed by the Supreme Court. Moreover, even if a few allegations of dishonest acts were to remain, those allegations are directed against certain individuals – not the State. Because all of the Policies include a severability provision specifying that the insurance applies separately to each insured (e.g., the State, each government official, and each employee) as if they were the only insured (see ¶ VI.Q.), any alleged wrongful conduct by one cannot be imputed to the others. Accordingly, the Fraudulent Acts Exclusion does not limit coverage here.

Second, the Sutton Action does not seek to impose liability against the State arising out of the sale or offer of securities or debts. None of the remaining causes of action against the State are based on the alleged violation of any securities laws. Rather, as noted above, the only causes of action remaining against the State are for Negligence; Negligent Misrepresentation; Breach of Contract; and Breach of Implied Covenant of Good Faith and Fair Dealing. Supposed misrepresentations in connection with the offering or sale of securities are not elements of, or required to establish liability under, these remaining causes of action.

To effectively invoke an exclusion in an insurance policy, AIG bears the burden of proving that the exclusion completely bars any possibility of coverage for the claims at issue. See *State v. CNA Ins. Companies*, 172 Vt. 318, 329 (2001) ("the insurer bears the burden of proving that an exclusion in the policy precludes coverage"); *Am. Eagle Ins. Co. v. Rutland Area Flyers, Inc.*, 949 F. Supp. 243, 249 (D. Vt. 1996) ("in cases involving exclusions from coverage, the burden of proof is on the insurer to show that the facts of the case fall within the bounds of the exclusion" (citing *Reynolds v. John Hancock Life Ins. Co.*, 117 Vt. 541, 545-46 (1953))). Here, the remaining claims for Negligence, Breach of Contract, etc. – as opposed to the dismissed claims for various

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securities violations and fraud – are not barred by the Sale of Securities Exclusion. The remaining claims against the State are based on allegations that it did not adequately supervise, manage or oversee the Jay Peak project – not allegations regarding the sale or offer of sale of any securities. For example, the Negligence claim rests on the allegation that “Defendants negligently failed to exercise due care in its [sic] role as state overseer, administrator, and overall regulator . . . .” Fourth Amended Complaint at ¶ 393. Accordingly, it certainly is not the case that all remaining claims against the state fall entirely within the scope of the Sale of Securities Exclusion. Indeed, the opposite is true, given the dismissal of the causes of action for securities violations and fraud.

Third, there is no “price or value” associated with an EB-5 transaction, and the claims in the Sutton Action do not arise out of any supposed representation by the State as to the price or value of the EB-5 loans at issue. It costs \$500,000 to participate in the EB-5 program. The price is the price, and no representations or advice were ever given by the State about the price. Furthermore, because there is no aftermarket for EB-5 loans, they have no “value” to speak of – and no representations were ever made by the State as to their “value.” Nor are there allegations in the Sutton Action of supposed misrepresentations by the State regarding the “price or value” of any EB-5 securities or loans. Accordingly, the Representations of Value Exclusion does not limit coverage here.

### C. AIG Never Effectively Reserved Its Right To Deny Coverage

For over two and a half years, AIG failed to raise any factual basis for limiting coverage under any of the Policies. Although AIG sent a boilerplate letter, dated August 21, 2017, referencing the 45 Policy and the 46 Policy, stating that AIG was “reviewing this matter” and generically stating that “the Company reserves all rights, including the right to deny coverage for this claim under the above policy,” AIG never asked the State to enter into a bilateral reservation of rights agreement and the State never agreed to any such thing. Moreover, at no time did AIG even issue a “reservation of rights” of any kind with respect to the ICSOP Policies.

AIG failed to assert any basis for limiting or denying coverage for the Claim despite the fact that the purported factual bases for its January 2020 denial were well-known to AIG from the outset. The first four versions of the Complaints in the Sutton Action included the same sixteen causes of action. The Fourth Amended Complaint, filed April 13, 2018, dropped the claims for violation of §§ 10(B), 20(A) and Rule 10b-5, Constructive Trust, Mutual Mistake and Unjust Enrichment, and added the claims for Breach of Contract and Breach of Good Faith and Fair Dealing. During the more than two and a half years that AIG was receiving regular updates regarding the defense of these claims, AIG never sought or obtained a bilateral non-waiver agreement from the State or raised any specific defenses to coverage. The State was never on notice that AIG might raise the Fraudulent Acts Exclusion, the Sale of Securities Exclusion or the Representations of Value Exclusion as a possible defense to coverage

## Anderson Kill P.C.

James Destefano

April 16, 2020

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– even though the purported factual basis for such defenses have been well-known to AIG since the initial notice of the Claim in June 2017.

Under Vermont law, in order to avoid waiving coverage defenses, AIG was required to either: (1) obtain a bilateral reservation of rights agreement signed by the State (see *Vermont Ins. Mgmt., Inc. v. Lumbermens' Mut. Cas. Co.*, 171 Vt. 601, 603 (2000) (“[Vermont] ha[s] long recognized that a bilateral reservation of rights agreement prevents a waiver of the right to dispute coverage” (citing *Beatty v. Employers' Liability Assurance Corp.*, 106 Vt. 25, 34 (1933)); or (2) specify the factual basis for its purported coverage defenses (see *In re. Lynch*, 226 B.R. 813, 814 (Bankr. D. Vt. 1998) (citing *American Fidelity Company v. Kerr*, 138 Vt. 359, 416 A.2d 163 (1980)). Because AIG did neither of those things here, AIG cannot deny coverage now.

The Vermont Supreme Court has held that a “unilateral reservation of rights . . . is ineffective.” *Am. Fid. Co. v. Kerr*, 138 Vt. at 363. Under longstanding Vermont law, an “insurer owes certain duties to the insured,” including “deal[ing] with his individual customer with entire frankness.” *In re Lynch*, 226 B.R. at 815 (quoting *Cummings v. Connecticut General Life Ins. Co.*, 102 Vt. 351, 361 (1930)). “[I]t is counterintuitive that a liability insurer can meet its duty of entire frankness by merely omitting references to specific coverage defenses.” *Id.*

Because AIG's 2017 unilateral, boilerplate reservation of rights was ineffective under Vermont law, AIG cannot deny coverage for the Claim only now that the State has suffered a setback in the defense of the Sutton Action. This is especially true with respect to the ICSOP Policies, as AIG never issued *any* reservation of rights at all with respect to the coverage for the Claim under those policies.

### Conclusion

The State is pleased that AIG is willing to meet and discuss this important matter, as stated in your January 30, 2020 letter. Based on recent comments by Plaintiffs' counsel since the State's filing of its Motion for Reconsideration of the Supreme Court's October 2019 ruling, it appears that there might be an opportunity to favorably resolve the Sutton Action for an amount well within the limits of any one of the AIG Policies that cover the Claim. The State is hopeful that AIG will choose to honor its obligations under the Policies and Vermont law, and support the State in the defense and resolution of the Sutton Action. Should AIG fail to do so, please understand that the State will hold AIG fully accountable for its conduct, to the fullest extent of the law, and in excess of the limits of liability in the Policies.

Please do not hesitate to contact me if you have any questions.

**Anderson Kill P.C.**

James Destefano  
April 16, 2020  
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Very truly yours,



Marshall Gilinsky

cc: Thomas J. Donovan, Jr. – Attorney General  
Earl F. Fechter – Assistant Attorney General

**From:** [Griffin, Bill](#)  
**To:** [Hooker, Ruth](#)  
**Subject:** AIG apologizes, looks forward to working with us  
**Date:** Saturday, April 18, 2020 12:43:51 PM

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Hi Ruth - Another message for the coverage correspondence folder.

---

From: Knight, Royce [Royce.Knight@AIG.com]  
Sent: Friday, April 17, 2020 6:35 PM  
To: Thomas.Donovan@vermont.gov  
Cc: Fechter, Earl (Earl.Fechter@vermont.gov); Hickey, Sean; Daniels, Charles; White, Jody; Bornstein, Brian; Mehl, Michele  
Subject: State of Vermont - AIG Claim #08005474450US (Sutton, et al. v. The Vermont Regional Center, et al.)

Dear Mr. Donovan:

As you may be aware, I had the opportunity to discuss the insurance claim related to the Sutton, et al. v. The Vermont Regional Center, et al. matter with Sean Hickey and others from RK Insurance yesterday. I want to offer my apologies for communication and coordination issues that arose over the past few months, specifically due to staffing changes on our end. We should have more timely communicated the changes of filehandlers to your office.

As I confirmed in the discussion yesterday, I will be closely involved in handling this matter to its conclusion, with the assistance of Michele Mehl, who is also copied on this email. My full contact information is in my signature line below for your reference.

While we may currently have differing opinions regarding the ultimate outcome of this matter, we look forward to working with you and your attorneys to resolve this claim.

Please note that this correspondence is being sent by AIG Claims, Inc. the authorized claims administrator for the Insurance Company of the State of Pennsylvania and Lexington Insurance Company.

Regards,  
Royce

Royce Knight  
AIG  
Vice President  
Complex Casualty Claims  
AIG Property Casualty

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May 8, 2020

*Via Electronic Mail Only (MGilinsky@andersonkill.com)*

Marshall Gilinsky, Esq.  
Anderson Kill P.C.  
1251 Avenue of the Americas  
New York, New York 10020

**Re: Insured:** State of Vermont  
**Policy Nos.:** 014180745; 014180746; 4203-3033; 4205-3034; 8766864; 8766868;  
5686696; 5686697  
**Matter:** *Wei Wang, et al. v. The Vermont Regional Center, et al.*, Civil Action No.  
100-5-17, pending in the Superior Court for the State of Vermont (the  
“*Sutton Action*”)  
**Claim No:** 0800547450US

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Dear Attorney Gilinsky:

This firm is coverage counsel to AIG and all future correspondence should be directed to our attention. We write in response to your letter of April 16, 2020 whereby you request that AIG reconsider and reverse its declination of coverage. For the following reasons, as well as those stated in our coverage correspondence of January 30, 2020, which is hereby incorporated by reference, we must decline your request.

**I. AIG DID NOT WAIVE ITS RIGHT TO ASSERT COVERAGE DEFENSES AND DENY COVERAGE**

We begin by addressing your erroneous assertion that AIG never effectively reserved its rights to deny coverage for the *Sutton Action*. It is true that “Vermont disfavors unilateral reservation of rights letters.” *City of Burlington v. Hartford Steam Boiler Inspection and Insurance Company*, 190 F. Supp.2d 663, 685 (D. Vt. 2002) *citing* *Am. Fidelity Co v. Kerr*, 138 Vt. 359, 363 (1980). However, “acquiescence by the insured may be impliedly found where...the insured does not object to the reservation of rights.” *City of Burlington*, 190 F. Supp.2d at 685 *citing* *Beatty v.*

Marshall Gilinsky, Esq.

May 8, 2020

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*Employers' Liability Assurance Corp.*, 168 A. 919, 924 (Vt. 1933). Here, as your letter points out, AIG's August 21, 2017 letter states that "AIG reserves all rights, including the right to deny coverage." The State never objected to the reservation of rights and, as a result, will be deemed to have acquiesced to it.

Additionally, your letter misinterprets Vermont decisional law on this point and relies upon heavily criticized case law. Specifically, Vermont law does not "hold that when an insurer generally reserves all applicable coverage defenses without specifying any particular defenses, it is barred from raising specific defenses later." *The Standard Fire Ins. Co., v. Donnelly*, 689 F. Supp.2d 696, 703 (D. Vt. 2010). To the contrary, Vermont decisional law "does not bar insurers from generally reserving their right to assert coverage defenses." *Id.* Furthermore, your letter repeatedly cites to *In re Lynch*, 226 B.R. 813 (Bankr. D. Vt. 1998) as support. However, *In re Lynch* has been so heavily criticized that its persuasive authority (if any) is doubtful. As one court put it "[t]he *Lynch* holding that a general reservation of rights is ineffective conflicts with the *Cummings* decision, as discussed above, and established Vermont jurisprudence ... Finally, despite the *Lynch* case being over ten years old, it has never been cited in a Vermont federal or state case." *The Standard Fire Ins. Co.*, 689 F. Supp.2d at 703-704.

With regard to the ICSOP Policies, your letter claims that AIG did not ever issue a reservation of rights. However, under Vermont law "an insurer is entitled to know that a demand is being made for coverage before treating anything that it may say as a waiver, the date from which to judge waiver must be the date of the demand for coverage." *Haley v. Continental Cas. Co.*, 749 F. Supp. 560, 566 (D. Vt. 1990). In determining whether there is a demand for coverage, courts will look to a policy's definition of loss. *See id.* Here, under Paragraph B. of Section I., the ICSOP Policies state that:

[AIG] shall have the right and duty to defend...any **claim** or **suit**...when the applicable Limits of Insurance of the **underlying insurance** listed in the Schedule of **Underlying Insurance**...or **your** self-insured retention portion of the **retained limit** have been exhausted by payment to third party of judgments [or] settlements[.]

The ICSOP policies are excess policies that also contain a retained limit of \$250,000. However, AIG has been provided with no information whatsoever to show that the conditions for coverage have been met or that the State has exhausted the **retained limit**. As such, even assuming *arguendo* that the ICSOP Policies could potentially provide coverage (which they do not), where these conditions have not been met, there can be no demand for excess coverage from the State. Without a demand for coverage, AIG cannot waive any of its rights under Vermont law. Therefore, for all these reasons, AIG is not barred from asserting coverage defenses to the *Sutton Action* under both the Lexington and the ICSOP Policies.



Marshall Gilinsky, Esq.

May 8, 2020

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## II. THE SUTTON ACTION IS PRECLUDED FROM COVERAGE BY MULTIPLE EXCLUSIONS

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### A. *The “Fraudulent Acts Exclusion” Applies*

At its core, your letter asserts that the multiple exclusions relied upon by AIG are inapplicable to the *Sutton Action*. Beginning with the “Fraudulent Acts Exclusion,” your letter claims that the various fraud-based claims were dismissed and, thus, the exclusion is inapplicable. This assertion, however, contradicts black-letter Vermont jurisprudence as “[i]n deciding the scope of a liability policy’s coverage, a court must compare the policy language with the facts pled in the underlying suit to see if the claim falls within the express terms of the policy; the legal nomenclature the plaintiff uses to frame the suit is relatively unimportant.” *TBH By and Through Howard v. Meyer*, 168 Vt. 149, 153 (1998) quoting *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 271 (1st Cir. 1990). Therefore, it is immaterial that the causes of action relating to fraud were dismissed, as AIG is required to, and did, base its coverage determination on the totality of the facts pled in the *Sutton Action*, not the labels attached to them.

Additionally, your letter claims that the Fraudulent Acts Exclusion does not apply to the State because the allegations concerning fraud were directed against certain individuals. This is not so. The *Sutton Action* alleges that “[t]hese individuals, ***by and through the VRC***, continually made representations on behalf of the Jay Peak Projects” and that the “representations ***made by the VRC*** on behalf of the Jay Peak Projects ... would ultimately turn out to be completely false.” (emphasis supplied with bolding and italics). These allegations fall squarely within the exclusion. Moreover, as can be seen in these allegations, the State itself, through its agency, VRC, is alleged to have committed fraudulent and/or dishonest acts. Secondly, your interpretation would result in a legal absurdity as allegations of fraud would never be excluded under a liability policy where, as here, a governmental entity can only act through authorized individuals. Therefore, the *Sutton Action*, the gravamen of which is fraud, is precluded from coverage by the Fraudulent Acts Exclusion.

### B. *The “Sale of Securities Exclusion” Also Bars Coverage*

Concerning the “Sale of Securities Exclusion,” once again your letter relies on the fact that “[n]one of the remaining causes of action against the State are based on the alleged violation of any securities law.” However, as explained above, AIG “must focus on the factual allegations in [the] complaint and not on the legal theories asserted[.]” *TBH By and Through Howard*, 168 Vt. at 153. In focusing on the factual allegations of the *Sutton Action* it must be kept in mind that the Sale of Securities Exclusion, like all of the exclusions on which AIG relies, includes the phrase “arising out of.” Like most states, Vermont interprets this phrase broadly and expansively, even as applied to exclusions. See *State Farm Mut. Auto. Ins. Co. v. Roberts*, 166 Vt. 452, 460 (1997) (“courts have acknowledged the breadth and lack of ambiguity in the ‘arising out of’ exclusionary language.”); *Vermont Pure Holdings, Ltd. v. Descartes Systems Group, Inc.*, 140 F. Supp.2d 331,

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334 (D. Vt. 2001) (“The Second Circuit has recently analyzed the terms ‘arising out of’ and ‘related to’ as those phrases appeared in an insurance policy, and...it noted that...the phrase ‘arising out of’ is usually interpreted as indicating a causal connection[.]”)

Here, your letter asserts that the Sale of Securities Exclusion does not apply because the *Sutton Action* “does not seek to impose liability against the State arising out of the sale or offer of securities or debts.” However, the exclusion is not limited to just securities or debts but also includes any “financial interest or instrument.” The *Sutton Action* clearly alleges that the “VRC Team actively marketed and solicited investors for the Jay Peak Projects.” Additionally, the *Sutton Action* alleges that the investors “reasonably relied” on the representations of the VRC and “left their home countries, liquidated their assets, displaced their families, and turned over their life savings to the fraud at the Jay Peak Projects.” Coupling these allegations along with the breadth of the exclusion, the *Sutton Action* undoubtedly arises out of the sale of a financial interest or instrument where it alleges that the VRC’s representations caused the plaintiffs to invest in the Jay Peak Projects which turned out to be a fraud. Thus, the *Sutton Action* is also precluded from coverage by the Sale of Securities Exclusion.

### C. *The “Representations of Value Exclusion” Further Precludes Coverage*

Lastly, your letter asserts that the “Representations of Value Exclusion” does not apply because the price of the EB-5 program is fixed and “there [are no] allegations in the *Sutton Action* of supposed misrepresentations by the State regarding the ‘price or value’ of any EB-5 securities or loans. To the contrary, the *Sutton Action* alleges that the VRC made several representations including “the added protection of state approval and oversight of VRC projects *to assure investors were making a sound investment*” and “the added credibility of a state-run agency *to assure investors were making a sound investment.*” Furthermore, the exclusion applies to any financial interest or instrument and also contains the broad “arising out of” phraseology. As such, the *Sutton Action*’s claims clearly arise out of the representations of the State, via the VRC, that the Jay Peaks Projects were a sound or valuable financial interest or instrument in which the plaintiffs were allegedly duped to invest. Thus, the Representations of Value Exclusion would additionally preclude coverage for the *Sutton Action*.

### III. CONCLUSION

Therefore, for all the foregoing reasons, and those stated previously, AIG must maintain its January 30, 2020 declination of coverage. In following up on the State’s previous request to meet to discuss the developments in the *Sutton Action* and AIG’s coverage position, we would be happy to do so. Given the unprecedented times we find ourselves in, however, such a meeting may need to be virtual or at a time when the states lift their restrictions on “non-essential” business travel. At your earliest convenience, please let us know your preference and availability. We look forward to hearing from you.

Marshall Gilinsky, Esq.  
May 8, 2020  
Page 5

In the interim, AIG continues to reserve all its rights, under the Policies, at law and in equity with respect to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "T. Smith", with a long, sweeping underline.

Tamara Smith Holtslag

A handwritten signature in blue ink, appearing to read "L. A. Rose", with a long, sweeping underline.

Lincoln A. Rose

cc: Earl F. Fechter (Earl.Fechter@vermont.gov)  
Thomas J. Donovan (Thomas.Donovan@vermont.gov)

1746394\_3  
15951-205646

**From:** Hooker, Ruth  
**Sent:** Tuesday, February 11, 2020 10:47 AM  
**To:** james.destefano@aig.com  
**CC:** Gallagher, Kate;White, Rebecca M  
**Subject:** Claim No. 0800547450US - State of Vermont  
**Attachments:** 2020 02 11 Ltr to AIG.pdf

The attached document is being sent at the request of Assistant Attorney General Kate T. Gallagher.

Please cc me on your responses regarding this matter.

Thank you.

*Ruth A. Hooker*  
Legal Assistant  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001  
(802) 828-1101

THOMAS J. DONOVAN, JR.  
ATTORNEY GENERAL

JOSHUA R. DIAMOND  
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON  
CHIEF ASST. ATTORNEY GENERAL



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STATE OF VERMONT  
OFFICE OF THE ATTORNEY GENERAL  
109 STATE STREET  
MONTPELIER, VT  
05609-1001

February 11, 2020

James Destefano, Senior Analyst  
AIG Property Casualty  
P.O. Box 10006  
Shawnee Mission, KS 66235

VIA EMAIL AND REGULAR MAIL

Re: *Claim No. 0800547450US*  
*Insured: State of Vermont*  
*Wei Wang, et al. v. The Vermont Regional Center, et al.*

Dear Mr. Destefano:

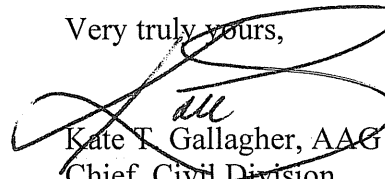
The State of Vermont has received AIG Property Casualty's ("AIG") January 30, 2020 coverage letter in connection with the above-referenced claim. We respectfully request a meeting to discuss your decision and update you on new developments in this matter. While the State is prepared to litigate, exploration of settlement discussions is warranted in part to minimize potential damages and resolve this matter globally. It is important to us that we meet to discuss AIG's analysis of coverage as risk to the State could increase over time.

The Vermont Attorney General would like to meet with AIG's decision makers to discuss its current position. If a meeting can be scheduled with the next two weeks, we are prepared to travel to New York or elsewhere for such a meeting.

Please contact me at your earliest convenience to arrange this meeting.

Thank you for your consideration.

Very truly yours,

  
Kate T. Gallagher, AAG  
Chief, Civil Division  
Vermont Attorney General's Office

KTG/mg

cc: Rebecca White, Office of Risk Management

**From:** Destefano, James  
**Sent:** Wednesday, February 26, 2020 4:08 PM  
**To:** Gallagher, Kate  
**CC:** White, Rebecca M;Hooker, Ruth;White, Jody;Daniels, Charles  
**Subject:** Claim No. 0800547450US - State of Vermont  
**Attachments:** 2.26.20\_State of Vermont Correspondence.pdf

**EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.**

Dear Attorney General Gallagher:

Enclosed please find the attached correspondence. I appreciate your assistance in this matter.

James Destefano

**James Destefano**

**AIG**

Senior Analyst

Complex Casualty Claims - Coverage | AIG Property Casualty

Mailing Address (Regular Mail):

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Shawnee Mission, KS 66225

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[James.Destefano@aig.com](mailto:James.Destefano@aig.com) | [www.aig.com](http://www.aig.com)

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February 26, 2020

AIG Property Casualty  
PO Box 10006  
Shawnee Mission, KS 66225  
www.aig.com

James Destefano  
Senior Analyst  
T 212-458-5513  
James.Destefano@aig.com

**Via E-Mail: (Kate.Gallagher@vermont.gov)**  
Attorney General Kate Gallagher  
Chief, Civil Division  
State of Vermont  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609

Re: Insured: State of Vermont (“Vermont”)  
Claimants: Wei Wang and Anthony Sutton, individually and on behalf of a class of  
similarly situated persons  
Wei Wang, et al. v. The Vermont Regional Center, et al., Civil Action No.  
100-5-17, pending in the Superior Court for the State of Vermont (the “*Wang  
Action*”)  
Policy Nos.: 014180745; 014180746; 4203-3033; 4205-3034; 8766864; 8766868;  
5686696; 5686697  
Our Claim: 0800547450US

Dear Assistant Attorney General Gallagher:

I am in receipt of your February 11, 2020 letter in which you request a meeting to discuss AIG’s coverage position as well as recent developments in the *Wang Action*. While I share your belief that such a meeting is important, AIG respectfully requests that the State of Vermont first provide it with a letter setting forth its position on coverage for the *Wang Action*. Additionally, we ask that you also provide us with any deposition transcripts, interrogatories, or any other discovery, pleadings and/or documents from the *Wang Action* which you believe supports your coverage position. Doing so will allow us to have a productive and informed conversation. Once we receive the State of Vermont’s position and review it, I will be happy to schedule a meeting at a time and location convenient to all.

AIG continues to reserve all of its rights under the policies and at law. Additionally, despite the present disagreement, I wish to reiterate that AIG values the State of Vermont as a customer. Please do not hesitate to contact me with any questions or to discuss any aspect of this matter further.

Thank you for your cooperation in this matter.

Very truly yours,

James Destefano  
Senior Analyst

cc: Rebecca M. White (Rebecca.White@vermont.gov)  
Ruth Hooker (Ruth.Hooker@vermont.gov)  
Charles Daniels (cdaniels@rkinsurance.com)  
Jody White (jwhite@rkinsurance.com)

**From:** Gilinsky, Marshall  
**Sent:** Friday, April 17, 2020 8:06 AM  
**To:** 'royce.knight@aig.com'  
**CC:** Donovan, Thomas;Fechter, Earl  
**Subject:** FW: State of Vermont - AIG Claim #08005474450US  
**Attachments:** scan0017.pdf

**EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.**

Mr. Knight,

I understand that you are taking over the handling of the above-referenced claim. Please see the attached. We look forward to working with you on this matter.

Thanks,  
Marshall

---

**From:** "Gilinsky, Marshall"  
**Sent:** Thursday, April 16, 2020 8:38 AM  
**To:** 'James.Destefano@aig.com'  
**Cc:** Thomas.Donovan@vermont.gov; Fechter, Earl (Earl.Fechter@vermont.gov)  
**Subject:** State of Vermont - AIG Claim #08005474450US

Mr. Destefano,

Please see the attached. I look forward to working with you on this matter.

Thanks,  
Marshall



Marshall Gilinsky  
Shareholder

ANDERSON KILL, PC

[MGilinsky@andersonkill.com](mailto:MGilinsky@andersonkill.com) - [www.andersonkill.com](http://www.andersonkill.com)  
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[Biography](#)

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Marshall Gilinsky, Esq.  
MGilinsky@andersonkill.com  
617-221-5445  
212-278-1513

By E-mail

April 16, 2020

Mr. James Destefano  
Senior Analyst  
AIG Property Casualty  
PO Box 10006  
Shawnee Mission, KS 66225  
[James.Destefano@aig.com](mailto:James.Destefano@aig.com)

Re: State of Vermont – EB-5 Litigation  
Your Claim No.08005474450US

Dear Mr. Destefano:

This firm has been retained by the State of Vermont (the "State") regarding the above-referenced insurance claim (the "Claim"), arising out of underlying litigation bearing the caption *Sutton, et al. v. The Vermont Regional Center, et al.*, Docket No. 100-5-17 Lecv (the "Sutton Action"), which Claim was presented to the Insurance Company of the State of Pennsylvania ("ICSOP") and Lexington Insurance Company ("Lexington") (collectively, "AIG") for coverage under a number of liability insurance policies sold to the State since 2005 (the "Policies").

AIG was given timely notice of the Sutton Action in June 2017, when the State was served with the First Amended Complaint. (The original complaint was filed with the court in May 2017, but was never served on the defendants.) On August 21, 2017, AIG wrote to the State and acknowledged receipt of the June 2017 notice. Over two and a half years the defense of the Sutton Action was led by the Vermont Attorney General's Office. During that time, the Plaintiffs filed three more Amended Complaints, asserting some combination of up to sixteen causes of action, including various overlapping claims for securities law violations, fraud, breach of fiduciary duty, breach of contract and negligence. The State provided regular updates to AIG regarding the defense of the Sutton Action.

On April 20, 2018, the Superior Court granted the State's Motion to Dismiss all of Plaintiffs' causes of action. Plaintiffs appealed, and on October 4, 2019, the Vermont Supreme Court affirmed the dismissal of most causes of action, but reversed and remanded the dismissal of the following five causes of action: (1) Negligence against ACCD; (2) Negligent Misrepresentation against ACCD; (3) Gross Negligence against Raymond and Candido; (4) Breach of Contract against ACCD; and

New York, NY ■ Los Angeles, CA ■ Stamford, CT ■ Washington, DC ■ Newark, NJ ■ Philadelphia, PA

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(5) Breach of Implied Covenant of Good Faith and Fair Dealing against ACCD. On October 10, 2019, the State notified AIG that the Action had been remanded to the trial court.

All of the reinstated causes of action had been part of the Sutton Action either from the outset in June 2017, or since the filing of the Fourth Amended Complaint in April 2018. AIG never raised any coverage defenses with respect to the Claim or any of those causes of action during the defense of the Sutton Action in 2017, 2018 and 2019. On January 30, 2020, AIG reversed course and sent a letter to the State purportedly denying coverage for the Claim.

In correspondence dated February 11, 2020, the State requested that AIG meet to discuss the coverage for the Claim and developments in the Sutton Action. On February 26, 2020, you replied and acknowledged the importance of such a meeting, but asked that the State first provide a letter explaining why the Claim is covered under the Policies.

Please accept this letter in response to that request. The State reserves its rights to obtain coverage for the Claim under all of the Policies, and respectfully asks that AIG reconsider and reverse its attempt to deny coverage as indicated in AIG's January 30, 2020 letter. The State specifically directs AIG's attention to the coverage provided under Policy Nos. 4205-3033, 8766864 and 5686696, sold by ISCOP on an occurrence basis during policy years 2005-06, 2006-07 and 2007-08, respectively (the "ISCOP Policies"); under Policy No. 014180746 sold by Lexington on an occurrence basis during the 2015-16 policy year (the "46 Policy"); and under Policy No. 014180745 sold by Lexington on a claims-made basis during the 2016-17 policy year (the "45 Policy"). For the reasons discussed in detail below, the Claim is covered under one or more of these policies.

### Analysis

#### A. Various Policies Cover the Claim

As noted above, the State reserves its right to seek coverage under all of the Policies. In preparation for a meeting with the State, we suggest that AIG focus specifically on the coverage provided under the specific Policies discussed below.

##### 1. The ICSOP Policies

Although AIG's denial letter relegates its analysis of the ICSOP Policies to footnotes, those policies provide coverage for the Claim. Each of the ICSOP Policies provides Errors and Omissions Liability coverage for the "ultimate net loss" that the State becomes legally obligated to pay arising out of a "wrongful act" that takes place in the policy periods from 2005-2008. Each of the ICSOP Policies provides \$10,000,000

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James Destefano  
April 16, 2020  
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in coverage, excess of a retained limit of \$250,000. Each policy also provides coverage for defense costs outside of policy limits.

AIG does not dispute that the Sutton Action includes allegations of “wrongful acts” during 2005-2008 that trigger coverage under each of the ICSOP Policies. AIG’s defenses to coverage under the ICSOP Policies rest entirely on the purported applicability of Exclusions L, N and O in those policies.<sup>1</sup> As discussed in Section B below, none of those exclusions limit coverage for the Claim. Accordingly, AIG’s coverage obligation for the Claim is up to \$10,000,000 under each of the three ICSOP Policies, with defense costs covered outside of and in addition to those limits.

### 2. The 45 Policy for 2016-17

AIG acknowledges that the 45 Policy sold for 2016-17 generally applies to the Sutton Action, in that it is the claims-made policy that provided Errors and Omissions Liability coverage at the time that the Sutton Action was asserted against the State. That policy provides \$1,500,000 in coverage, excess of a retained limit of \$500,000.

AIG’s defenses to coverage under the 45 Policy rest on the purported applicability of Exclusions O, R and S, which limit coverage on the same basis as the exclusions raised with respect to the ICSOP Policies. Again, none of those exclusions limit coverage for the Claim, as discussed in Section B below. Accordingly, AIG’s coverage obligation under the 45 Policy is up to \$1,500,000.

### 3. The 46 Policy for 2015-16

AIG’s January 30, 2020 letter states that there is no coverage under the 46 Policy sold for the 2016-17 policy period because the wrongful acts alleged in the Sutton Action occurred prior to the 2016-17 policy period and based on the “Exclusion for Claims Where No Vermont Immunity Granted” added via endorsement to the 46 Policy for 2016-17. But AIG fails to analyze whether there is coverage under a 46 Policy sold for any prior policy year.

Like the 2016-17 policy, the 46 Policy sold for policy year 2015-16 was written on an occurrence basis, and AIG acknowledges that the Sutton Action includes allegations of wrongful acts during the 2015-16 policy period (see January 30, 2020 denial letter, at p. 2). Moreover, unlike the 46 Policy for 2016-17, AIG did not include an “Exclusion for Claims Where No Vermont Immunity Granted” as part of the 46 Policy in 2015-16. Accordingly, to the extent that the 45 Policy does not cover the Claim, then

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<sup>1</sup> Although the January 30, 2020 denial letter refers to Exclusions L, N and O in all of the ICSOP Policies, the exclusions are lettered M, O and P in ICSOP Policy #5686696.

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the 46 Policy for 2015-16 would – up to its policy limits of \$10,500,000, excess of the \$500,000 retention.

### B. AIG's Purported Coverage Defenses Are Invalid

As noted above, AIG's denial is based on exclusions for claims for liability against the State arising out of: (1) the willful commission of a crime or other dishonest, fraudulent, or malicious acts (the "Fraudulent Acts Exclusion"); (2) the purchase, sale, or offer of sale of any security, debt, or financial interest or instrument (the "Sale of Securities Exclusion"); and (3) representations made in relation to the price or value of a security, debt, financial interest or instrument (the "Representations of Value Exclusion"). None of these exclusions apply or restrict coverage for the Claim here.

First, the Fraudulent Acts Exclusion does not apply because the State did not engage in any "willful" commission of a crime or other dishonest, fraudulent or malicious acts. Perhaps some of the claims initially pled in the Sutton Action alleged such things against certain individual defendants (e.g., the various fraud-based claims), but such claims were dismissed by the Superior Court and that dismissal was affirmed by the Supreme Court. Moreover, even if a few allegations of dishonest acts were to remain, those allegations are directed against certain individuals – not the State. Because all of the Policies include a severability provision specifying that the insurance applies separately to each insured (e.g., the State, each government official, and each employee) as if they were the only insured (see ¶ VI.Q.), any alleged wrongful conduct by one cannot be imputed to the others. Accordingly, the Fraudulent Acts Exclusion does not limit coverage here.

Second, the Sutton Action does not seek to impose liability against the State arising out of the sale or offer of securities or debts. None of the remaining causes of action against the State are based on the alleged violation of any securities laws. Rather, as noted above, the only causes of action remaining against the State are for Negligence; Negligent Misrepresentation; Breach of Contract; and Breach of Implied Covenant of Good Faith and Fair Dealing. Supposed misrepresentations in connection with the offering or sale of securities are not elements of, or required to establish liability under, these remaining causes of action.

To effectively invoke an exclusion in an insurance policy, AIG bears the burden of proving that the exclusion completely bars any possibility of coverage for the claims at issue. See *State v. CNA Ins. Companies*, 172 Vt. 318, 329 (2001) ("the insurer bears the burden of proving that an exclusion in the policy precludes coverage"); *Am. Eagle Ins. Co. v. Rutland Area Flyers, Inc.*, 949 F. Supp. 243, 249 (D. Vt. 1996) ("in cases involving exclusions from coverage, the burden of proof is on the insurer to show that the facts of the case fall within the bounds of the exclusion" (citing *Reynolds v. John Hancock Life Ins. Co.*, 117 Vt. 541, 545-46 (1953))). Here, the remaining claims for Negligence, Breach of Contract, etc. – as opposed to the dismissed claims for various

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securities violations and fraud – are not barred by the Sale of Securities Exclusion. The remaining claims against the State are based on allegations that it did not adequately supervise, manage or oversee the Jay Peak project – not allegations regarding the sale or offer of sale of any securities. For example, the Negligence claim rests on the allegation that “Defendants negligently failed to exercise due care in its [sic] role as state overseer, administrator, and overall regulator . . . .” Fourth Amended Complaint at ¶ 393. Accordingly, it certainly is not the case that all remaining claims against the state fall entirely within the scope of the Sale of Securities Exclusion. Indeed, the opposite is true, given the dismissal of the causes of action for securities violations and fraud.

Third, there is no “price or value” associated with an EB-5 transaction, and the claims in the Sutton Action do not arise out of any supposed representation by the State as to the price or value of the EB-5 loans at issue. It costs \$500,000 to participate in the EB-5 program. The price is the price, and no representations or advice were ever given by the State about the price. Furthermore, because there is no aftermarket for EB-5 loans, they have no “value” to speak of – and no representations were ever made by the State as to their “value.” Nor are there allegations in the Sutton Action of supposed misrepresentations by the State regarding the “price or value” of any EB-5 securities or loans. Accordingly, the Representations of Value Exclusion does not limit coverage here.

### C. AIG Never Effectively Reserved Its Right To Deny Coverage

For over two and a half years, AIG failed to raise any factual basis for limiting coverage under any of the Policies. Although AIG sent a boilerplate letter, dated August 21, 2017, referencing the 45 Policy and the 46 Policy, stating that AIG was “reviewing this matter” and generically stating that “the Company reserves all rights, including the right to deny coverage for this claim under the above policy,” AIG never asked the State to enter into a bilateral reservation of rights agreement and the State never agreed to any such thing. Moreover, at no time did AIG even issue a “reservation of rights” of any kind with respect to the ICSOP Policies.

AIG failed to assert any basis for limiting or denying coverage for the Claim despite the fact that the purported factual bases for its January 2020 denial were well-known to AIG from the outset. The first four versions of the Complaints in the Sutton Action included the same sixteen causes of action. The Fourth Amended Complaint, filed April 13, 2018, dropped the claims for violation of §§ 10(B), 20(A) and Rule 10b-5, Constructive Trust, Mutual Mistake and Unjust Enrichment, and added the claims for Breach of Contract and Breach of Good Faith and Fair Dealing. During the more than two and a half years that AIG was receiving regular updates regarding the defense of these claims, AIG never sought or obtained a bilateral non-waiver agreement from the State or raised any specific defenses to coverage. The State was never on notice that AIG might raise the Fraudulent Acts Exclusion, the Sale of Securities Exclusion or the Representations of Value Exclusion as a possible defense to coverage

## Anderson Kill P.C.

James Destefano

April 16, 2020

Page 6

– even though the purported factual basis for such defenses have been well-known to AIG since the initial notice of the Claim in June 2017.

Under Vermont law, in order to avoid waiving coverage defenses, AIG was required to either: (1) obtain a bilateral reservation of rights agreement signed by the State (see *Vermont Ins. Mgmt., Inc. v. Lumbermens' Mut. Cas. Co.*, 171 Vt. 601, 603 (2000) (“[Vermont] ha[s] long recognized that a bilateral reservation of rights agreement prevents a waiver of the right to dispute coverage” (citing *Beatty v. Employers' Liability Assurance Corp.*, 106 Vt. 25, 34 (1933)); or (2) specify the factual basis for its purported coverage defenses (see *In re. Lynch*, 226 B.R. 813, 814 (Bankr. D. Vt. 1998) (citing *American Fidelity Company v. Kerr*, 138 Vt. 359, 416 A.2d 163 (1980)). Because AIG did neither of those things here, AIG cannot deny coverage now.

The Vermont Supreme Court has held that a “unilateral reservation of rights . . . is ineffective.” *Am. Fid. Co. v. Kerr*, 138 Vt. at 363. Under longstanding Vermont law, an “insurer owes certain duties to the insured,” including “deal[ing] with his individual customer with entire frankness.” *In re Lynch*, 226 B.R. at 815 (quoting *Cummings v. Connecticut General Life Ins. Co.*, 102 Vt. 351, 361 (1930)). “[I]t is counterintuitive that a liability insurer can meet its duty of entire frankness by merely omitting references to specific coverage defenses.” *Id.*

Because AIG’s 2017 unilateral, boilerplate reservation of rights was ineffective under Vermont law, AIG cannot deny coverage for the Claim only now that the State has suffered a setback in the defense of the Sutton Action. This is especially true with respect to the ICSOP Policies, as AIG never issued *any* reservation of rights at all with respect to the coverage for the Claim under those policies.

### Conclusion

The State is pleased that AIG is willing to meet and discuss this important matter, as stated in your January 30, 2020 letter. Based on recent comments by Plaintiffs’ counsel since the State’s filing of its Motion for Reconsideration of the Supreme Court’s October 2019 ruling, it appears that there might be an opportunity to favorably resolve the Sutton Action for an amount well within the limits of any one of the AIG Policies that cover the Claim. The State is hopeful that AIG will choose to honor its obligations under the Policies and Vermont law, and support the State in the defense and resolution of the Sutton Action. Should AIG fail to do so, please understand that the State will hold AIG fully accountable for its conduct, to the fullest extent of the law, and in excess of the limits of liability in the Policies.

Please do not hesitate to contact me if you have any questions.

**Anderson Kill P.C.**

James Destefano  
April 16, 2020  
Page 7

Very truly yours,



Marshall Gilinsky

cc: Thomas J. Donovan, Jr. – Attorney General  
Earl F. Fechter – Assistant Attorney General

**From:** Knight, Royce  
**Sent:** Friday, April 17, 2020 6:00 PM  
**To:** Gilinsky, Marshall  
**CC:** Donovan, Thomas;Fechter, Earl;Mehl, Michele  
**Subject:** RE: State of Vermont - AIG Claim #08005474450US

**EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.**

Marshall,

Thank you for your letter and apologies for the difficulties encountered yesterday in sending this to us. We are reviewing and will respond after thoughtful consideration.

In the meantime, if necessary please feel free to contact me or Michele Mehl, copied on this email, who is assisting me on this file. We look forward to working with you on this matter as well.

Please note that this correspondence is being sent by AIG Claims, Inc. the authorized claims administrator for the Insurance Company of the State of Pennsylvania and Lexington Insurance Company.

Regards,  
Royce

**Royce Knight**  
**AIG**

Vice President  
Complex Casualty Claims  
AIG Property Casualty

175 Water Street, 11<sup>th</sup> Floor, New York, New York 10038  
For US Mail:  
PO Box 26027, Shawnee Mission, Kansas 66225

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[royce.knight@aig.com](mailto:royce.knight@aig.com) | [www.aig.com](http://www.aig.com)

---

**From:** Gilinsky, Marshall [mailto:MGilinsky@andersonkill.com]  
**Sent:** Friday, April 17, 2020 8:06 AM  
**To:** Knight, Royce  
**Cc:** Thomas.Donovan@vermont.gov; Fechter, Earl (Earl.Fechter@vermont.gov)  
**Subject:** [EXTERNAL] FW: State of Vermont - AIG Claim #08005474450US

**This message is from an external sender; be cautious with links and attachments.**

Mr. Knight,

I understand that you are taking over the handling of the above-referenced claim. Please see the attached. We look forward to working with you on this matter.

Thanks,  
Marshall

---

**From:** "Gilinsky, Marshall"  
**Sent:** Thursday, April 16, 2020 8:38 AM  
**To:** 'James.Destefano@aig.com'



**Cc:** Thomas.Donovan@vermont.gov; Fechter, Earl (Earl.Fechter@vermont.gov)

**Subject:** State of Vermont - AIG Claim #08005474450US

Mr. Destefano,

Please see the attached. I look forward to working with you on this matter.

Thanks,  
Marshall



Marshall Gilinsky  
Shareholder

ANDERSON KILL, PC

[MGilinsky@andersonkill.com](mailto:MGilinsky@andersonkill.com) - [www.andersonkill.com](http://www.andersonkill.com)

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[Biography](#)

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**From:** Knight, Royce

**Sent:** Friday, April 17, 2020 6:35 PM

**To:** Donovan, Thomas

**CC:** Fechter, Earl;Hickey, Sean;cdaniels@rkinsurance.com;jwhite@rkinsurance.com;Bornstein, Brian;Mehl, Michele

**Subject:** State of Vermont - AIG Claim #08005474450US (Sutton, et al. v. The Vermont Regional Center, et al.)

**EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.**

Dear Mr. Donovan:

As you may be aware, I had the opportunity to discuss the insurance claim related to the *Sutton, et al. v. The Vermont Regional Center, et al.* matter with Sean Hickey and others from RK Insurance yesterday. I want to offer my apologies for communication and coordination issues that arose over the past few months, specifically due to staffing changes on our end. We should have more timely communicated the changes of filehandlers to your office.

As I confirmed in the discussion yesterday, I will be closely involved in handling this matter to its conclusion, with the assistance of Michele Mehl, who is also copied on this email. My full contact information is in my signature line below for your reference.

While we may currently have differing opinions regarding the ultimate outcome of this matter, we look forward to working with you and your attorneys to resolve this claim.

Please note that this correspondence is being sent by AIG Claims, Inc. the authorized claims administrator for the Insurance Company of the State of Pennsylvania and Lexington Insurance Company.

Regards,  
Royce

**Royce Knight**

**AIG**

Vice President

Complex Casualty Claims

AIG Property Casualty

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**From:** Patricia D. Crickard  
**Sent:** Friday, May 8, 2020 4:35 PM  
**To:** 'MGilinsky@andersonkill.com'  
**CC:** Fechter, Earl;Donovan, Thomas;Tamara Smith Holtslag;Lincoln A. Rose  
**Subject:** Sutton v. Vermont  
**Attachments:** Sutton v. Vermont - 5.8.20 Response Letter to Anderson Kill.pdf

**EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.**

Attorney Gilinsky,

Attached please find correspondence with regard to the above-referenced matter which I am sending on behalf of Attorneys Tamara Smith Holtslag and Lincoln A. Rose.

Regards,

Pat Crickard



**Pat Crickard**  
Legal Assistant  
[pcrickard@peabodyarnold.com](mailto:pcrickard@peabodyarnold.com)

Peabody & Arnold LLP  
600 Atlantic Avenue, Boston, MA 02210  
Tel: 617.261.5150 | Fax: 617-951-2125  
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Tamara Smith Holtslag  
(617) 951-2012  
tsmith@peabodyarnold.com

Lincoln A. Rose  
(617) 951-2069  
lrose@peabodyarnold.com

May 8, 2020

*Via Electronic Mail Only (MGilinsky@andersonkill.com)*

Marshall Gilinsky, Esq.  
Anderson Kill P.C.  
1251 Avenue of the Americas  
New York, New York 10020

**Re: Insured:** State of Vermont  
**Policy Nos.:** 014180745; 014180746; 4203-3033; 4205-3034; 8766864; 8766868;  
5686696; 5686697  
**Matter:** *Wei Wang, et al. v. The Vermont Regional Center, et al.*, Civil Action No.  
100-5-17, pending in the Superior Court for the State of Vermont (the  
“*Sutton Action*”)  
**Claim No:** 0800547450US

---

Dear Attorney Gilinsky:

This firm is coverage counsel to AIG and all future correspondence should be directed to our attention. We write in response to your letter of April 16, 2020 whereby you request that AIG reconsider and reverse its declination of coverage. For the following reasons, as well as those stated in our coverage correspondence of January 30, 2020, which is hereby incorporated by reference, we must decline your request.

**I. AIG DID NOT WAIVE ITS RIGHT TO ASSERT COVERAGE DEFENSES AND DENY COVERAGE**

We begin by addressing your erroneous assertion that AIG never effectively reserved its rights to deny coverage for the *Sutton Action*. It is true that “Vermont disfavors unilateral reservation of rights letters.” *City of Burlington v. Hartford Steam Boiler Inspection and Insurance Company*, 190 F. Supp.2d 663, 685 (D. Vt. 2002) *citing* *Am. Fidelity Co v. Kerr*, 138 Vt. 359, 363 (1980). However, “acquiescence by the insured may be impliedly found where...the insured does not object to the reservation of rights.” *City of Burlington*, 190 F. Supp.2d at 685 *citing* *Beatty v.*

Marshall Gilinsky, Esq.

May 8, 2020

Page 2

*Employers' Liability Assurance Corp.*, 168 A. 919, 924 (Vt. 1933). Here, as your letter points out, AIG's August 21, 2017 letter states that "AIG reserves all rights, including the right to deny coverage." The State never objected to the reservation of rights and, as a result, will be deemed to have acquiesced to it.

Additionally, your letter misinterprets Vermont decisional law on this point and relies upon heavily criticized case law. Specifically, Vermont law does not "hold that when an insurer generally reserves all applicable coverage defenses without specifying any particular defenses, it is barred from raising specific defenses later." *The Standard Fire Ins. Co., v. Donnelly*, 689 F. Supp.2d 696, 703 (D. Vt. 2010). To the contrary, Vermont decisional law "does not bar insurers from generally reserving their right to assert coverage defenses." *Id.* Furthermore, your letter repeatedly cites to *In re Lynch*, 226 B.R. 813 (Bankr. D. Vt. 1998) as support. However, *In re Lynch* has been so heavily criticized that its persuasive authority (if any) is doubtful. As one court put it "[t]he *Lynch* holding that a general reservation of rights is ineffective conflicts with the *Cummings* decision, as discussed above, and established Vermont jurisprudence ... Finally, despite the *Lynch* case being over ten years old, it has never been cited in a Vermont federal or state case." *The Standard Fire Ins. Co.*, 689 F. Supp.2d at 703-704.

With regard to the ICSOP Policies, your letter claims that AIG did not ever issue a reservation of rights. However, under Vermont law "an insurer is entitled to know that a demand is being made for coverage before treating anything that it may say as a waiver, the date from which to judge waiver must be the date of the demand for coverage." *Haley v. Continental Cas. Co.*, 749 F. Supp. 560, 566 (D. Vt. 1990). In determining whether there is a demand for coverage, courts will look to a policy's definition of loss. *See id.* Here, under Paragraph B. of Section I., the ICSOP Policies state that:

[AIG] shall have the right and duty to defend...any **claim** or **suit**...when the applicable Limits of Insurance of the **underlying insurance** listed in the Schedule of **Underlying Insurance**...or **your** self-insured retention portion of the **retained limit** have been exhausted by payment to third party of judgments [or] settlements[.]

The ICSOP policies are excess policies that also contain a retained limit of \$250,000. However, AIG has been provided with no information whatsoever to show that the conditions for coverage have been met or that the State has exhausted the **retained limit**. As such, even assuming *arguendo* that the ICSOP Policies could potentially provide coverage (which they do not), where these conditions have not been met, there can be no demand for excess coverage from the State. Without a demand for coverage, AIG cannot waive any of its rights under Vermont law. Therefore, for all these reasons, AIG is not barred from asserting coverage defenses to the *Sutton Action* under both the Lexington and the ICSOP Policies.

Marshall Gilinsky, Esq.

May 8, 2020

Page 3

## II. THE SUTTON ACTION IS PRECLUDED FROM COVERAGE BY MULTIPLE EXCLUSIONS

---

### A. *The “Fraudulent Acts Exclusion” Applies*

At its core, your letter asserts that the multiple exclusions relied upon by AIG are inapplicable to the *Sutton Action*. Beginning with the “Fraudulent Acts Exclusion,” your letter claims that the various fraud-based claims were dismissed and, thus, the exclusion is inapplicable. This assertion, however, contradicts black-letter Vermont jurisprudence as “[i]n deciding the scope of a liability policy’s coverage, a court must compare the policy language with the facts pled in the underlying suit to see if the claim falls within the express terms of the policy; the legal nomenclature the plaintiff uses to frame the suit is relatively unimportant.” *TBH By and Through Howard v. Meyer*, 168 Vt. 149, 153 (1998) quoting *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 271 (1st Cir. 1990). Therefore, it is immaterial that the causes of action relating to fraud were dismissed, as AIG is required to, and did, base its coverage determination on the totality of the facts pled in the *Sutton Action*, not the labels attached to them.

Additionally, your letter claims that the Fraudulent Acts Exclusion does not apply to the State because the allegations concerning fraud were directed against certain individuals. This is not so. The *Sutton Action* alleges that “[t]hese individuals, ***by and through the VRC***, continually made representations on behalf of the Jay Peak Projects” and that the “representations ***made by the VRC*** on behalf of the Jay Peak Projects . . . would ultimately turn out to be completely false.” (emphasis supplied with bolding and italics). These allegations fall squarely within the exclusion. Moreover, as can be seen in these allegations, the State itself, through its agency, VRC, is alleged to have committed fraudulent and/or dishonest acts. Secondly, your interpretation would result in a legal absurdity as allegations of fraud would never be excluded under a liability policy where, as here, a governmental entity can only act through authorized individuals. Therefore, the *Sutton Action*, the gravamen of which is fraud, is precluded from coverage by the Fraudulent Acts Exclusion.

### B. *The “Sale of Securities Exclusion” Also Bars Coverage*

Concerning the “Sale of Securities Exclusion,” once again your letter relies on the fact that “[n]one of the remaining causes of action against the State are based on the alleged violation of any securities law.” However, as explained above, AIG “must focus on the factual allegations in [the] complaint and not on the legal theories asserted[.]” *TBH By and Through Howard*, 168 Vt. at 153. In focusing on the factual allegations of the *Sutton Action* it must be kept in mind that the Sale of Securities Exclusion, like all of the exclusions on which AIG relies, includes the phrase “arising out of.” Like most states, Vermont interprets this phrase broadly and expansively, even as applied to exclusions. See *State Farm Mut. Auto. Ins. Co. v. Roberts*, 166 Vt. 452, 460 (1997) (“courts have acknowledged the breadth and lack of ambiguity in the ‘arising out of’ exclusionary language.”); *Vermont Pure Holdings, Ltd. v. Descartes Systems Group, Inc.*, 140 F. Supp.2d 331,

Marshall Gilinsky, Esq.

May 8, 2020

Page 4

334 (D. Vt. 2001) (“The Second Circuit has recently analyzed the terms ‘arising out of’ and ‘related to’ as those phrases appeared in an insurance policy, and...it noted that...the phrase ‘arising out of’ is usually interpreted as indicating a causal connection[.]”)

Here, your letter asserts that the Sale of Securities Exclusion does not apply because the *Sutton Action* “does not seek to impose liability against the State arising out of the sale or offer of securities or debts.” However, the exclusion is not limited to just securities or debts but also includes any “financial interest or instrument.” The *Sutton Action* clearly alleges that the “VRC Team actively marketed and solicited investors for the Jay Peak Projects.” Additionally, the *Sutton Action* alleges that the investors “reasonably relied” on the representations of the VRC and “left their home countries, liquidated their assets, displaced their families, and turned over their life savings to the fraud at the Jay Peak Projects.” Coupling these allegations along with the breadth of the exclusion, the *Sutton Action* undoubtedly arises out of the sale of a financial interest or instrument where it alleges that the VRC’s representations caused the plaintiffs to invest in the Jay Peak Projects which turned out to be a fraud. Thus, the *Sutton Action* is also precluded from coverage by the Sale of Securities Exclusion.

### C. *The “Representations of Value Exclusion” Further Precludes Coverage*

Lastly, your letter asserts that the “Representations of Value Exclusion” does not apply because the price of the EB-5 program is fixed and “there [are no] allegations in the *Sutton Action* of supposed misrepresentations by the State regarding the ‘price or value’ of any EB-5 securities or loans. To the contrary, the *Sutton Action* alleges that the VRC made several representations including “the added protection of state approval and oversight of VRC projects *to assure investors were making a sound investment*” and “the added credibility of a state-run agency *to assure investors were making a sound investment.*” Furthermore, the exclusion applies to any financial interest or instrument and also contains the broad “arising out of” phraseology. As such, the *Sutton Action*’s claims clearly arise out of the representations of the State, via the VRC, that the Jay Peaks Projects were a sound or valuable financial interest or instrument in which the plaintiffs were allegedly duped to invest. Thus, the Representations of Value Exclusion would additionally preclude coverage for the *Sutton Action*.

### III. CONCLUSION

Therefore, for all the foregoing reasons, and those stated previously, AIG must maintain its January 30, 2020 declination of coverage. In following up on the State’s previous request to meet to discuss the developments in the *Sutton Action* and AIG’s coverage position, we would be happy to do so. Given the unprecedented times we find ourselves in, however, such a meeting may need to be virtual or at a time when the states lift their restrictions on “non-essential” business travel. At your earliest convenience, please let us know your preference and availability. We look forward to hearing from you.

Marshall Gilinsky, Esq.  
May 8, 2020  
Page 5

In the interim, AIG continues to reserve all its rights, under the Policies, at law and in equity with respect to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "T. Smith", with a long, sweeping underline.

Tamara Smith Holtslag

A handwritten signature in blue ink, appearing to read "L. A. Rose", with a long, sweeping underline.

Lincoln A. Rose

cc: Earl F. Fechter (Earl.Fechter@vermont.gov)  
Thomas J. Donovan (Thomas.Donovan@vermont.gov)

1746394\_3  
15951-205646



**From:** Gilinsky, Marshall  
**Sent:** Thursday, May 21, 2020 4:12 PM  
**To:** Tamara Smith Holtslag  
**CC:** Fechter, Earl;Lincoln A. Rose  
**Subject:** RE: Sutton v. Vermont

**EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.**

Hi Tamara,

Attorney General Donovan would like to arrange a meeting with AIG as noted in the prior correspondence regarding this important claim. He and I and others from his office would like to set a date for a videoconference meeting during the week of June 8 – any day except the 9<sup>th</sup>. Please let me know what date works for AIG that week and we'll sort out the technical details from there.

It's good to hear from you, and I hope that you and yours are safe and sound.

Thanks,

Marshall



Marshall Gilinsky  
Shareholder

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[MGilinsky@andersonkill.com](mailto:MGilinsky@andersonkill.com) - [www.andersonkill.com](http://www.andersonkill.com)  
(617) 221-5445  
(212) 278-1513  
[Biography](#)

---

**From:** Patricia D. Crickard [mailto:[pcrickard@peabodyarnold.com](mailto:pcrickard@peabodyarnold.com)]  
**Sent:** Friday, May 08, 2020 4:35 PM  
**To:** Gilinsky, Marshall  
**Cc:** 'Earl.Fechter@vermont.gov'; 'Thomas.Donovan@vermont.gov'; Tamara Smith Holtslag; Lincoln A. Rose  
**Subject:** Sutton v. Vermont

**EXTERNAL SENDER**

---

Attorney Gilinsky,

Attached please find correspondence with regard to the above-referenced matter which I am sending on behalf of Attorneys Tamara Smith Holtslag and Lincoln A. Rose.

Regards,

Pat Crickard



PEABODY  
&ARNOLD

**Pat Crickard**

Legal Assistant

[pcrickard@peabodyarnold.com](mailto:pcrickard@peabodyarnold.com)

Peabody & Arnold LLP

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**From:** Gilinsky, Marshall  
**Sent:** Wednesday, May 27, 2020 1:21 PM  
**To:** 'Tamara Smith Holtslag'  
**CC:** Fechter, Earl; Lincoln A. Rose'  
**Subject:** RE: Sutton v. Vermont

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Hi Tamara,  
Please get back to me about this meeting.  
Thanks,  
Marshall

---

**From:** Gilinsky, Marshall  
**Sent:** Thursday, May 21, 2020 4:12 PM  
**To:** Tamara Smith Holtslag  
**Cc:** 'Earl.Fechter@vermont.gov'; Lincoln A. Rose  
**Subject:** RE: Sutton v. Vermont

Hi Tamara,  
Attorney General Donovan would like to arrange a meeting with AIG as noted in the prior correspondence regarding this important claim. He and I and others from his office would like to set a date for a videoconference meeting during the week of June 8 – any day except the 9<sup>th</sup>. Please let me know what date works for AIG that week and we'll sort out the technical details from there.  
It's good to hear from you, and I hope that you and yours are safe and sound.  
Thanks,  
Marshall



Marshall Gilinsky  
Shareholder

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[MGilinsky@andersonkill.com](mailto:MGilinsky@andersonkill.com) - [www.andersonkill.com](http://www.andersonkill.com)  
(617) 221-5445  
(212) 278-1513  
[Biography](#)

---

**From:** Patricia D. Crickard [<mailto:pcrickard@peabodyarnold.com>]  
**Sent:** Friday, May 08, 2020 4:35 PM  
**To:** Gilinsky, Marshall  
**Cc:** 'Earl.Fechter@vermont.gov'; 'Thomas.Donovan@vermont.gov'; Tamara Smith Holtslag; Lincoln A. Rose  
**Subject:** Sutton v. Vermont

**EXTERNAL SENDER**

---

Attorney Gilinsky,

Attached please find correspondence with regard to the above-referenced matter which I am sending on behalf of Attorneys Tamara Smith Holtslag and Lincoln A. Rose.

Regards,

Pat Crickard



**Pat Crickard**

Legal Assistant

[pcrickard@peabodyarnold.com](mailto:pcrickard@peabodyarnold.com)

Peabody & Arnold LLP

600 Atlantic Avenue, Boston, MA 02210

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**From:** Tamara Smith Holtslag  
**Sent:** Wednesday, June 17, 2020 8:02 AM  
**To:** Gilinsky, Marshall  
**CC:** Lincoln A. Rose;Michele.Mehl@AIG.com;Donovan, Thomas;Gallagher, Kate;Griffin, Bill;Fechter, Earl  
**Subject:** Re: Vermont AG meeting Zoom Information

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Thank you, Marshall. We look forward to our "meeting" as well. I am sure we will have questions at various points.

Sent from my iPhone

On Jun 17, 2020, at 8:00 AM, Gilinsky, Marshall <MGilinsky@andersonkill.com> wrote:

**CAUTION:** This email originated from outside of the Firm. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Michelle, Tamara and Lincoln,

On behalf of the State of Vermont, I wanted to let you know that we are looking forward to meeting with you all today. Here's an outline of what we plan to cover:

1. Introduction and Overview – Attorney General Donovan
2. Summary of Insurance Coverage – Marshall Gilinsky, Anderson Kill
3. Detailed Overview of *Sutton* Litigation – Bill Griffin, Special Assistant Attorney General
4. Summary of Exposure Analysis and Discussion of Settlement Opportunity – Earl Fechter, Assistant Attorney General
5. Questions / Discussion on Collaboration

Please let us know if there are specific items that you want to be sure we cover.

Thanks,  
Marshall

---

**From:** Pramanand, Robin  
**Sent:** Tuesday, June 16, 2020 5:35 PM  
**To:** Gilinsky, Marshall; 'Thomas.Donovan@vermont.gov'; 'Kate.Gallagher@vermont.gov'; 'bill.griffin@vermont.gov'; 'Earl.Fechter@vermont.gov'; 'TSmith@peabodyarnold.com'; 'lrose@peabodyarnold.com'; 'Michele.Mehl@AIG.com'  
**Subject:** Vermont AG meeting Zoom Information

Topic: Vermont AG meeting  
Time: Jun 17, 2020 08:30 AM Eastern Time (US and Canada)

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Password: 841440

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**From:** Gilinsky, Marshall  
**Sent:** Friday, June 19, 2020 11:50 AM  
**To:** 'Tamara Smith Holtslag'  
**CC:** Lincoln A. Rose  
**Subject:** RE: Vermont [Let me know about the agreement and what time is good for Monday afternoon.]

**EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.**

Terrific. Let me know about the agreement and what time is good for Monday afternoon.  
Thanks,  
Marshall

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**From:** Tamara Smith Holtslag [mailto:TSmith@peabodyarnold.com]  
**Sent:** Friday, June 19, 2020 8:09 AM  
**To:** Gilinsky, Marshall  
**Cc:** Lincoln A. Rose  
**Subject:** RE: Vermont

**EXTERNAL SENDER**

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Marshall:

Good morning. I am tied up all morning Monday, but we could talk in the afternoon. We will look at the proposed agreement and get back to you as soon as we can.

Kind regards,  
Tamara



**Tamara Smith Holtslag**  
Partner  
tsmith@peabodyarnold.com

Peabody & Arnold LLP  
600 Atlantic Avenue, Boston, MA 02210  
Tel: 617.951.2012 | Fax: 617.235.3509  
[peabodyarnold.com](http://peabodyarnold.com)

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**From:** Gilinsky, Marshall <[MGilinsky@andersonkill.com](mailto:MGilinsky@andersonkill.com)>  
**Sent:** Friday, June 19, 2020 6:48 AM  
**To:** Tamara Smith Holtslag <[TSmith@peabodyarnold.com](mailto:TSmith@peabodyarnold.com)>  
**Cc:** Lincoln A. Rose <[lrose@peabodyarnold.com](mailto:lrose@peabodyarnold.com)>  
**Subject:** Vermont

**CAUTION:** This email originated from outside of the Firm. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Tamara,

Is there a time Monday that's good for you to discuss the coverage issues mentioned on our call this week? I'm open all day.

We are pulling together the documents you requested, and would like to have a common interest agreement in place to protect applicable privileges. Please let me know if the attached draft looks ok to you.

Thanks,

Marshall



Marshall Gilinsky  
Shareholder

ANDERSON KILL, PC

[MGilinsky@andersonkill.com](mailto:MGilinsky@andersonkill.com) - [www.andersonkill.com](http://www.andersonkill.com)

(617) 221-5445

(212) 278-1513

[Biography](#)

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## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the “Agreement”) is entered into by and among the State of Vermont on its own behalf and all those insured under its policies (“Vermont”) on the one hand, and Lexington Insurance Company (“Lexington”), the Insurance Company of the State of Pennsylvania (“ICSOP”), AIG Claims, Inc. (“AIG Claims”) and all AIG member companies (collectively, and as further defined below, “AIG Insurers”) that issued policies of insurance to Vermont that could be implicated by the underlying EB-5 Claims, including but not limited to, those certain plaintiffs represented by the Barr Law Group (defined below as the “EB-5 Claims”) brought against Vermont and its agencies and departments and its current and former officials and employees, as well as EB-5 claims that have yet to be brought and are contemplated by the “Final Bar Order” as defined and contemplated in the Settlement Agreement and Release entered into by Vermont on August 10, 2023 to resolve the EB-5 Claims, and the “Coverage Settlement Term Sheet” executed by counsel for Vermont and the AIG Insurers on August 1, 2023, hereby incorporated by reference. Vermont and the AIG Insurers may be referred to herein individually as a “Party” and together as the “Parties.”

**WHEREAS**, ICSOP issued the following policies to Vermont: Policy No. 4205-3033 with a Policy Period of July 1, 2005 to July 1, 2006; Policy No. 4205-3034 with a Policy Period of July 1, 2005 to July 1, 2006; Policy No. 8766864 with a Policy Period of July 1, 2006 to July 1, 2007; Policy No. 8766868 with a Policy Period of July 1, 2006 to July 1, 2007; Policy No. 5686696 with a Policy Period of July 1, 2007 to July 1, 2008; and Policy No. 5686697 with a Policy Period of July 1, 2007 to July 1, 2008 (the “ICSOP Policies”);

**WHEREAS**, Lexington issued the following policies to Vermont: Policy No. 001172930 with a policy period of July 1, 2008 to July 1, 2009; Policy No. 013136218 with a Policy Period

of July 1, 2009 to July 1, 2010; Policy No. 013136451 with a Policy Period of July 1, 2010 to July 1, 2011; Policy No. 014180745 for the following Policy Periods: July 1, 2013 to July 1, 2014; July 1, 2014 to July 1, 2015; July 1, 2015 to July 1, 2016; July 1, 2016 to July 1, 2017; and July 1, 2017 to July 1, 2018; and Policy No. 014180746 for the following Policy Periods: July 1, 2013 to July 1, 2014; July 1, 2014 to July 1, 2015; July 1, 2015 to July 1, 2016; July 1, 2016 to July 1, 2017; and July 1, 2017 to July 1, 2018 (the “Lexington Policies”);

**WHEREAS**, the Securities and Exchange Commission filed a civil enforcement action styled *SEC v. Jay Peak, et al.*, Case No. 16-cv-21301-DPG (S.D. Fla.) (Gayles, J.) in which the Receiver was appointed (the “SEC Action”). The Jay Peak Receivership currently includes the investors in both the Jay Peak entities and the Burke Mountain Hotel;

**WHEREAS**, Vermont and its current and former officials and employees have been named as defendants in the following lawsuits:

(a) *Antony Sutton, et al. v. State of Vermont Agency of Commerce and Community Development, James Candido and Brent Raymond*, Civil Action No. 100-5-17 Lecv, Lamoille Superior Court for the State of Vermont (the “Sutton Action”);

(b) *Fatime Abdel-Fakhara, et al. v. The State of Vermont, et al.*, Civil Action No. 5:21-cv-00198-gwc, U.S. District Court for the District of Vermont (the “Abdel-Fakhara Action”)

(c) *Qianli Ao v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03493, Caledonia Superior Court for the State of Vermont; *Jacqeline Achuelos Cabrera v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03801, Orleans Superior Court for the State of Vermont; *Reynaldo Da Costa v. State of Vermont Agency of Commerce and Community Development and Brent Raymond*, Civil Action No. 22-CV-03496, Caledonia Superior Court for

the State of Vermont; *Chunxia Wang v. State of Vermont Agency of Commerce and Community Development and Brent Raymond*, Civil Action No. 22-CV-03495, Caledonia Superior Court for the State of Vermont; *Chi Ho Eric Cheung v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03370, Orleans Superior Court for the State of Vermont; *Yancheng Du v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03800, Caledonia Superior Court for the State of Vermont; *Cora Elena Garcia Duarte v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03795, Lamoille Superior Court for the State of Vermont; *Hugh Frazier v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03284, Orleans Superior Court for the State of Vermont; *Hongjun Wang v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03798, Caledonia Superior Court for the State of Vermont; *Juan Hinestroza v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03296, Lamoille Superior Court for the State of Vermont; *Jingbo Zhang v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03495, Lamoille Superior Court for the State of Vermont; *Martha Laura Flores Longoria v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03295, Caledonia Superior Court for the State of Vermont; *Ruiping Qin v. State of Vermont Agency of Commerce and Community Development and Brent Raymond*, Civil Action No. 22-CV-03497, Caledonia Superior Court for the State of Vermont; *Pun Sarasas v. State of Vermont Agency of Commerce and Community Development and Brent Raymond*, Civil Action No. 22-CV-03494, Caledonia Superior Court for the State of Vermont; *Alejandra Araceli Del*

*Castillo v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03202, Caledonia Superior Court for the State of Vermont; *Charbel David Mendoza Abs v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03265, Caledonia Superior Court for the State of Vermont; *Yixin Zhang v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03266, Caledonia Superior Court for the State of Vermont; *Alexandre Silveira Daccache v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03285, Orleans Superior Court for the State of Vermont; *Douglas Grant Frazer v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03371, Orleans Superior Court for the State of Vermont; *Jose Luis Gonzalez Hernandez v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03368, Orleans Superior Court for the State of Vermont; *Artem Egiazaryan v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03264, Caledonia Superior Court for the State of Vermont; *Osama Makram Wahby Guirguis v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-03369, Caledonia Superior Court for the State of Vermont; *Vidar Antonsen v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-04087, Orleans Superior Court for the State of Vermont; *Jihong Park v. State of Vermont Agency of Commerce and Community Development and Brent Raymond*, Civil Action No. 22-CV-04086, Caledonia Superior Court for the State of Vermont; *Tianyun Wang v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Acton No. 22-CV-04564, Caledonia Superior Court for the State of Vermont; *Jing Zhao v. State of Vermont*

*Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-04551, Orleans Superior Court for the State of Vermont; *Tianmu Wang v. State of Vermont Agency of Commerce and Community Development and James Candido*, Civil Action No. 22-CV-04563, Orleans Superior Court for the State of Vermont; *Paul Tirado Rubio v. State of Vermont Agency of Commerce and Community Development*, Civil Action No. 22-CV-04562, Orleans Superior Court for the State of Vermont; and *Paulina Fuentes Moad v. State of Vermont Agency of Commerce and Community Development and Brent Raymond*, Civil Action No. 22-CV-04548, pending in the Caledonia Superior Court for the State of Vermont (collectively, the “ACCD Actions”); and

(d) *Justin Singh, Tongyi Wang, and Pun Sarasas, individually, and on behalf of a class of similarly situated persons v. State of Vermont, et al.*, Civil Action No. 23-CV-02298, Lamoille Unit of the Superior Court for the State of Vermont (the “Singh Action”);

**WHEREAS**, it is anticipated that other claimants or suits will subsequently be brought (the “Potential Claims”) in the absence of the Final Bar Order contemplated in the Settlement Agreement and Release entered into by Vermont on August 10, 2023 to resolve the EB-5 Claims, defined below.

**WHEREAS**, herein after the Sutton Action, the Abdel-Fakhara Action, the ACCD Actions, the Singh Action and the Potential Claims shall be referred to herein as the “EB-5 Claims”;

**WHEREAS**, AIG Insurers had denied coverage under the Lexington Policies and the ICSOP Policies for the EB-5 Claims;

**WHEREAS**, Vermont had requested that AIG Insurers provide it with prospective indemnification coverage for the EB-5 Claims under the Lexington Policies and the ICSOP policies, but AIG Insurers have maintained their denial of coverage on various grounds;

**WHEREAS**, on or about June 30, 2023, Vermont reached agreement with the Barr Law Group, its clients, and the Receiver in the SEC Action to settle the EB-5 Claims for a sum of \$16.5 million, contingent on the Final Bar Order and other terms and approvals set out in the Settlement Agreement and Release entered into by Vermont on August 10, 2023 to resolve the EB-5 Claims. Prior to that, on or about June 22, 2023, Vermont reached agreement with eight (8) other plaintiffs represented by the Barr Law Group that had begun trial in the Sutton Action on June 19, 2023, as part of the EB-5 Claims for \$750,000; and those plaintiffs have previously agreed to deliver releases to Vermont, absent which they shall be included in the Final Bar Order. The total amount of these two settlements is seventeen million two hundred and fifty dollars and no cents (\$17,250,000.00) (the “EB-5 Settlement”);

**WHEREAS**, the Parties dispute whether, and to what extent, the Lexington Policies and the ICSOP Policies afford indemnity coverage for the EB-5 Claims and the EB-5 Settlement (the “Coverage Dispute”); and

**WHEREAS**, Vermont and AIG Insurers wish now to resolve any and all disputes between them regarding the EB-5 Claims, the Coverage Dispute, the Lexington Policies and the ICSOP Policies finally and forever between them, by entering into this Agreement.

**NOW, THEREFORE**, in consideration of the mutual promises, releases and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Recitals.** The foregoing Recitals are true and correct and constitute a material part of this Agreement.

2. **Additional Definition.** “The AIG Insurers” shall mean Lexington, ICSOP, AIG Claims and their respective successors and assigns, and their predecessors in interest, successors in interest, and their present and former parent corporations, subsidiaries, corporate affiliates, officers, directors, agents, attorneys, employees, and reinsurers (but only in their capacity as reinsurers of the Lexington Policies and the ICSOP Policies).

3. **Settlement Amount and Payment.** In consideration of a full resolution of any and all disputes between Vermont and the AIG Insurers regarding the EB-5 Claims, the Coverage Dispute, and claims for coverage under the Lexington Policies and the ICSOP Policies for the EB-5 Claims and/or EB-5 Settlement, the AIG Insurers shall pay Vermont eight hundred and fifty thousand dollars (\$850,000.00) on or before July 1, 2024, with such sum constituting the AIG Insurers’ full and complete contribution to the EB-5 Settlement (the “AIG Insurer’s Settlement Payment”).

4. **Releases.** Upon issuance of the Final Bar Order, which shall include the AIG Insurers:

a. Vermont hereby releases and forever discharges the AIG Insurers of and from any obligations, duties, responsibilities, claims, causes of action, demands, rights, debts, costs, expenses, liabilities, or damages: under the Lexington Policies and the ICSOP Policies (a) arising from or related to the EB-5 Claims, the EB-5 Settlement, or the Coverage Dispute; or (b) the AIG Insurers’ handling of the EB-5 Claims. The foregoing release includes any claims arising from or related to the EB-5 Claims, the EB-5

Settlement, or the Coverage Dispute arising out of any alleged bad faith, violation of any law, statute, or regulation, including Unfair Claims Practices Acts or other similar statutes.

**b.** The AIG Insurers hereby release and forever discharge Vermont and their respective directors, officers, employees, agents, counselors, attorneys, successors, heirs and assigns of and from any obligations, duties, responsibilities, claims, liabilities, or damages: under the Lexington Policies and the ICSOP Policies (a) arising from or related to the EB-5 Claims, the EB-5 Settlement, the Coverage Dispute; or (b) Vermont's handling of the EB-5 Claims. The foregoing release includes any claims arising from or related to the EB-5 Claims, the EB-5 Settlement, or the Coverage Dispute for deductibles, retentions, "reverse bad faith," rescission, or violation of any law, statute, or regulation.

**5. Withdrawal of Arbitration Demand.** Additionally, in consideration of the Settlement Payment specified herein, and within five (5) business days from the executions of this Agreement by the Parties, counsel for Vermont will withdraw Vermont's demand for arbitration, which was set forth in its May 8, 2023 letter to counsel for the AIG Insurers.

**6. Disclaimer of Liability.** The Parties agree and acknowledge that they accept the payment terms specified in Paragraph 3; that neither payment of the sums by the AIG Insurers, nor any statement made or event occurring during negotiations for this Agreement, or any statement or communication made in connection therewith by the AIG Insurers or their adjusters, claim administrators, attorneys, or representatives, shall be considered an admission of liability; and that no past or present wrongdoing on the part of the AIG Insurers shall be implied therefrom.

**7. Entire Agreement.** The Parties agree and acknowledge that this Agreement is in settlement of their Coverage Dispute. The Parties hereto intend to have this Agreement be entirely consistent with the Coverage Term Sheet executed by counsel for the Parties on August 1, 2023;



and said Coverage Term Sheet is a material part of, and incorporated into, this Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes any prior oral agreements or representations by any Party or their counsel.

**8. Execution Authorized.** The undersigned each represent that it has been duly authorized to execute this Agreement by the respective Party they represent, and that when so executed this Agreement is a valid and legally binding obligation on the Parties, and enforceable against each of them in accordance with its terms.

**9. Cooperation.** The Parties shall cooperate in good faith to execute and deliver additional documents that may be required to effectuate the terms of this Agreement, including, without limitation, any requested tax forms necessary to the Settlement Payment. The Parties further agree that the AIG Insurers shall be included in the Final Bar Order for the EB-5 Claims and/or EB-5 Settlement and that Vermont will cooperate with the AIG Insurers to ensure that the AIG Insurers are included in the Final Bar Order.

**10. Confidentiality.** The Parties intend for this Agreement to comply with Vermont's Public Records Act, 1 V.S.A. §§ 315-320. To the extent permissible, the Parties will keep the terms of this Agreement confidential to the extent they are not subject to the Vermont Public Records Act.

**11. Counterparts.** This Agreement may be executed by facsimiles or scanned versions of signatures transmitted via electronic mail, and in one or more counterparts, each of which shall be an original, but which together shall constitute one Agreement that is binding on the Parties for all purposes.

**12. Severability.** If any of the provisions of this Agreement should be deemed invalid or unenforceable by any court of competent jurisdiction, such invalidity or unenforceability

shall not affect the whole Agreement, but the Agreement will be construed as if not containing the particular provision held to be invalid or unenforceable, and the obligations of the Parties will be construed and enforced accordingly. Notwithstanding the foregoing, the payment and release provisions of this Agreement are recognized to be indispensable and not severable, and if deemed invalid or unenforceable by any court of competent jurisdiction, then the whole Agreement shall be null and void and unenforceable against the Parties.

**13. Amendment, Change, or Modification.** No amendment, change, or modification of this Agreement shall be valid unless in writing and signed by all Parties.

**14. No Custom, Practice or Course of Dealing.** The terms of this Agreement have been specifically negotiated and drafted with respect to the specific matters dealt with herein, and that in doing so each Party has made compromises from the positions which it believes itself to be factually and legally entitled to assert, and no custom, practice or course of dealing may be held against it in the future by reason of its acceptance of this Agreement or any of its terms.

**15. Represented by Counsel.** Each Party has been represented by, and has consulted with, counsel of its choice regarding the provisions, obligations, rights, risks and legal effects of this Agreement.

**16. Non-Assignment.** Each Party represents and warrants that it is the holder of those claims it is releasing and that it has not transferred or assigned any rights it has, had or may have had that are within the scope of the release provisions of this Agreement.

**17. Governing Law.** The Parties agree that the validity, interpretation, and performance of this Agreement shall be governed by, and construed in accordance with, the laws of the State of Vermont without reference to its conflict of law provisions.

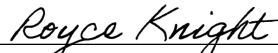
**18. Arbitration Clause.** Any dispute concerning the enforcement of this Agreement or the obligations hereunder the Lexington Policies and/or the ICSOP policies shall be resolved in accordance with the arbitration provision contained in Lexington Policy No. 014180745 with the policy period of July 1, 2016 to July 1, 2017.

**19. Attorneys' Fees.** The Parties to the Agreement shall bear their own attorneys' fees and costs.

**20. Joint Drafting.** The principle of *contra proferentem* shall not apply to this Agreement. Rather, this Agreement shall be construed as if it had been drafted by all Parties to the Agreement.


Date: 9/19/2023

**AIG CLAIMS, INC., AS CLAIMS  
ADMINISTRATOR FOR  
LEXINGTON INSURANCE COMPANY AND  
THE INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA**

By:   
Name: Royce Knight  
Title: Vice President

Date: 9/7/2023

**THE STATE OF VERMONT on behalf of  
itself and all Insureds**

By:   
Name: Benjamin D. Battles  
Title: Assistant Attorney General