STATE OF VERMONT

SUPERIOR COURT
Lamoille Unit

CIVIL DIVISION
Docket No. 100-5-17 Lecv

ANTONY SUTTON, WEI WANG, XIAOFENG FENG, GUANGYI XIONG and ROBERT CONNORS, individually, and on behalf of a class of similarly situated persons,
Plaintiffs,

v.

THE VERMONT REGIONAL CENTER, STATE OF VERMONT AGENCY OF COMMERCE AND COMMUNITY DEVELOPMENT, STATE OF VERMONT DEPARTMENT OF FINANCIAL REGULATION, JAMES CANDIDO, WILLIAM CARRIGAN, SUSAN DONEGAN, EUGENE FULLAM, JOAN GOLDSTEIN, JOHN W. KESSLER, LAWRENCE MILLER, PATRICIA MOULTON, MICHAEL PIECIAK, and BRENT RAYMOND,
Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

STATE OF VERMONT

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Introduction

Plaintiffs in this action are five investors who, over a period of more than seven years, invested in two VRC projects[1] that are unrelated except for the principals who ran them: Bill Stenger and Ariel Quiros. Stenger and Quiros are alleged, in state and federal enforcement actions brought in April 2016, to have engaged in a massive, secret, "Ponzi-like" scheme to misuse and misappropriate millions of dollars in foreign investor funds, including the funds of Plaintiffs.

Defendants are the Vermont Agency of Commerce and Community Development ("ACCD"), the Vermont Department of Financial Regulation ("DFR") and the Vermont Regional Center ("VRC"),[2] along with ten individual current and former state employees who are alleged to constitute the "VRC Team."

Plaintiffs are also putative representatives of a class of other investors from all of the Stenger/Quiros projects.[3] Their claims boil down to the assertion that various state entities and employees made misleading statements about the Stenger/Quiros projects, and did not adequately perform discretionary functions or timely discover and pursue Stenger and Quiros's alleged frauds.

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[1] Although Plaintiff Sutton alleges in this matter that he invested in Phase II (*see* 3d Am. Compl. ¶ 5), he has alleged in federal court that he invested in Phase I. First Amended Verified Complaint, ECF Doc. 11, *Sutton v. Saint-Sauveur Valley Resorts, Inc.*, Docket No. 2:17-cv-61 (D. Vt.) (filed May 31, 2017) at ¶ 1. The State believes the latter allegation to be correct.

[2] The VRC is a program within ACCD and not an independent legal entity with the capacity to be sued. *See generally* 10 V.S.A. § 20; 3d Am. Compl. ¶ 28. Thus, unlike DFR and ACCD, the VRC is not a state agency, department, commission, or board. *Cf*. 3 V.S.A. § 212(3) (creating DFR); *id*. § 2402 (creating ACCD). Accordingly, all claims against the VRC must be dismissed. However, if the claims are not dismissed on that basis, they should be dismissed for all the same reasons as the claims against DFR and ACCD.

[3] Defendants anticipate opposing Plaintiffs' Rule 23 motion for class certification, should one be filed, as the putative class is improper for several reasons, including most notably that the putative class includes plaintiffs who are not similarly situated.

All of Plaintiffs' claims asserted in this action are barred by sovereign and official immunity. Of the ten individual Defendants, six are absolutely immune from suit. The remaining four are entitled to the protections provided to state employees by the qualified immunity doctrine. ACCD and DFR are likewise immune from suit because the State has not waived its sovereign immunity for the claims Plaintiffs assert.

In addition, dismissal is warranted because Plaintiffs' Complaint fails to satisfy Vermont's pleading standards. Although the Complaint includes multiple fraud claims, nowhere does it allege that any Defendant did or said anything specific to any particular Plaintiff at any particular time. Instead, the Complaint attempts to rely on the sort of vague, generalized allegations that courts have uniformly found insufficient under Rule 9(b) and securities law. Indeed, despite all its length, the Complaint also fails to meet even the minimal standards of Rule 8, because it fails to meaningfully put any individual Defendant on notice of the factual basis for alleging liability as to any particular individual. Moreover, even if Plaintiffs' allegations were adequate to meet Vermont's pleading standards, they are not sufficient to state any viable causes of action against Defendants under Vermont law.

Finally, the Complaint is expressly barred by the federal court order appointing the Receiver in the SEC's enforcement case against Quiros and Stenger. That order gives the Receiver "exclusive" authority to pursue claims for the benefit of investors.

For all these reasons, the Court should dismiss Plaintiffs' Complaint in its entirety.

Factual and Procedural Background

The EB-5 Program

The EB-5 Immigrant Investor Program ("EB-5 Program"), was established by the federal Immigration Act on November 29, 1990.[4] *See* 3d Am. Compl. ¶¶ 23, 25. At its core, the EB-5 Program allows foreign nationals to invest money to create or save jobs and promote economic development in a rural or economically disadvantaged area in return for a federal immigration benefit – a "green" card. *See generally* About the EB-5 Visa Classification, U.S. Citizenship & Immigration Servs. ("USCIS"), *available at* https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa-classification. A fundamental requirement of the EB-5 Program is that the foreign investor must place the requisite capital "at risk" – i.e., there can be no guarantee or promise of investment principal return as a matter of federal law. 8 C.F.R. § 204.6(j)(2). In other words, there is no certainty that an EB-5 investor will ever see any return on his or her investment. Moreover, no investor is guaranteed to receive a green card through the program; each individual is responsible for diligently pursuing his or her own application to USCIS, which may be denied for reasons both within and beyond the investor's control. *See* 8 C.F.R. § 204.6(j), (k).

In 1993[5] and 2002,[6] federal amendments to the program created the Immigrant Investor Pilot Program and eliminated the prior requirement that the investor "establish" the enterprise they invested in. The Pilot Program allows EB-5 investments in any project affiliated with a public or private "regional center" rather than only in an entity that would employ the investor.

[4] Pub. L. 101-649, § 21 (The Immigration Act of 1990).

[5] Pub. L. 102-395, § 610 (The Judiciary Appropriations Act).

[6] Pub. L. 107-273, § 11036 (The 21st Century Dept. of Justice Appropriations Authorization Act).

The regional-center avenue is only available, however, in a Targeted Employment Area ("TEA"), designated by a State, in which unemployment is at least 150% of the national average. 8 C.F.R. § 204.6(e). All of Vermont except for the Burlington Metropolitan Statistical Area is a TEA. Investing in a TEA allows for an EB-5 minimum investment of $500,000 rather than the otherwise-applicable minimum of $1 million. *Id*. § 204.6(f). Despite these expansions, the EB-5 program nationally remained quite small until the Recession of 2008. The contraction in domestic capital availability in the Recession greatly increased interest in EB-5 investments as a source of funding.

Prior to 2013, the precise nature and legal status of EB-5 investments was not well defined. In 2013, the SEC brought its first two enforcement actions against EB-5 project principals, making clear that EB-5 projects would be subject to SEC scrutiny under the Securities Act of 1933. In that year, the SEC also issued for the first time a bulletin outlining the intersection of securities law and the EB-5 program.[7]

Since 2013, federal enforcement efforts have been more keenly focused on the EB-5 program's securities-law aspect, and have brought more securities-based enforcement actions against EB-5 developers. The federal case against the Jay Peak principals, of course, is one example. *See SEC v. Ariel Quiros, et al.*, Docket No. 16-cv-21301 (S.D. Fla.) (filed April 12, 2016). Further, as far as Defendants' research has discovered, Vermont is the only state in which the state securities regulator has brought an EB-5 enforcement action. *See State v. Ariel Quiros, William Stenger, et al.*, No. 217-4-16 Wncv (filed April 14, 2016).

[7] *See* https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_immigranthtm.html (October 1, 2013 investor bulletin); *see also* https://www.sec.gov/news/press-release/2013-210 (SEC press release concerning *SEC v. Ramirez* civil fraud case).

The Vermont Regional Center

The Vermont Regional Center has been administered as a program of the Agency of Commerce & Community Development since the VRC's inception in 1997. 3d Am. Compl. ¶ 8. Since December 22, 2014, DFR has co-administered the VRC, pursuant to an MOU entered into with ACCD (the "DFR/ACCD MOU"). *Id*. ¶¶ 9, 214; 10 V.S.A. § 20. A copy of the DFR/ACCD MOU is attached hereto as **Exhibit 1**.

Under federal law, regional centers are required to meet only three requirements annually to retain their designation: (1) satisfy § 610(a) of the Appropriations Act (promote economic growth); (2) provide USCIS with a satisfactory Form I-924A (annual reporting generally of capital invested or released from escrow into projects and jobs created); and (3) pay a required fee. 8 C.F.R. § 204.6(m)(6). A regional center may be "any economic unit, public or private, which is involved in the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." *Id*. § 204.6(e).

Federal and State Civil Enforcement Cases and the Receiver

The instant case occurs against the backdrop of an alleged multi-year, massive "Ponzi-like" scheme perpetrated intentionally and in secret by Ariel Quiros and Bill Stenger. *See generally Preliminary Injunction*, ECF Doc. 238, *SEC v. Ariel Quiros*, Docket No. 1:16-cv-21301-DPG (S.D. Fla. Nov. 21, 2016) ("Injunction Order"), *available at* https://jaypeakreceivership.com/wp-content/uploads/2016/11/40063068_1-2.pdf and attached hereto as **Exhibit 2**. After extensive investigations, in April 2016, the State of Vermont and the federal Securities and Exchange Commission both brought near-simultaneous enforcement actions against Quiros, Stenger, and various corporate entities they controlled, alleging numerous

violations of securities laws (and in the State's case, consumer-protection laws). *See generally* Docket No. 1:16-cv-21301-DPG (S.D. Fla.) (SEC case); Docket No. 217-4-16 Wncv (State case). The SEC and the State cooperated in their investigations. SEC Press Release, April 14, 2016, at 2.[8]

SEC Enforcement Case. In September 2016, after a hearing at which Mike Pieciak – then the Deputy Commissioner of DFR's Securities Division – testified for the SEC (Injunction Order, at 3), the United States District Court issued a preliminary injunction, finding that the preliminary evidence showed that Stenger and Quiros used the seven phases of the Jay Peak projects (including Phase VII, the AnC Bio Project in Newport) to perpetrate a nine-figure Ponzi scheme on investors, including Plaintiffs in this case. The scheme involved dozens of bank accounts and the use of investor funds as collateral for over $100 million in margin loans. Injunction Order at 17-20. The scheme also involved the use of a "construction management" company whose very existence was "not disclosed" to many investors. *Id.* at 20. The margin loans were taken on accounts at Raymond James on which Quiros was the sole signatory, and which were managed by Quiros's former son-in-law. *Id*. at 12. The federal court found that Quiros ultimately used "over $50 million [in investor funds] for his personal use," *id*. at 33, including roughly $6 million to buy two New York City condominiums, and over $10 million to pay his personal income taxes. *Id*. at 18-20.

The federal court noted that, as is typical of a Ponzi-type scheme, the early stages of the Jay Peak project were paid for with funds from later stages. Phases I through V are generally "complete and operating," while "Phase VI is not fully complete and Phase VII is $43 million short of funds." *Id*. at 26. Put simply, "Quiros paid obligations from prior phases with later

[8] *Available at* https://www.sec.gov/news/pressrelease/2016-69.html.

phase funds." *Id*. at 27. This structure served as a form of concealment and deception, as the harms to investors and others were masked by the use of later-phase funds to cover early obligations.

The court also made preliminary findings reflecting that Quiros and Stenger "actively concealed the fraud." *Id*. at 37. Among other things, they:

- Did not record the deed of sale (at an inflated price) for the AnC Bio property (*id.* at 19 n.11);
- Did not disclose the existence of Jay Construction Management to investors in at least three phases (*id*. at 20);
- Failed to disclose to later-phase investors the misuse of investor funds in earlier phases (*id.* at 28);
- Submitted, via Jay Construction Management, $47 million in false invoices for Phase VII construction that never occurred (*id*. at 19);
- Did not disclose the status of FDA approval of products for Phase VII (*id.* at 28).

Accordingly, the court preliminarily enjoined Quiros from, among other things, participating in any EB-5 offering or sale and holding any management or control position in any enterprise issuing EB-5 securities. *Id*. at 33.

In September 2016, the SEC and Stenger reached a partial settlement in which Stenger neither admitted nor denied the allegations, but agreed to a permanent injunction prohibiting him from ever being involved in the EB-5 program and from violating federal securities laws in the future. *Judgment of Permanent Injunction and Other Relief against Defendant William Stenger*, ECF Doc. 215, *SEC v. Ariel Quiros, et al.*, Docket No. 1:16-cv-21301-DPG (S.D. Fla. Sept. 21, 2016).[9] The Order provides that Stenger may be directed to pay a civil penalty by the Court and

[9] *Available at* https://jaypeakreceivership.com/wp-content/uploads/2016/09/DE-215-Judgment-of-Permanent-Injunction-and-Other-Relief-Against-Defendant-William-Stenger-1.pdf.

if there is a contested hearing on the penalty, Stenger is precluded from arguing he did not violate federal securities laws as alleged in the action. *Id.* at 5.

In August 2017, the SEC reached a similar settlement with Quiros in which he neither admitted nor denied the allegations, but agreed to a permanent injunction. *Judgment of Permanent Injunction and Other Relief against Defendant Ariel Quiros*, ECF Doc. 398, *SEC v. Ariel Quiros, et al.*, Docket No. 1:16-cv-21301-DPG (S.D. Fla. Aug. 23, 2017).[10] The Court's Order directs that Quiros disgorge ill-received funds and the Court may order a civil penalty. *Id.* at 6. Further, in those proceedings, Quiros is precluded from arguing that he did not violate federal securities laws as alleged in the action. *Id.*

State Civil Enforcement Case. As noted above, the State filed its civil enforcement case against Quiros, Stenger and their Jay Peak related corporate entities in Vermont Superior Court, Civil Division, Washington County, on April 14, 2016, the day that the SEC's complaint was unsealed by the federal court. Quiros and Stenger filed motions to dismiss, which the superior court denied in December 2016. Preliminary relief, including the injunctions and an asset freeze of Quiros' assets, was obtained via the federal court action. The state action is currently in the discovery phase.

Federal Receiver. At the SEC's request, the federal court also appointed a Receiver to oversee the projects and take whatever actions are necessary to "protect what remains of the investors' assets." Injunction Order at 38; *see also Order Granting Plaintiff SEC's Motion for Appointment of Receiver*, ECF Doc. 13, *SEC v. Ariel Quiros*, Docket No. 1:16-cv-21301-DPG (S.D. Fla. April 13, 2016) ("Receiver Order"), ¶ 15 ("During the period of this receivership, all

[10] *Available at* https://jaypeakreceivership.com/wp-content/uploads/2017/08/DE_398_-_Judgment_of_Permanent_Injunction_and_Other_Relief_Against_Defendant_Ariel_Quiros_8-23-17-1.pdf.

persons, including . . . investors . . . are enjoined from . . . prosecuting any actions or proceedings which involve the receiver or which affect the property of the [defendants in the SEC action].”), *available at* https://jaypeakreceivership.com/wp-content/uploads/2016/04/DE-13-Order-Granting-Motion-for-Appointment-of-Receiver-3.43.19-PM-2.pdf and attached hereto as **Exhibit 3**. The Receiver has had control of the Jay projects (and Burke Mountain) since April 2016. *Id*. at 9.

The Receiver and the State entered into a common interest agreement in April 2016. The State reached an administrative enforcement settlement with Raymond James for $5.95 million in June 2016, of which $4.5 million was turned over to the Receiver for the benefit of investors. *Administrative Consent Order*, Docket No. 16-026-S, (DFR June 30, 2016).[11] In April 2017, the Receiver settled his claims with Raymond James for $145 million. *Final Order*, ECF Doc. 353, *SEC v. Ariel Quiros*, Docket No. 1:16-cv-21301-DPG (S.D. Fla. June 30, 2017).[12] The Receiver thanked the State for its “unwavering commitment to protecting the defrauded investors.” Press Release, April 13, 2017.[13]

Procedural History

On May 30, 2017, Plaintiff Antony Sutton commenced this action by filing a Complaint against Defendants in this Court. On June 12, 2017, before any Defendants were served, Plaintiff filed an Amended Complaint as a matter of course pursuant to Rule 15(a).[14] Next, on

[11] *Available at* http://www.dfr.vermont.gov/sites/default/files/RJA%20signed%20consent%20order.pdf.

[12] *Available at* https://jaypeakreceivership.com/wp-content/uploads/2017/06/Jay-Peak-Raymond-James-Bar-Order-DE-353-6-30-17-3.pdf.

[13] *Available at* https://jaypeakreceivership.com/wp-content/uploads/2017/04/41473529_1-2.pdf.

[14] The Amended Complaint removed a second individual who had initially been named as a Plaintiff in this action.

June 30, 2017, Plaintiff Sutton moved to amend the Complaint again to add another investor-Plaintiff, Wei Wang and additional factual allegations. The Court granted the motion on July 11, and all Defendants were served with the Second Amended Complaint.

The parties stipulated to extend the time for Defendants to respond to the Second Amended Complaint until September 8, 2017. Thereafter, however, Plaintiffs indicated that they intended to make even further amendments to their Complaint, and the parties agreed to extend Defendants' deadline for responding to the new Complaint to October 9, 2017. On September 22, 2017, Plaintiffs moved for permission to file a Third Amended Complaint. By email to counsel dated October 2, 2017, Defendants consented to the filing of Plaintiffs' proposed Third Amended Complaint with the Court. Accordingly, the instant motion to dismiss is in response to Plaintiffs' Third Amended Complaint, dated September 22, 2017.

Plaintiffs' Third Amended Complaint added additional named Plaintiffs and factual allegations. However, the 13 Defendants and the 16 claims remain the same. Plaintiffs generally allege that Defendants did not adequately regulate the Quiros/Stenger Jay Peak Projects and made false or misleading representations concerning their level of oversight and regulation of the EB-5 program. Plaintiffs assert that they lost their investments and an opportunity for U.S. residency as a result of Defendants' alleged failure to timely discover and stop the fraud committed by Quiros and Stenger. Plaintiffs' 16 claims against Defendants are primarily for fraud, negligence, unjust enrichment, and breach of contract, among others. For the reasons discussed below, all claims in Plaintiffs' Third Amended Complaint should be dismissed.

Argument

In reviewing a motion to dismiss, the Court accepts "all facts alleged in the complaint as true and in the light most favorable to the nonmoving party." *Coutu v. Town of Cavendish*, 2011

VT 27, ¶ 4, 189 Vt. 336, 19 A.3d 160. However, courts are not required to accept as true conclusory allegations or legal conclusions mislabeled as factual conclusions. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1, 955 A.2d 1082 (citing *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002)). "The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the law of the claim, not the facts that support it." *Samis v. Samis*, 2011 VT 21, ¶ 9, 189 Vt. 434, 22 A.3d 444. Dismissal is proper when there is no set of facts and circumstances alleged in the complaint which, if proved, would entitle the plaintiff to relief. *See id.*

The Complaint in this case should be dismissed for several reasons. First, Plaintiffs' claims against the state agencies are barred by sovereign immunity. Second, the claims against the individual state employees, both current and former, are barred by official immunity. Third, a federal court order appointing a Receiver for the Jay Peak project entities bars investors from bringing any action affecting the projects. Fourth, the Court lacks jurisdiction over the federal securities law claims. Fifth, the Complaint is an impermissible shotgun complaint that fails to provide adequate notice of which claims are brought against which Defendants. Sixth, the Complaint fails to satisfy the heightened pleading standard for fraud under Rule 9(b). And finally, Plaintiffs fail to state any valid claims for relief. For the Court's convenience, Defendants have included an **Appendix** containing the grounds for dismissal for each of the 16 Counts of Plaintiffs' Complaint, as asserted against the 13 state and individual Defendants.

I. PLAINTIFFS' CLAIMS AGAINST THE STATE ARE BARRED BY SOVEREIGN IMMUNITY.

Plaintiffs have purported to assert claims against ACCD and DFR, which are an agency and department of the State. *See* 3d Am. Compl. ¶¶ 7-9, 28, 35. These claims are barred by sovereign immunity. As the Vermont Supreme Court has explained,

> Lawsuits against the State are barred unless the State waives its sovereign immunity. Under the Vermont Tort Claims Act, 12 V.S.A. § 5601(a), the State has waived its immunity and has consented to be sued for injury to persons caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment. Despite this general waiver, the Tort Claims Act has retained sovereign immunity for certain claims.

Lane v. State, 174 Vt. 219, 222-23, 811 A.2d 190, 193-94 (2002) (citations omitted).

The State has retained its sovereign immunity for all claims Plaintiffs appear to assert in their Complaint.

A. Plaintiffs' Fraud Claims Are Barred Under The Tort Claims Act (Counts 1-5, 12 & 15).

The Vermont Torts Claims Act expressly excludes from the sovereign immunity waiver "[a]ny claim arising out of . . . misrepresentation, deceit, fraud." 12 V.S.A. § 5601(e)(6). Counts 1-5, 12, and 15 all allege some form of fraud or misrepresentation and thus should be dismissed.

Count 1 of Plaintiffs' Complaint alleges common law fraud. Count 2 alleges a violation of §§ 5501 and 5509 of the Vermont Uniform Securities Act, which prohibit securities fraud. *See* 9 V.S.A. §§ 5501, 5509. Count 3 alleges a violation of the federal Securities Exchange Act and Rule 10b-5 promulgated under that Act. Section 10(b) of the Securities Exchange Act and Rule 10b-5 prohibit the employment of manipulative and deceptive devices to defraud participants in the securities market. *See* 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5. Count 5 alleges common law negligent misrepresentation. And Count 15 alleges consumer fraud pursuant to 9 V.S.A. §§ 2451–2466.

Count 4 does not allege a separate cause of action but instead alleges "control person" liability under § 20(a) of the Securities Exchange Act. *See* 15 U.S.C. § 78t(a). Since Count 3 alleges a violation of the provision of the Securities Exchange Act prohibiting fraud, Count 4

alleges that Defendants are liable for fraud as a result of their control of the Jay Peak Projects, which is alleged to have committed securities fraud.

Likewise, Count 12 does not allege a separate cause of action but instead alleges a different form of liability for common law fraud. Count 12 alleges that Defendants are liable for aiding and abetting the Jay Peak Projects to commit fraud.

In short, Plaintiffs' seven fraud and misrepresentation claims are specifically excluded from the Tort Claims Act's waiver and are therefore are barred by sovereign immunity. *See, e.g.*, *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991) (federal tort claims act does not waive governmental sovereign immunity with respect to claims predicated upon misrepresentations).[15] These claims should be dismissed against the State.

B. Plaintiffs' Claims Based On Misrepresentations Are Barred Under The Tort Claims Act (Counts 6, 7 & 11).

As discussed above, Counts 1-5, 12, and 15 expressly allege fraud or misrepresentation and are thus explicitly barred by 12 V.S.A. § 5601(e)(6). In addition, three other claims should be dismissed on this basis, although they have not been clearly labeled as misrepresentation or fraud claims.

"Plaintiffs' labels alone cannot control the substance of the case." *Dalmer v. State*, 174 Vt. 157, 167, 811 A.2d 1214, 1223 (2002). The Court "must focus on the factual allegations in [the] complaint and not on the legal theories asserted." *TBH v. Meyer*, 168 Vt. 149, 153, 716 A.2d 31, 34 (1998). "A pleading . . . is taken for what it is in substance, regardless of its form or

[15] The Federal Tort Claims Act (FTCA) is nearly identical to that of Vermont's Tort Claims Act (VTCA), and Vermont courts look to the case law interpreting the federal provision to provide guidance in analyzing 12 V.S.A. § 5601(e). *Searles v. Agency of Transp.*, 171 Vt. 562, 563 n.*, 762 A.2d 812, 813 n.* (2000) (mem.); *LaShay v. Dep't of Soc. & Rehab. Servs.*, 160 Vt. 60, 67-68, 625 A.2d 224, 229 (1993). For example, the fraud and misrepresentation provision of the VTCA is nearly identical to the parallel provision of the FTCA. *Compare* 12 V.S.A. § 5601(e)(6), *with* 28 U.S.C. § 2680(h).

the name given it by the pleader." *Century Indem. Co. v. Mead*, 121 Vt. 434, 437, 159 A.2d 325, 327 (1960).

Thus, Counts 6, 7, and 11 – although denoted as gross negligence, breach of fiduciary duty, and aiding and abetting a breach of duty, respectively – are also barred by § 5601(e)(6) because they all are fundamentally based on the allegation that the State made misrepresentations that harmed Plaintiffs. For example, in Count 6, Plaintiffs allege that, "[i]f the Defendants had not been grossly negligent with respect to Plaintiffs' assets invested in the Jay Peak Projects, they would have discovered that the Jay Peak Projects were a fraud, and would not have *represented* that Plaintiffs invest in the Jay Peak Projects." 3d Am. Compl. ¶ 344 (emphasis added). In other words, Plaintiffs contend that Defendants were grossly negligent because they "represented that Plaintiffs invest in the Jay Peak Projects."

Likewise, in Count 7, Plaintiffs allege that the State "had substantial discretion and control over the Jay Peak Projects, the marketing of the Jay Peak Projects, and communications to Plaintiffs." *Id*. ¶ 349. "The Defendants held themselves out as providing superior state oversight, management, administration, and overall regulation," and "Plaintiffs reasonably relied on such *representations*" to their detriment. *Id*. ¶ 350(c) (emphasis added); *see also id*. ¶ 351 ("Plaintiffs principally relied upon the Defendants' *representations* regarding the state oversight, administration, management, and overall regulatory compliance of the Jay Peak Projects' development strategy." (emphasis added)). Count 11 similarly alleges that the VRC "fail[ed] to disclose that the *representations* made by both state officials and the Jay Peak Projects in their marketing and offering documents could not be relied upon." *Id*. ¶ 373 (emphasis added).

Plaintiffs' allegations are strikingly similar to those in *Alvarez v. United States*, 862 F.3d 1297 (11th Cir. 2017). In that case, investors, who were victims of a fraudulent investment

scheme, sued the federal agency charged with regulating securities. Like Plaintiffs in this case, the investors in *Alvarez* alleged that the agency acted negligently and aided and abetted the fraudulent scheme. *Id*. at 1300. Specifically, the investors alleged that government employees (1) aided and abetted the fraudster in his sale of unregistered securities; (2) committed common law negligence, including breach of an employer/employee duty of care, based on a number of theories; (3) negligently failed to supervise the fraudster; (4) breached their fiduciary duty by, for example, allowing prohibited commercial solicitation; (5) negligently supervised the fraudster; and (6) negligently inflicted emotional distress. *Id*.

The Eleventh Circuit Court of Appeals affirmed the dismissal of the complaint under the misrepresentation and discretionary function exceptions to the Federal Tort Claims Act ("FTCA"), despite the fact that the investors did not allege a claim expressly labeled fraud or misrepresentation. *See id*. at 1300-01. In doing so, the court stated that "it is of no consequence that Plaintiffs characterize the alleged breached duties as other than misrepresentation because a plaintiff cannot circumvent the misrepresentation exception [of the FTCA] simply through the artful pleading of its claims." *Id*. at 1304 (quotations omitted). Accordingly, the investors' claims failed because the alleged negligent conduct of the government employees stemmed from both their failure to stop the fraudster's solicitation (non-communications) and their endorsement of the fraudster (miscommunications). *Id*. at 1305 ("[T]he basis for each of the alleged breached duties is in fact the Government's failure to communicate information about [the fraudster], as well as their miscommunications in endorsing [him].").

Likewise, Plaintiffs' claim for breach of fiduciary duty here is no different from the *Alvarez* investors' claim. The *Alvarez* investors alleged breach of fiduciary duty by improperly soliciting and promoting the fraudulent business. *Id*. Plaintiffs here make the same allegations:

> Included in the VRC's active promotional efforts were intentional misrepresentations and omissions of project oversight, financial monitoring and auditing, which were repeated to both immigrant investors and would-be investors throughout the marketing of the Jay Peak Projects, all in order to induce foreign investors to join the VRC and its crown jewel, the Jay Peak Projects.

3d Am. Compl. ¶ 79; *see also id*. ¶ 269 ("The damages in this cause of action arise out of Defendants administering, promoting, marketing, and, in the end, profiting from the largest EB-5 fraud in history.").[16] Further, Plaintiffs allege that "the Defendants failed to perform the adequate due diligence before promoting the Jay Peak Projects as a sound investment to the world-at-large and the Jay Peak Investors." *Id*. ¶ 296(j)(ii). The *Alvarez* investors similarly alleged "that the Government breached its duty to use due care in communicating information upon which [the investors] may reasonably be expected to rely in the conduct of their economic affairs." *Alvarez*, 862 F.3d at 1305 (quotations omitted). But the court ruled that "[s]oliciting and promoting are plainly acts of communication that fall within the misrepresentation exception" of the Tort Claims Act. *Id*. at 1306. In short, because Plaintiffs' claims concern alleged non-communication and miscommunication of information by various state employees, they fundamentally amount to misrepresentation and are barred by sovereign immunity.

C. Plaintiffs' Claims Are Barred By Sovereign Immunity Because The State's Activities Have No Private Analog (Counts 1, 5-16).

Moreover, tort actions against the State are permitted only when the tort has a private analog. Thus Counts 1, 5-16 (all of non-securities law claims) must be dismissed. The threshold issue under the Tort Claims Act is whether the factual allegations satisfy the necessary elements of a cause of action comparable to one that may be maintained against a private person. *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481, 487, 622 A.2d 495, 498 (1993). "If no such analog to

[16] Other allegations about Defendants promoting the Jay Peak Projects and soliciting investors for them can be found in the following paragraphs of the Third Amended Complaint: ¶¶ 39, 43-45, 50-53, 76, 140, 157, 216, 218-19, 225, 227, 262-64, 343.

private action exists, suit against the State is precluded." *Amy's Enters. v. Sorrell*, 174 Vt. 623, 623, 817 A.2d 612, 615-16 (2002) (mem.). Thus, the Tort Claims Act is not intended "to visit Government with novel and unprecedented liabilities." *Noble v. Office of Child Support*, 168 Vt. 349, 351-52, 721 A.2d 121, 123 (1998) (quotations omitted); *see also Kane v. Lamothe*, 2007 VT 91, ¶ 6, 182 Vt. 241, 936 A.2d 1303.

Many of the alleged activities that give rise to Plaintiffs' claims are uniquely governmental with no private analog. The allegation repeated more than 40 times throughout the Complaint is that the State failed to adequately perform its "state oversight . . . and overall regulation" of the Jay Peak Projects to ensure their compliance with the securities laws. 3d Am. Compl. ¶¶ 302, 303, 307, 329, 333, 334, 339, 351, 353, 354, 361, 363, 365, 368, 372(b) & (d), 373, 377(a)-(d), 378, 392, 395, 399, 400, 401, 402, 403. This allegation forms the basis of Counts 1 and 5-16.[17] *See id*. While there may be privately-operated regional centers, only the State can investigate securities law violations and enforce those laws. Thus, there is no analogy between state oversight or the regulation, investigation, and enforcement of securities laws and any act of a private individual or regional center that could give rise to a cause of action. *See Amy's Enters.*, 174 Vt. at 623-24, 817 A.2d at 616. Nor is there a private analog for the public statements of a government regulator about its regulation of a regulated entity. *Denis Bail Bonds*, 159 Vt. at 484, 622 A.2d at 497 (no private analog to BISHCA Commissioner's alleged failure to notify plaintiff of particular investigation's progress).

[17] Count 14 does not specifically allege a failure to perform state oversight and regulation, but instead alleges that Defendants' "unlawful acts and omissions" resulted in their unjust enrichment. 3d Am. Compl. ¶ 386. The alleged unlawful acts and omissions that resulted in unjust enrichment are described in Count 9: "The VRC was unjustly enriched by the retention of fees that were predicated on the VRC's fictitious state oversight, administration, managements, and overall regulation of the Jay Peak Projects." *Id*. ¶ 365. Count 14 is therefore based on an alleged breach of duty concerning governmental functions for which no private analog exists.

Rather, as the Vermont Supreme Court has held in other contexts, an agency's regulatory duties are uniquely governmental functions. *See, e.g., Lafond v. Vt. Dep't of Soc. & Rehab. Servs.*, 167 Vt. 407, 409, 708 A.2d 919, 920 (1998) ("The licensing and inspection of [private] facilities are inherently *governmental* functions which find no private analog or duty of care in our common law."); *Andrew v. State*, 165 Vt. 252, 260, 682 A.2d 1387, 1392 (1996) (no private analog for claim of negligent enforcement of safety standards against State agency responsible for policing compliance with the law); *Corbin v. Buchanan*, 163 Vt. 141, 144, 657 A.2d 170, 172 (1994) (there is no general private right of action based on government's failure to enforce safety regulations whose clear purpose is the general welfare); *see also Andela v. Admin. Office of U.S. Courts*, 569 Fed. App'x 80, 84 (3d Cir. 2014) (EEOC could not be sued under FTCA based on alleged failures in handling complaint, "as there is no private analogue to EEOC's work in processing and investigating discrimination charges"). Likewise, an agency's *statements* about its regulatory functions can have no private analog, as such statements are part and parcel of the uniquely governmental function – regulation – itself. *Denis Bail Bonds*, 159 Vt. at 484, 622 A.2d at 497.

Absent any private analog to the State's regulation of the Jay Peak Projects – whether under the aegis of the VRC, ACCD, DFR, or some combination thereof – the State remains immune from suit under the Tort Claims Act.

D. Plaintiffs' Claims Should Be Dismissed Because The State's Actions Are Protected Under The Discretionary Function Test (Counts 6-16).

Actions involving the State's discretionary duties or functions are also barred by the Tort Claims Act. *See* 12 V.S.A. § 5601(e)(1) (State's immunity is not waived for lawsuits "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a State agency or an employee of the State, whether or not the discretion

involved is abused"). Plaintiffs' Complaint is replete with the express acknowledgement that the matters they complain of are discretionary. *See, e.g.*, 3d Am. Compl. ¶¶ 342, 349, 350, 372. And even where the discretion is not openly acknowledged, it is nonetheless clear that Plaintiffs' allegations of wrongdoing involve discretionary functions.

Counts 6-16 allege some form of breach of a discretionary duty or failure to enforce the law. Thus, Count 6 (gross negligence and willful misconduct) alleges that the Defendants "act[ed] as promotional agents with *discretionary control* over the Jay Peak Projects . . . that gave rise to a duty to exercise due care in the oversight and administration of Plaintiffs' assets in the Jay Peak Projects, and in the selection and monitoring of the Jay Peak Projects' managers and sub-custodians." 3d Am. Compl. ¶ 342 (emphasis added). Plaintiffs then assert that Defendants "grossly failed to exercise due care" by "fail[ing] to exercise the degree of prudence, caution, and good business practice that would be expected of any reasonable state overseer, manager, administrator, and regulator of the Immigrant Investor Program." *Id*. ¶ 343.

Similarly, Count 7 (breach of fiduciary duty) alleges that "Defendants had *substantial discretion* and control over the Jay Peak Projects, the marketing of the Jay Peak Projects, and communications to Plaintiffs" and that "[t]his *discretion* and control gave rise to a fiduciary duty and duty of care on the part of the Defendants to the Plaintiffs." *Id*. ¶¶ 349-50 (emphasis added). Plaintiffs state that "Defendants served as the principal administrators of the Immigrant Investor Program in Vermont since June 26, 1997, and state overseers, administrators, managers, and overall regulators of the Jay Peak Projects since December 21, 2006." *Id*. ¶ 351.

Likewise, the essence of Counts 8-13 and Counts 15-16 is that the State's oversight and administration of the Jay Peak Projects were lacking. Every one of these counts is bottomed on alleged deficiencies in functions that are facially discretionary: "oversight, administration,

management, and overall regulation." *See id*. ¶ 361 (Count 8); *id*. ¶ 363 (Count 9); *id*. ¶ 368 (Count 10); *id*. ¶ 373 (Count 11); *id*. ¶ 377 (Count 12); *id*. ¶ 381 (Count 13); *id*. ¶ 395 (Count 15); *id*. ¶ 400 (Count 16).[18]

Moreover, Count 9, entitled "constructive trust," is not an independent cause of action, but rather a remedy for Plaintiffs' unjust enrichment claim, Count 14. *See id*. ¶ 387; *Mueller v. Mueller*, 2012 VT 59, ¶ 29, 192 Vt. 85, 54 A.3d 168 ("The common remedy for unjust enrichment is imposition of a constructive trust."). Count 9 also seeks to impose a constructive trust for the alleged unjust enrichment of the State. *See* 3d Am. Compl. ¶ 365. Accordingly, Counts 9 and 14 are not independent claims but the same claim denominated as a cause (Count 14: "unjust enrichment") and remedy (Count 9: "constructive trust"). Because the actions described in Count 9 form the basis of Plaintiffs' unjust enrichment claim, and those actions are discretionary, the acts giving rise to Count 14 are discretionary as well.

The purpose of the discretionary function exception is to ensure "that the courts do not invade the province of coordinate branches of government by passing judgment on legislative or administrative policy decisions through tort law." *Earle v. State*, 2006 VT 92, ¶ 22, 180 Vt. 284, 910 A.2d 841 (quoting *Sabia v. State*, 164 Vt. 293, 307, 669 A.2d 1187, 1196-97 (1995)). Vermont courts use a two-part test for determining whether the discretionary function exception bars a plaintiff's claims. *Id.* ¶ 23. The first question is whether "the act or omission challenged

[18] Counts 8, 10, and 16 are framed in terms of contract, not tort. However, "Plaintiffs' labels alone cannot control the substance of the case." *Dalmer*, 174 Vt. at 167, 811 A.2d at 1223. Nor can "a plaintiff . . . circumvent the [Tort Claims Act] simply through the artful pleading of its claims." *Alvarez*, 862 F.3d at 1304. Counts 8, 10, and 16 each present nothing more than "a tort claim veiled as a breach of contract claim." *Bloomer v. Gibson*, 2006 VT 104, ¶ 24, 180 Vt. 397, 912 A.2d 424 (quotations omitted). There is no allegation of a breach of a specific term in an express contract; instead the gravamen of the action is a breach of a legal duty, making this a tort case. *See id*. Thus, these claims should be dismissed. *See Powers v. Office of Child Support*, 173 Vt. 390, 399, 795 A.2d 1259, 1266 (2002) (affirming dismissal of claim relating to State's alleged failure to enforce a child support order because, while captioned in the complaint as a "breach of contract" claim, it was in substance a negligence claim).

by the plaintiff is one that involves an element of judgment or choice or whether a statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id*. If the act involves judgment, the second step is to determine whether "that judgment is of the kind that the discretionary function exception was designed to shield," namely "governmental actions and decisions based on considerations of public policy." *Id.* Importantly, courts "presume[] that when a government agent is authorized to exercise discretion, the agent's acts are grounded in policy when exercising that discretion." *Id.*

In this case, the acts or omissions challenged by Plaintiff all involve judgment or choice. Plaintiffs' above allegations admit as much. Other than general allegations of fraud, Plaintiffs do not cite any statute, regulation, or policy that *specifically* prescribes a course of action the State must follow in the oversight, administration, regulation, or overall management of the EB-5 program generally or the Jay Peak Projects specifically. Nor could they. Instead, the allegations demonstrate that DFR, ACCD, and the VRC all acted within their broad, discretionary authority to regulate securities and promote economic development.

1. *DFR's regulation of securities is a discretionary function.*

DFR has broad authority over the regulation of securities. *See* 8 V.S.A. § 11(a)(1); 9 V.S.A. § 5601(a). DFR may (1) make rules regulating securities and brokers; (2) investigate persons suspected of violating Vermont's securities laws; and (3) enforce the securities laws administratively or in court. *See* 9 V.S.A. §§ 5602-5605. Additionally,

> If the Commissioner [of DFR] determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of [the Uniform Securities Act] . . . or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this [Act] . . . , the Commissioner may . . . issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or *to take other action necessary or appropriate* to comply with this [Act.]

Id. § 5604(a)(1) (emphasis added). Furthermore, the DFR "Commissioner may in the Commissioner's *sole discretion* . . . issue determinations that the Commissioner will not institute a proceeding or an action under [the Uniform Securities Act] against a specified person for engaging in a specified act, practice, or course of business if the determination is consistent with this [Act]." *Id*. § 5605(d) (emphasis added). These statutes evince the Legislature's intent to invest DFR and its commissioner with wide discretion to investigate and enforce securities laws.

The thrust of Plaintiffs' Complaint is that DFR did not exercise this authority quickly enough to protect them, or exercised its authority negligently. However, DFR's regulation of securities and its investigation of an investor's complaints are discretionary functions for which the State retains sovereign immunity under 12 V.S.A. § 5601(e)(1). *See Amy's Enters.*, 174 Vt. at 625, 817 A.2d at 617 ("[D]ecisions made in the course of investigations are discretionary."); *Czechorowski v. State*, 2005 VT 40, ¶ 22, 178 Vt. 524, 872 A.2d 883 (mem.) (decision "to recommend, initiate, and pursue an enforcement action" lies at the core of discretionary judgment); *see also Zelaya v. United States*, 781 F.3d 1315, 1329 (11th Cir. 2015) (discretionary function exception to government's waiver of immunity in Federal Tort Claims Act ("FTCA") barred investors' claims based on SEC's alleged negligence for approving company's registration after it concluded that company was operating a Ponzi scheme); *Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 2013) (discretionary function exception to FTCA barred investors' action against SEC for failure to investigate operator of securities firm and uncover his Ponzi scheme; SEC retained complete discretion over when, whether, and to what extent to investigate and bring an action against an individual or entity); *Alinsky v. United States*, 415 F.3d 639, 648 (7th Cir. 2005) (discretionary function exemption protects government from liability for claims premised on lack of training or oversight). As a result, DFR retains its

immunity for Plaintiffs' claims that allege some form of breach of a discretionary duty or failure to enforce the law.[19]

2. *ACCD's and VRC's promotional activities are a discretionary function.*

Like DFR, the acts or omissions of ACCD and the VRC are discretionary functions for which they have broad authority. "ACCD is charged with, *inter alia*, enhancing Vermont's business climate, marketing Vermont to businesses and individuals, along with facilitating, promoting and creating business opportunities within Vermont to contribute to the economic viability and growth of the State." 3d Am. Compl. ¶ 27. "The [Vermont Regional] Center is managed by the Agency of Commerce and Community Development in partnership with the Department of Financial Regulation." 10 V.S.A. § 20(a); *cf.* 3d Am. Compl. ¶¶ 26, 28. ACCD has the personnel and resources to market and promote economic opportunities in Vermont, and the Legislature has deemed it "imperative" that management of the VRC reflect the ACCD's expertise. 10 V.S.A. § 20(b). Plaintiffs also allege that the VRC approves developments that apply for designation as a "Regional Center" project and engages in limited monitoring of approved projects to assure their compliance with USCIS EB-5 regulations, U.S. immigration laws, and federal and state securities laws. 3d Am. Compl. ¶ 36.

The Complaint frequently does not differentiate between ACCD, DFR, and the VRC. Unlike ACCD and DFR, as noted above, the VRC is not a state agency, department, commission, or board in and of itself. It is simply a program administered first by ACCD and then jointly by ACCD and DFR. *See id*. ¶¶ 26, 28, 214; 10 V.S.A. § 20(a); *see also supra* n.2. Defendants are collectively accused of "acting as promotional agents with discretionary control over the Jay

[19] Likewise, to the extent the Complaint alleges that the VRC or ACCD should have somehow initiated a securities enforcement action despite lacking statutory authority to do so, such a decision is surely discretionary. To hold otherwise would be to hold that agencies not only *can*, but *must* enforce laws and regulations even when they have no jurisdiction to do so.

Peak Projects," 3d Am. Compl. ¶ 342, exercising "substantial discretion and control over the Jay Peak Projects, the marketing of the Jay Peak Projects, and communications to Plaintiffs," *id*. ¶ 349, and "fail[ing] to exercise due care in its role as state overseer, administrator, manager, and overall regulator." *Id*. ¶ 382. As discussed above, all of these activities are discretionary functions for which the State retains sovereign immunity. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 813-14 (1984) (discretionary function exception of FTCA was intended to encompass discretionary acts of government acting in its role as regulator of conduct of private individuals); *Stables v. United States*, 366 F. Supp. 2d 559, 567 (S.D. Ohio 2004) (regulation and oversight of companies and enforcement and implementation of regulations are properly subject to discretionary function exception); *Warren v. Washington Metro. Area Transit Auth.*, 880 F. Supp. 14, 16 (D.D.C. 1995) (management decisions grounded in social, economic or political goals may be protected as discretionary functions); *Baptie v. Bruno*, 2013 VT 117, ¶ 12, 195 Vt. 308, 88 A.3d 1212 (scope of investigation into plaintiffs' complaint was at the heart of discretionary duties).

Regarding the VRC specifically, and therefore ACCD as well, it is also alleged to have promoted the Jay Peak Projects, solicited investors, monitored compliance with EB-5 job-creation requirements, and (mis)handled investor complaints. 3d Am. Compl. ¶ 38, 45, 46, 61, 88. Plaintiffs cite no statute or regulation prescribing the particular methods for ACCD (or the VRC) to promote Vermont businesses, solicit investments in the State, or investigate investor complaints. In fact, no such law exists. Section 20(d) of Title 10 gives ACCD and DFR authority to perform these activities, and there are no rules requiring the performance of specific ministerial acts.

Thus, such promotional and oversight activities are discretionary functions over which the State retains sovereign immunity under 12 V.S.A. § 5601(e)(1). *See Levinsky v. Diamond*, 151 Vt. 178, 191, 559 A.2d 1073, 1082 (1989) (activities involving publicity are discretionary); *see also Forsyth v. Eli Lilly & Co.*, 904 F. Supp. 1153, 1160 (D. Haw. 1995) (claim that FDA negligently approved drug for marketing barred by discretionary function exception); *State v. Shaw*, 45 So. 3d 656, 660 (Miss. 2010) (promotion of fundraiser at state school is discretionary). Consequently, Defendants are immune from Plaintiffs' claims relating to the State's discretionary activities in marketing, promoting, regulating, and creating business opportunities in Vermont.

E. Plaintiffs' Gross Negligence And Willful Misconduct Claim Against The State Is Barred (Count 6).

Count 6 asserts a claim for "gross negligence/willful misconduct against all defendants." However, the State's limited waiver of sovereign immunity "does not apply to gross negligence or willful misconduct." 12 V.S.A. § 5602(a), (b); *see also id.* § 5601(a). Thus, the State retains its sovereign immunity for claims of gross negligence and willful misconduct, and any such claim may be brought, if at all, against the state employee. *Cf. Kennery v. State*, 2011 VT 121, ¶¶ 21, 40, 191 Vt. 44, 38 A.3d 35 (distinguishing negligence claim available against State and gross negligence claim available against employees); *Amy's Enters.*, 174 Vt. at 624, 817 A.2d at 616 (same).

* * * *

In sum, the State's sovereign immunity compels dismissal of all claims asserted by Plaintiffs against ACCD and DFR (and the VRC). The Tort Claims Act expressly bars claims based on fraud, misrepresentation, and gross negligence or willful misconduct. Further, the Tort Claims Act's waiver of the State's sovereign immunity does not apply to Plaintiffs' non-

securities law claims because they have no private analog or to any Counts that arise out of the performance of discretionary functions. Accordingly, Plaintiffs' Complaint should be dismissed. *See generally* **Appendix**.

II. PLAINTIFFS' CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS ARE BARRED BY OFFICIAL IMMUNITY.

While sovereign immunity is limited to claims against the State, "[o]fficial immunity. . . is available in some circumstances to shield public officials from lawsuits against them based on their activities." *Levinsky*, 151 Vt. at 183, 559 A.2d at 1078. There are two types of official immunity for civil lawsuits: (1) absolute immunity, which applies to judges, legislators, prosecutors, and the State's highest executive officers, and (2) qualified immunity, which extends to lower-level officers, employees and agents. *Id*. at 185, 559 A.2d at 1078. The Complaint alleges that all of the individual Defendants were state officers or employees at the time of the events at issue; therefore, official immunity applies to each such Defendant in this case. *See* 3d Am. Compl. ¶¶ 10-19.

Specifically, Defendants Donegan, Goldstein, Miller, and Moulton are protected by absolute immunity as the State's highest executive officers. *See O'Connor v. Donovan*, 2012 VT 27, ¶ 16, 191 Vt. 412, 48 A.3d 584 (absolute immunity protects "'high executive' officials such as the Attorney General and agency heads"); *Curran v. Marcille*, 152 Vt. 247, 249, 565 A.2d 1362, 1363 (1989) (commissioners of departments of state government "are among the state's highest executive officers" for purposes of absolute immunity). In addition, Defendants Pieciak[20] and Carrigan are absolutely immune from suit because the only allegations that can

[20] "Defendant, Michael Pieciak, is the current Commissioner of the DFR, having previously served as the DFR's Deputy Commissioner of the Securities Division during the DFR's state oversight and administration of the Jay Peak Projects." 3d Am. Compl. ¶ 18. Because Plaintiffs' claims against Pieciak

even be inferred against them relate to their prosecutorial function as Deputy Commissioner of Securities. The remaining Defendants – Candido, Fullam, Kessler, and Raymond – are entitled to qualified immunity. Moreover, state employees cannot be sued for negligence under the Tort Claims Act. *See* 12 V.S.A. § 5602. And statutory immunity likewise shields the DFR employees from suit. *See* 8 V.S.A. § 17.

A. Absolute Immunity Defeats The Claims Against The Commissioners Of DFR And DED And The Secretaries Of ACCD.

Defendants Donegan, Goldstein, Miller, and Moulton headed state agencies or departments during the time periods alleged in the Complaint and are therefore absolutely immune from suit for their actions during that time. "[A]s the 'highest executive officers in their respective governmental units,' [Defendants are] entitled to absolute immunity if the acts complained of 'were performed within the general authority of those offices.'" *O'Connor*, 2012 VT 27, ¶ 9 (quoting *Levinsky*, 151 Vt. at 185, 559 A.2d at 1079). "'An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity.'" *Id*. ¶ 6 n.2 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976)). When protected by absolute immunity, an official's alleged motive or intent is irrelevant. *Id*.

As the Complaint makes clear, the alleged acts of Donegan, Goldstein, Miller, and Moulton were within the general authority of their respective offices. There are virtually no specific allegations against most of the individual Defendants. Rather, the allegations are primarily directed at Defendants as a group. *See* 3d Am. Compl. at 1-2 (referring to all

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appear to be based on his actions before he became Commissioner, he is entitled to either absolute immunity for prosecutorial functions or qualified immunity for other functions. *Cf. Levinsky*, 151 Vt. at 185, 189, 559 A.2d at 1079, 1081 (deputy attorney general entitled to qualified immunity). But to the extent that Plaintiffs seek to hold Pieciak liable for any of his actions after becoming Commissioner, he is entitled to absolute immunity as a high executive official. *See id*. 151 Vt. at 185, 188, 559 A.2d at 1079, 1081.

Defendants collectively as the "VRC Team"). Each individual Defendant is also named in paragraph 43 of the Complaint, which alleges that "the Jay Peak Projects enlisted" all the individual Defendants "and directed them to actively market and solicit investors for the Jay Peak Projects." 3d Am. Compl. ¶ 43. However, this paragraph does not allege that any Defendant followed that direction or provide any details of what each supposedly did.

1. *Commissioner Susan Donegan*

Beyond paragraph 43 and identifying her as a defendant, Commissioner Donegan's name appears in only one other paragraph of the 405 paragraphs of the Complaint. Paragraph 221 of the Complaint alleges that the State's "incompetence was compounded when representatives of the Jay Peak Projects coordinated with the Commissioner of the DFR, Susan Donegan, Michael Pieciak, and other members of the VRC Team to craft private placement memoranda language and offering documents . . . to give the false appearance of state oversight and monitoring." 3d Am. Compl. ¶ 221. As Commissioner of DFR, Donegan had broad authority over the regulation of securities. *See* 8 V.S.A. § 11(a)(1); 9 V.S.A. § 5601(a). Among other things, the Commissioner has the authority to enforce the securities laws administratively or in court. *See* 9 V.S.A. §§ 5603-5604. More broadly, the Commissioner may take any "other action necessary or appropriate" to ensure compliance with the State's securities laws. *Id*. § 5604(a)(1).

Plainly, the "oversight and monitoring" of an entity selling securities, i.e., the Jay Peak Projects, falls squarely within Donegan's authority, and requiring language to be placed in an entity's offering documents is a necessary and appropriate exercise of that authority. *See* 3d Am. Compl. ¶ 221. It does not matter that this was allegedly done "incompeten[tly]" or to give a "false appearance of state oversight" – official immunity shields the state's highest executive officers from suit regardless of whether the acts are done competently. *See O'Connor*, 2012 VT

27, ¶ 27 (noting that the purpose of official immunity is to prevent "those who try to do their duty [from being subject] to the constant dread of retaliation" (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.)). Accordingly, Donegan is entitled to absolute immunity as the highest executive officer in her department.

2. *Commissioner Joan Goldstein*

The Complaint makes no individual allegations against Commissioner Goldstein. As the Commissioner of the Department of Economic Development (a department within the ACCD, the agency authorized to manage the VRC), Goldstein has authority to administer Vermont's EB-5 program, which is "designed to stimulate the U.S. economy through job creation and capital investment by foreign investors." 10 V.S.A. § 20(a). And, as noted above, the Jay Peak Projects were intended to stimulate Vermont's economy and create jobs. *See* 3d Am. Compl. ¶ 58. In other words, Goldstein is accused at most of doing her job, and acting within the scope of her authority, by marketing Vermont businesses, like the Jay Peak Projects, to foreign investors to raise capital for businesses who will in turn create jobs in Vermont. Because Goldstein is not alleged to have acted outside her authority, she is entitled to absolute immunity.

3. *Secretary Lawrence Miller*

Like many of the other individual Defendants, Plaintiffs do not assign any particular wrongdoing to ACCD Secretary Miller specifically. He allegedly "chat[ted]" with James Candido and Patricia Moulton about Mt. Snow's submission of EB-5 materials. *Id*. ¶ 107. However, as Plaintiffs admit, ACCD is responsible for "enhancing Vermont's business climate, marketing Vermont to businesses and individuals, along with facilitating, promoting and creating business opportunities within Vermont to contribute to the economic viability and growth of the State." *Id*. ¶ 27. ACCD is charged by statute to manage the VRC. *See* 10 V.S.A. § 20(a). The

VRC's role includes reviewing applications from companies seeking to participate in the program. *See id*. § 20(d)(4); 3d Am. Compl. ¶ 36. None of the activities Miller allegedly engaged in fall outside the scope of his authority; he is therefore absolutely immune.

4. *Secretary Patricia Moulton*

Secretary Moulton had the same authority as Secretary Miller while she was Secretary of ACCD, including managing the VRC and promoting Vermont businesses. Plaintiffs allege that Moulton did nothing in response to Plaintiff Sutton's complaint about the Jay Peak Projects. *See* 3d Am. Compl. ¶ 196. According to the Complaint, Moulton told Sutton that she has no "responsibility to the Jay Peak Investors," and "did not have legal authority to vet the Jay Peak Projects." *Id*. ¶¶ 193-94. Moulton also allegedly told Sutton that the only reporting required of the Jay Peak Projects related to meeting federal EB-5 program objectives. *Id*. ¶ 195. The Complaint asserts that "[i]n doing so, Patricia Moulton admitted that the VRC's representations of state oversight were complete and utter lies." *Id*. ¶ 197.

On the contrary, Moulton's alleged statements were correct. As described above, DFR is the state securities regulator and it determines whether to investigate particular complaints or allegations of securities violations, and if so, how such investigation is to be undertaken. *See* 9 V.S.A. § 5602(a) (providing that the DFR Commissioner may "conduct public or private investigations . . . which the Commissioner considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this chapter"). ACCD had neither the statutory authority nor the resources to do so. Thus, Moulton's alleged response correctly stated that ACCD's role was limited to ensuring that the Jay Peak Projects met federal EB-5 program objectives, and "neither [Sutton], nor any of the investors, ha[d] identified a violation of any of the federal laws and regulations governing the EB-5 program." 3d Am.

Compl. ¶ 195. Accordingly, there is no allegation that Moulton was acting outside of her authority – indeed, the allegation is that she *declined* to act outside of her authority. Secretary Moulton is entitled to absolute immunity.

B. Absolute Immunity Protects Pieciak And Carrigan, Who Are Alleged (At Most) To Have Improperly Exercised Their Prosecutorial Discretion.

All of Plaintiff's claims against Defendants Pieciak and Carrigan appear to arise out of alleged acts or omissions during their respective tenures as Deputy Commissioner of DFR's Securities Division. Pieciak and Carrigan are accused of failing to adequately enforce Vermont securities laws against the Jay Peak Projects and their principals. However, Pieciak and Carrigan's exercise of such prosecutorial discretion in this matter is protected by absolute immunity.

The Vermont Supreme Court has established that state employees who make prosecutorial decisions concerning whether and how to pursue civil prosecutions are entitled to absolute immunity. *See Czechorowski*, 2005 VT 40, ¶ 22 (affirming dismissal of claims against general counsel for Department of Aging and Disabilities for actions as civil enforcement attorney in action to protect vulnerable adult on grounds of absolute immunity). In *Czechorowski*, the Court concluded that while the agency attorney was generally entitled to only qualified immunity for her day-to-day provision of legal advice, she should be protected by absolute immunity for her discretionary decisions while pursuing a civil enforcement action. *Id.* ¶¶ 13-16. Further, it is well settled that the prosecutorial function includes not just the decision to prosecute, but rather the whole panoply of discretionary decisions involved in deciding *whether* to prosecute. *See, e.g.*, *O'Connor*, 2012 VT 27, ¶ 23 (dismissing plaintiff police officer's lawsuit against state's attorney based on his decision *not* to bring cases that relied on plaintiff's testimony). Likewise, under federal law, absolute prosecutorial immunity extends to

the decision *not* to prosecute offenses or otherwise take permissible action within the scope of the office. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 396 (2d Cir. 2006) (Attorney General's decision not to defend a state employee is entitled to absolute immunity); *Fields v. Soloff*, 920 F.2d 1114, 1119 (2d Cir. 1990) (district attorney absolutely immune from allegations that he maliciously prevented investigation and prosecution of police brutality claims). Accordingly, Deputy Commissioners Pieciak and Carrigan are entitled to absolute immunity for their discretionary decisions relating to any potential enforcement of Vermont's securities laws against the Jay Peak entities.

Indeed, under federal law, securities regulators, including self-regulatory organizations ("SRO's") acting under delegated SEC authority, are routinely granted absolute immunity for performing (or allegedly not performing) their regulatory, investigatory, and prosecutorial functions. *See, e.g., In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95-97 (2d Cir. 2007) (Sotomayor, J.) (NYSE has absolute immunity from claims that it "failed to regulate"); *D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93, 105 (2d Cir. 2001) (SRO's enjoy absolute immunity in their regulatory functions); *Schloss v. Bouse*, 876 F.2d 287, 290 (2d Cir. 1989) (reasoning that, if immunity applied only to decision *to* prosecute, prosecutors would have incentive to pursue non-meritorious claims).

For example, in the leading Second Circuit case, *NYSE Specialists Securities*, 503 F.3d at 91, 96, the court found the New York Stock Exchange was absolutely immune from class-action claims that the NYSE had "failed to regulate and provide a fair and orderly market." In reaching this conclusion, the court noted that it had previously found SRO's absolutely immune from suit for misconduct involving:

> (1) disciplinary proceedings against exchange members; (2) the enforcement of security rules and regulations and general regulatory oversight over exchange

> members; (3) the interpretation of the securities laws and regulations as applied to the exchange or its members; (4) the referral of exchange members to the SEC and other government agencies for civil enforcement or criminal prosecution under the securities laws; and (5) the public announcement of regulatory decisions.

Id. at 96 (citations omitted). As the court observed, the "common thread" in the above list is that the alleged activities "'relate[] to the proper functioning of the regulatory system.'" *Id*. (quoting *D'Alessio*, 258 F.3d at 106). The court rejected the argument that "absolute immunity should protect an SRO that decides to act but not one that decides not to act." *Id*. at 97.

Moreover, the *NYSE Specialists* court found that the regulators' absolute immunity extended to claims that they had aided and abetted certain firms in evading regulation. Based on its view of the complaint as a whole, the court determined that the "gravamen" of the claims involved functions that "may not appear to form the heart of the regulatory functions . . . [but] are nonetheless central to effectuating . . . regulatory decision-making." *Id* at 100.[21] Similarly, here, the gravamen of Plaintiffs' claims against Deputy Commissioners Pieciak and Carrigan is that they failed to make the correct or appropriate regulatory and prosecutorial decisions with respect to the Jay Peak Projects. Thus, all claims against Pieciak and Carrigan should be dismissed on the grounds of absolute immunity.

C. Qualified Immunity Protects The Remaining Individual Defendants From Suit.

The four remaining individual Defendants – Candido, Fullam, Kessler, and Raymond – are protected by qualified immunity. "Such immunity protects lower-level government employees from tort liability when they perform discretionary acts in good faith during the course of their employment and within the scope of their authority." *Sprague v. Nally*, 2005 VT

[21] As the Supreme Court has explained, broad absolute immunity is grounded in the strong policy concern that, without it, prosecutors and regulators will be placed on the horns of a dilemma: if they enforce the law too vigorously, they may face suit, and if they are less vigorous, they may face suit anyway. *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976).

85, ¶ 4, 178 Vt. 222, 882 A.2d 1164 (quoting *Cook v. Nelson*, 167 Vt. 505, 509, 712 A.2d 382, 384 (1998)). Here, there is no dispute that Defendants were acting within the scope of their employment and authority and that they were performing discretionary acts, as the Complaint repeatedly concedes. Further, Defendants were acting in good faith, because their conduct was objectively reasonable and did not violate any of Plaintiffs' clearly-established rights. Accordingly, qualified immunity applies.

1. *James Candido is entitled to qualified immunity.*

The Complaint makes several allegations against former VRC Director James Candido, but they do not defeat his qualified immunity. All of Plaintiffs' allegations concern Candido's conduct during the course of his employment with the State. *See* 3d Am. Compl. ¶ 10. For example, the Legislature intended ACCD and the VRC to (1) communicate with the USCIS about the EB-5 program, (2) market EB-5 Vermont investment opportunities, (3) oversee approved projects, and (4) establish relationships with investors, among other things. 10 V.S.A. § 20(d); *cf.* 3d Am. Compl. ¶¶ 27, 36.

Candido's alleged actions were all within the scope of this authority. According to Plaintiffs, Candido performed a poor audit of the Jay Peak Projects, *see* 3d Am. Compl. ¶¶ 92-97, and ignored an email from USAdvisors warning him of "possibl[e]" violations of securities laws. *Id*. ¶¶ 87-88, 93. He is further alleged to have terminated the VRC's relationship with Rapid USA over its Vermont EB-5 marketing activities. *Id*. ¶¶ 76-77, 105, 107-08, 110. Finally, he is accused of communicating with investors about Vermont's oversight of the EB-5 program and encouraging them to invest in Vermont businesses. *Id*. ¶¶ 113-15, 124-25. None of these activities are outside the scope of the authority granted by the Legislature to the Director of the VRC.

Moreover, Candido's actions were clearly discretionary, and not ministerial. At bottom, Plaintiffs' criticism is that Candido poorly investigated and audited the Jay Peak Projects and then did not accurately describe how the projects were regulated. As discussed extensively above, such actions are discretionary. *See O'Connor*, 2012 VT 27, ¶ 9 (statements made at press conferences are discretionary for official immunity analysis); *Czechorowski*, 2005 VT 40, ¶ 22 (decision "to recommend, initiate, and pursue an enforcement action" lies at the core of discretionary judgment); *Amy's Enters.*, 174 Vt. at 625, 817 A.2d at 617 ("[D]ecisions made in the course of investigations are discretionary."); *Levinsky*, 151 Vt. at 191, 559 A.2d at 1082 (decision to investigate and activities regarding publicity are discretionary). Plaintiffs describe these actions as discretionary in their Complaint. *See* 3d Am. Compl. ¶¶ 342, 349, 350, 372(a).

In addition, Candido's actions were undertaken in good faith. Vermont has adopted the federal, objective "good faith" test to determine entitlement to qualified immunity. As the *Sprague* Court established,

> the federal objective good faith standard is used to prevent exposing state employees to the distraction and expense of defending themselves in the courtroom. The outcome of the analysis depends on the objective reasonableness of the official's conduct in relation to settled, clearly-established law. Thus, if the official's conduct does not violate clearly-established rights of which a reasonable person would have known, the official is protected by qualified immunity from tort liability.

Sprague, 2005 VT 85, ¶ 4 (quoting *Cook*, 167 Vt. at 509, 712 A.2d at 384).[22] Under this objective standard, Candido acted in good faith because his conduct did not violate any clearly-established rights of which a reasonable person would have known. Investors, like the public

[22] Indeed, as the Court has noted, the qualified immunity "defense is available even if the plaintiff shows that the official acted 'with the malicious intention to cause a deprivation of constitutional rights or other injury.'" *Rich v. Montpelier Supervisory Dist.*, 167 Vt. 415, 424, 709 A.2d 501, 506 (1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)). Accordingly, under the Court's objective test, allegations of malice or improper motive do not defeat a state official's entitlement to qualified immunity.

generally, have no clearly-established right to have a government official investigate and uncover financial wrongdoing by a company. *Cf. Baptie*, 2013 VT 117, ¶ 20 (statutes aimed at preventing crime create no private right of action that would make an officer liable for negligently responding to or investigating a crime). Thus, in this regard, Candido is analogous to a police officer who is alleged to have conducted a faulty criminal investigation and fails to arrest a suspect before another crime is committed. *Id*.; *Kane*, 2007 VT 91, ¶ 9 (law creates no special relationship between crime victims and law enforcement personnel because officer's duty is owed to community as a whole). Nor would Plaintiffs have a right to contest the policies of the prosecuting authority where they are neither prosecuted nor threatened with prosecution. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

Likewise, the securities laws and regulations the Jay Peak Projects allegedly violated are meant to protect the investing public generally, and do not create a duty to any specific person. If a state official fails to enforce general safety regulations, he or she is not liable to those injured from the lack of enforcement. *See Andrew*, 165 Vt. at 259, 682 A.2d at 1392 (noting that "government is generally not liable for its undertaking of safety inspections pursuant to a regulatory enforcement statute"); *Corbin*, 163 Vt. at 143, 657 A.2d at 172 (dismissing tort claim for failure to enforce safety regulation whose purpose is protection of public as a whole). Thus, Candido's actions were objectively reasonable because investors have no clearly established right to have state officials investigate or oversee the companies Plaintiffs invested in.

Nor do Plaintiffs' allegations that Candido made misrepresentations give rise to any clearly established, privately enforceable rights. Any such official statements were made to the public at large, and did not create a specific duty to any individual Plaintiff concerning the

precise amount of oversight that would be exercised over an industry. *See Alvarez*, 862 F.3d at 1306; *Zelaya*, 781 F.3d at 1334-35; *Guild v. United States*, 685 F.2d 324, 325 (9th Cir. 1982) (government is not liable for injuries resulting from commercial decisions made in reliance on government misrepresentations); *see also O'Connor*, 2012 VT 27, ¶ 27 ("Plaintiff's assertion on appeal that patently false and defamatory statements simply cannot enjoy official immunity misapprehends the fundamental balance that underlies the doctrine."); *Levinsky*, 151 Vt. at 190-91, 559 A.2d at 1081-82 (qualified immunity for allegedly false statements made at press conference). Accordingly, Candido is protected by qualified immunity from Plaintiffs' claims.

2. *William Carrigan is entitled – at a minimum – to qualified immunity.*

For the reasons discussed above, Carrigan is entitled to absolute immunity for actions taken – or not taken – in his capacity as the State's head securities regulator. Alternatively, however, he is entitled to qualified immunity.

Notably, the Complaint contains no allegations that Carrigan did anything other than the conclusory assertion made against all Defendants, that he was "directed" "to actively market and solicit investors for the Jay Peak Projects." 3d Am. Compl. ¶ 43. There is no specific allegation that Carrigan followed this direction. In other words, the Complaint discloses no specifics of any actions by Carrigan or any other substantive facts about what he supposedly did or did not do that would be wrongful. But even if Carrigan were alleged to have failed to investigate and stop the fraud at the Jay Peak projects, then such actions were within his authority. *See* 9 V.S.A. §§ 5602-5605. Additionally, actions related to his investigation of the Jay Peak Projects and enforcement of the securities laws were discretionary. *See id*. § 5605(d); *Zelaya v*, 781 F.3d at 1328-29; *Molchatsky*, 713 F.3d at 162. Moreover, as noted above, such actions would not violate any clearly established rights of Plaintiffs. Therefore, Carrigan is immune from suit.

3. *Eugene Fullam is entitled to qualified immunity.*

As with Carrigan, there are no substantive allegations against Former VRC Director Eugene Fullam. His authority as director of the VRC was the same as Candido's. As such, his promotional and marketing activities were within his authority. *See* 10 V.S.A. § 20(d); 3d Am. Compl. ¶ 27. The same goes for his regulatory authority to ensure compliance with the laws governing the EB-5 program. *See* 10 V.S.A. § 20(d); 3d Am. Compl. ¶ 36. Thus, for the same reasons as Candido, Fullam is protected by qualified immunity for all of Plaintiffs' claims asserted in this case.

4. *John Kessler is entitled to qualified immunity.*

Likewise, there are no alleged facts that show John Kessler, general counsel for ACCD, acted outside his authority or performed other than discretionary duties. Plaintiffs allege that on April 11, 2012, Kessler received an email warning him of problems with the Jay Peak Projects, including "possibl[e]" violations of securities laws, and that Kessler ignored this warning from USAdvisors. 3d Am. Compl. ¶¶ 85-88. In addition, the Complaint asserts that on November 18, 2014, Kessler received another email notifying him of Plaintiff Sutton's fraud accusation against the Jay Peak Projects. *Id*. ¶ 202. According to Plaintiffs, Kessler "indicated no desire to investigate Mr. Sutton's detailed outline of fraud at the Jay Peak Projects," and then "requested Mr. Sutton's permission to forward the complaint to his partners at the Jay Peak Projects." *Id*. ¶¶ 202-03. Lastly, Plaintiffs accuse Kessler of sending a memorandum to the principals of the Jay Peaks Projects on July 24, 2014 that "demonstrates that they were actively working together to cover up the agency relationship between the VRC and the Jay Peak Projects." *Id*. ¶ 213. However, the memorandum is not quoted or attached to the Complaint.

As an ACCD employee, Kessler's authority was no different from Candido's, detailed above. *See* 10 V.S.A. § 20(d); 3d Am. Compl. ¶¶ 27, 36. His alleged decision not to investigate USAdvisors' and Sutton's complaints was discretionary, and Sutton has no clearly established right to have the State investigate the conduct of someone else in any particular manner or on a particular timeline. *See Linda R.S.*, 410 U.S. at 619; *Sprecher v. Von Stein*, 772 F.2d 16, 18 (2d Cir. 1985); *Baptie*, 2013 VT 117, ¶ 20; *Kane*, 2007 VT 91, ¶ 1; *Andrew*, 165 Vt. at 260, 682 A.2d at 1392; *Corbin*, 163 Vt. at 144, 657 A.2d at 172; *Denis Bail Bonds*, 159 Vt. at 488-89, 622 A.2d at 499-500. Similarly, Kessler's alleged memorandum to persons regulated by ACCD cannot be characterized as ministerial. Not surprisingly, Plaintiffs do not contend that allegedly "cover[ing] up" fraud is a ministerial task. Nor can Kessler's memorandum, as referenced in the Complaint, be said to have violated any of Plaintiffs' clearly established rights. There is no recognized right to have government officials disclose the details of, or make any particular representations about, their oversight of other persons or entities. *See Alvarez*, 862 F.3d at 1306; *Zelaya*, 781 F.3d at 1335; *Guild*, 685 F.2d at 325; *O'Connor*, 2012 VT 27, ¶ 27; *Levinsky*, 151 Vt. at 190-91, 559 A.2d at 1081-82. Accordingly, qualified immunity applies to Kessler for all claims.

5. *Michael Pieciak is entitled – at a minimum – to qualified immunity.*

For the reasons discussed above, Pieciak is entitled to absolute immunity for actions taken – or not taken – in his capacity as the State's head securities regulator. Alternatively, however, he is entitled to qualified immunity.

Pieciak was the Deputy Commissioner of Securities at DFR during the period described in the Complaint. 3d Am. Compl. ¶ 18. Again, the Complaint contains no factual allegations that Pieciak acted outside his authority or performed other than discretionary duties. Rather,

Pieciak is alleged to have asked then-VRC Director Brent Raymond "for a tutorial on basic concepts of job creation and the 'at-risk' nature of investor funds inherent to the EB-5 program." *Id*. ¶ 220. Plaintiffs also allege that "[s]uch incompetence was compounded when representatives of the Jay Peak Projects coordinated with . . . Pieciak, and other members of the VRC Team to craft private placement memoranda language and offering documents (which included the Jay Peak MOU) to give the false appearance of state oversight and monitoring." *Id*. ¶ 221. Additionally, after another EB-5 project, Mt. Snow, received approval from the USCIS, Pieciak said that "the success of [that adjudication] indicates that the Vermont EB-5 Regional Center is in business as usual mode with USCIS." *Id*. ¶ 258 (alteration in original).

As the Deputy Commissioner of Securities, Pieciak had broad authority over securities regulation. *See* 9 V.S.A. §§ 5602-5605. In short, DFR may take any "action necessary or appropriate" to ensure that people comply with the securities laws. *Id*. § 5604(a)(1). This encompasses requiring companies to have legally compliant offering statements and other financial documents. As described above, DFR employees' actions regarding "state oversight and monitoring" compliance with the securities laws are discretionary. *See id*. §§ 5602(a), 5605(d). Finally, the allegations that Pieciak drafted misleading language or exhibited "incompetence" do not take his actions out of the realm of good faith. As noted above, there is no clearly-established right to have particular representations by government officials regarding their oversight of an industry. *See Alvarez*, 862 F.3d at 1306; *Zelaya*, 781 F.3d at 1335; *Guild*, 685 F.2d at 325; *O'Connor*, 2012 VT 27, ¶ 27; *Levinsky*, 151 Vt. at 190-91, 559 A.2d at 1081-82. Accordingly, Pieciak is immune from suit as to all claims.

6. *Brent Raymond is entitled to qualified immunity.*

The allegations against former VRC Director Brent Raymond have the same flaws as the allegations against the other Defendants. The essence of these allegations is that Raymond misrepresented the State's oversight of the Jay Peak Projects and Vermont's EB-5 program.[23] He is also accused of failing to investigate reports of wrongdoing by the Jay Peak Projects.[24] As a result, the conclusion that qualified immunity protects Candido and the other individual Defendants applies with equal force to Raymond.

D. The Individual Defendants Cannot Be Sued For Negligence Arising Out Of Their Official Conduct (Counts 5 And 13).

Counts 5 and 13 allege negligent misrepresentation and negligence, respectively, against all Defendants. "Generally, claims based on the acts or omissions of an employee of the State acting within the scope of employment lie against the State, not against the individual employees who allegedly committed the harm." *Amy's Enters.*, 174 Vt. at 624, 817 A.2d at 616 (citing 12 V.S.A. § 5602(a)). Accordingly, state employees may not be sued for negligence while acting within the scope of their employment. *See Bradshaw v. Joseph*, 164 Vt. 154, 155, 666 A.2d 1175, 1176 (1995); *see also Amy's Enters*., 174 Vt. at 624, 817 A.2d at 616 (dismissing negligent supervision claim against individual state employees).

[23] For example, the Complaint states that Raymond told investors "that the VRC had no legal authority to conduct financial reviews," but that he "does many things to monitor projects." 3d Am. Compl. ¶¶ 156, 161. It also states that he "falsely claimed that the true nature of the Jay Peak Investors' complaints against the VRC were due to delayed responses to Jay Peak Investor concerns." *Id*. ¶ 194.

[24] For example, the Complaint alleges that Raymond "deflect[ed] investor complaints," and did not audit the Jay Peak Projects' financial records. 3d Am. Compl. ¶¶ 145, 157. Plaintiffs assert that Raymond would not investigate their fraud claims because they "had not supplied any evidence to support their allegations of fraud." *Id*. ¶ 164. Plus, Raymond allegedly would not bring Sutton's complaint to the fraudsters until Sutton supplied Raymond with authorizations showing Sutton's complaint was representative of other investors' complaints. *Id*. ¶¶ 190-91. Raymond also "approved the Jay Peak Projects to solicit investors for QBurke and AnCBio" in January 2015. *Id*. ¶ 219.

Here, the allegations against the ten individual Defendants all arise from actions taken within the scope of their employment. In other words, they are not being sued for actions taken as private individuals. Accordingly, under the Vermont Tort Claims Act, the negligence claims against the individual Defendants must be dismissed. *See, e.g.*, *Powers*, 173 Vt. at 398, 795 A.2d at 1265 (negligence claims properly dismissed against "individual named OCS employee defendants" who "were acting within the scope of their employment at all relevant times").

E. Statutory Immunity Shields DFR Employees From Suit.

Defendants Carrigan, Donegan, and Pieciak were all DFR employees at the time of the actions giving rise to the Complaint. 3d Am. Compl. ¶¶ 11, 12, 18. Plaintiffs allege that the securities division of DFR would "not conduct[] an investigation of Jay Peak" despite several investor complaints of fraud. 3d Am. Compl. ¶ 184. However, any such claims are barred by the statutory immunity granted to DFR officials.

Vermont securities law is clear that:

> A person serving in any official capacity under this title, 9 V.S.A. chapter 131 or 150, or 18 V.S.A. chapter 221, including the Commissioner and any officer, employee, or agent of the Department, shall not be liable in any civil action for damages for any act done or omitted in good faith in performing the functions of his or her office.

8 V.S.A. § 17. The "Department" refers to DFR, and the "Commissioner" is the Commissioner of DFR. *See id*. §§ 11-12. Chapter 150 of Title 9 is the Uniform Securities Act, the Act that Plaintiffs contend was not enforced. *See* 9 V.S.A. §§ 5101-5614; 3d Am. Compl. ¶¶ 36, 78, 84-88, 310.

Accordingly, under Vermont law, Carrigan, Donegan, and Pieciak are not subject to civil liability for any act done or omitted in good faith in performing the functions of his or her office. This necessarily includes a decision regarding whether and when to investigate claims of

securities fraud. Such a decision, or omission, was a function of their office. *See* 9 V.S.A. § 5605(d) (DFR may issue determinations that it will not institute a proceeding or an action under the securities act against a specified person for engaging in a specified act, practice, or course of business). Further, as discussed above, Carrigan, Donegan, and Pieciak's actions were all undertaken in good faith. *See Baptie*, 2013 VT 117, ¶ 11 ("Good faith exists where an official's acts did not violate clearly established rights of which the official reasonably should have known." (quotations omitted)); *Mellin v. Flood Brook Union Sch. Dist.*, 173 Vt. 202, 213, 790 A.2d 408, 419 (2001) (courts "use an objective standard when assessing whether a public official's acts were taken in good faith"). Pursuant to 8 V.S.A. § 17, Plaintiffs' claims against the DFR Defendants should be dismissed.

* * * *

In sum, official immunity serves to protect the individual Defendants from the burdens of lawsuits, such as this one, that arise out of the performance of their official duties. As the State's highest executive officers, Defendants Donegan, Goldstein, Miller, and Moulton are entitled to absolute immunity. Qualified immunity applies to Defendants Candido, Fullam, Kessler, and Raymond. Defendants Pieciak and Carrigan are protected by absolute immunity based on their prosecutorial functions as Deputy Commissioner of Securities (as well as qualified immunity). Statutory immunity also shields the DFR employees from suit. Finally, negligence claims cannot be asserted against state employees. Accordingly, Plaintiffs' claims against the individual Defendants should be dismissed. *See generally* **Appendix**.

III. PLAINTIFFS' CLAIMS ARE FURTHER BARRED BY THE FEDERAL COURT'S ORDER APPOINTING THE RECEIVER.

Even absent the sovereign and official immunity doctrines discussed above, Plaintiffs lack the ability to bring the claims asserted in this action. In the SEC's enforcement case against

Quiros, Stenger, and the Jay Peak Project entities, the U.S. District Court's Order appointing the Receiver expressly bars lawsuits by investors that "involve the Receiver or which affect the property of the Corporate Defendants or Relief Defendants." *See* Receiver Order ¶ 15. The Receiver, under the Order, also has possession of all "rights of action" of the Corporate and Relief Defendants. The Corporate and Relief Defendants include the limited partnerships in which all plaintiffs and putative class members are partners.

Under the Order, the Receiver also has "full and *exclusive* power, duty and authority to . . . take whatever actions are necessary for the protection of the investors." *Id*. at 2 (emphasis added). The fact that the Receiver's power is "exclusive" means that investors, whether individually or as a class, are barred from bringing actions to vindicate wrongs allegedly done to them in the course of their investment in the Jay Peak Project limited partnerships. *See, e.g.*, *United States v. Acorn Tech. Fund L.P.*, No. Civ.A.03-70, 2004 WL 1803321, at *6 (E.D. Pa. Aug. 12, 2004), *aff'd*, 429 F.3d 438 (3d Cir. 2005) ("The Receiver is the only proper party to bring a derivative suit aimed at recovering all losses incurred by the partnership because it stands in the shoes derivatively of all limited partners who would seek recovery for the benefit of the partnership."); *United States v. Penny Lane Partners, L.P.*, Civ. No. 06-1894, 2008 WL 2902552, at *3 (D.N.J. July 24, 2008) ("Receiver is the only party that may properly bring a derivative suit on behalf of the partnership.").[25]

Plaintiffs' fraud claims, although lacking all detail, are generally that Defendants assisted Quiros and Stenger in the fraudulent scheme to misappropriate the limited partnerships' funds.

[25] Although Plaintiffs do not label their claims as "derivative," the label is not controlling; the substance is. *Lenz v. Associated Inns & Rest. Co. of Am.*, 833 F. Supp. 362, 379 (S.D.N.Y. 1993). Fundamentally, "[c]laims for loss of value of partnership interest must be brought as derivative suits." *Acorn Tech.*, 2004 WL 1803321, at *6; *see also Whalen v. Carter*, 954 F.2d 1087, 1093 (5th Cir. 1992); *Kenworthy v. Hargrove*, 855 F. Supp. 101, 106 (E.D. Pa. 1994).

See 3d Am. Compl. ¶¶ 50, 283, 373, 378. Even claims of the "failure to supervise" the limited partnerships fall within category of actions to protect investors. The federal court order directs that these claims belong to the Receiver.

The bar against suits by investors is fundamentally premised on the need to ensure that the Receiver, and nobody else, is in full control of all receivership assets and to avoid "thwart[ing] the efforts of the Receiver to pursue and preserve all claims pertaining to the partnership." *Acorn Tech.*, 2004 WL 1803321, at *6. *Acorn Technology Fund* is instructive; there, the investors sought to sue, among others, the Small Business Administration, for an alleged "breach of its statutory and regulatory duties." *Id*. at *3. The federal court rejected the effort, concluding that the investors' putative action could only be brought by the Receiver against the general partner. *Id*. at *6.

The Plaintiffs' claims here run a particular risk of thwarting the Receiver's efforts because the claims are made against the State of Vermont, which has a Common Interest Agreement with the Receiver and has been assisting him for more than a year, and against individuals (in particular Defendant Pieciak) who have been instrumental in aiding the Receiver and the SEC in prosecuting the alleged true wrongdoers here: Quiros and Stenger. Likewise, the State Defendants have assisted the Receiver in seeking recoveries from other entities, and worked with him in connection with the $145.5 million settlement with Raymond James.[26] The Receiver is using those funds to, among other things, repay Phase VII investors, including three

[26] *Order Approving Settlement Between Receiver, Interim Class Counsel, and Raymond James & Associates, Inc.*, ECF Doc. 353, Docket No. 1:16-cv-21301-DPG (*available at* https://jaypeakreceivership.com/wp-content/uploads/2017/06/Jay-Peak-Raymond-James-Bar-Order-DE-353-6-30-17-3.pdf); *see also* Press Release, April 13, 2017 (Receiver thanked the State for its "unwavering commitment" to protecting investors).

of the named Plaintiffs here (Wang, Feng, and Xiong). The Receiver has likewise entered into a $13.3 million settlement with Citibank, the proceeds of which were used for purposes that the federal court recognized would be used for the "benefit of [Jay Peak and AnC Bio] investors."[27]

The Receiver since April 13, 2016 has had (and has diligently employed) the exclusive right and authority to decide whether to sue any entity or person to recover investor or limited-partnership funds. Plaintiffs' suit runs headlong into this exclusive authority and should be dismissed on that basis.

IV. STATE COURTS HAVE NO JURISDICTION OVER FEDERAL SECURITIES LAW ACTIONS (COUNTS 3 AND 4).

In Counts 3 and 4, Plaintiffs allege violations of the federal Securities Exchange Act and Rule 10b-5 promulgated under that Act. 3d Am. Compl. ¶¶ 319, 328, 330. Section 27 of the Securities Exchange Act grants federal courts exclusive jurisdiction to hear cases brought under the Act. *See* 15 U.S.C. § 78aa(a); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016) (federal district courts have exclusive jurisdiction of all suits brought to enforce any liability or duty created by Exchange Act or rules thereunder). In other words, as the Supreme Court has made clear, "§ 27 prohibits state courts from adjudicating claims arising under the Exchange Act." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996). As a result, this Court lacks subject-matter jurisdiction to adjudicate Counts 3 and 4, and those claims should be dismissed pursuant to Rule 12(b)(1).

[27] *Order Approving Settlement Between Receiver & Citibank, N.A.*, ECF Doc. 231, Docket No. 1:16-cv-21301-DPG, at 4 (*available at* https://jaypeakreceivership.com/wp-content/uploads/2016/10/39808667_1-1.pdf).

V. PLAINTIFFS' SCATTERSHOT COMPLAINT DOES NOT PROVIDE THE VARIOUS DEFENDANTS WITH ADEQUATE NOTICE OF THE CLAIMS AGAINST EACH OF THEM.

In order to survive a motion to dismiss, a claim must satisfy at least the liberal pleading requirements of Rule 8. *Bock v. Gold*, 2008 VT 81, ¶ 5, 184 Vt. 575, 959 A.2d 990 (mem.). Under Rule 8, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." V.R.C.P. 8(a)(1). "The key to whether a complaint is sufficient is notice; the complaint must provide a statement clear enough to give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Prive v. Vt. Asbestos Grp.*, 2010 VT 2, ¶ 15, 187 Vt. 280, 992 A.2d 1035 (quotation omitted).

However, a "shotgun" pleading like this one does not comply with Rule 8 because it does not give a "short and plain statement of the claim" at all. *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001); *Manbeck v. Micka*, 640 F. Supp. 2d 351, 366 (S.D.N.Y. 2009) (noting that use of a "shotgun pleading . . . illustrates utter disrespect for Rule 8" and makes it "extremely difficult to discern the precise nature of the claims" (quotation omitted)). "With a shotgun complaint, "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996). "The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1323 (11th Cir. 2015). This case presents the quintessential example of a shotgun pleading that should be dismissed. *See, e.g., Yeyille v. Miami Dade Cty. Pub. Sch.*, 643 Fed. App'x 882, 884-85 (11th Cir. 2016) (affirming dismissal of "shotgun pleading" that "[r]ather than using short and plain statements as required by the Federal

Rules . . . included an 85-paragraph fact section spanning 31 pages, much of it written in narrative, diary-like form").

First, the Complaint, which purports to assert a class-action lawsuit, names five individual Plaintiffs, none of whom are mentioned specifically in any of the 16 causes of action. In other words, taking the Complaint at face value, as the Court must, it alleges that every single Defendant is liable to every single Plaintiff for every single cause of action, and for exactly the same reasons. As explained below, this is logically impossible given the allegations about when the Plaintiffs invested and when the Defendants were employed.

Second, Plaintiffs' Complaint asserts "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Weiland*, 792 F.3d at 1323. This specific type of shotgun pleading is routinely dismissed by the federal courts. Plaintiffs' Complaint simply does not provide *each* Defendant fair notice of what Plaintiffs' claims are and the grounds on which they rest. *See Prive*, 2010 VT 2, ¶ 15. In this case, there are 13 Defendants: two are state agencies independent of one another, one is not a state agency at all but a program administered by the other state Defendants, and ten of the Defendants are current or former state employees sued in their personal capacities. However, *all* 16 counts are against all Defendants without any clarity as to which actions of which Defendants are alleged to give rise to each count. This is improper.

Indeed, Plaintiffs' Complaint is very similar to the shotgun pleadings in *Magluta v. Samples*, which the federal court of appeals ordered stricken for failing to comply with Rule 8. In *Magluta*, as is the case here, the complaint was "replete with allegations that 'the defendants' engaged in certain conduct, making no distinction among the fourteen defendants charged,

though geographic and temporal realities make plain that all of the defendants could not have participated in every act complained of." 256 F.3d at 1285. Moreover, both the *Magluta* defendants and the instant Defendants worked for the named state entities at different times and had different job responsibilities, meaning that all of the Defendants could not possibly have participated in every action alleged. *See, e.g.*, 3d Am. Compl. ¶¶ 10-19. Accordingly, this Court should dismiss Plaintiffs' shotgun Complaint for failure to comply with Rule 8(a)(1).

VI. PLAINTIFFS' COMPLAINT FAILS TO SATISFY THE HEIGHTENED PLEADING STANDARD FOR FRAUD UNDER STATE LAW OR TO STATE ANY FRAUD CLAIMS UNDER RULE 12(b)(6).

A. Counts 1, 2, 12, And 15 Should Be Dismissed For Lack Of Particularity.

Even if Plaintiffs' claims were not barred by the immunity doctrines discussed above, and even if they were found to satisfy Rule 8, they do not even begin to satisfy Rule 9(b)'s particularity requirement for fraud claims. Indeed, the Complaint does not identify a single specific communication made by any Defendant and received by any specific Plaintiff. Because of this remarkable lack of particularity, Counts 1, 2, 12, and 15 should be dismissed.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake *shall* be stated with particularity." V.R.C.P. 9(b) (emphasis added). The rule "requires that the facts and circumstances sufficient to satisfy all of the elements of fraud be specifically pled." *Silva v. Stevens*, 156 Vt. 94, 105, 589 A.2d 852, 859 (1991) (citing *Cheever v. Albro*, 138 Vt. 566, 570, 421 A.2d 1287, 1289 (1980)); 5A Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 1297, at 590 (3d ed. 2004) ("Wright & Miller").

The 9(b) requirements are fundamentally designed to ensure that defendants receive due process and are protected against lightly made claims of a serious nature. In the securities law context, Rule 9(b) functions as well to discourage strike suits as a vehicle for evidentiary fishing

expeditions. 5A Wright & Miller § 1296; s*ee also DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) ("Rule 9(b) is designed to further three goals: (1) providing a defendant fair notice of plaintiff's claim, to enable preparation of defense; (2) protecting a defendant from harm to reputation or goodwill; and (3) reducing the number of strike suits.").

Vermont's Rule 9(b) is modeled after Rule 9(b) of the Federal Rules of Civil Procedure, and Vermont courts accordingly turn to federal interpretations for guidance. *See* V.R.C.P. 9, Reporter's Notes. The materially identical federal rule requires that "the complaint must (1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 171 (2d Cir. 2015) (quoting *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 187 (2d Cir. 2004)).

Plaintiffs' Complaint entirely fails to satisfy these requirements as to all Defendants. As an initial matter, it relies primarily on the alleged statements of a non-defendant, former Governor Peter Shumlin. *See* 3d Am. Compl. ¶¶ 53, 157, 233-35, 238. It also suggests that "the VRC Team" – defined to include every single individual Defendant, notwithstanding the fact that several of the Defendants were never employed by the State at the same time – "continually made representations on behalf of the Jay Peak Projects to third parties." *Id.* ¶ 45. Even more vaguely, it states that certain representations were made "by the VRC," *id.* ¶ 46, and that these representations "were repeated consistently to the named Plaintiffs herein." *Id.* ¶ 48.

Tellingly, what the Complaint *fails* to do is what a multi-plaintiff, multi-defendant fraud complaint must do under Rule 9(b): identify with particularity *which* defendant said *what*, and *when* and *where* they said it, and to *which* plaintiff. *Loreley Fin.*, 797 F.3d at 171; *see also* 5A

Wright & Miller § 1297 n.14 (citing cases). As the Second Circuit has explained, "[w]here multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud." *DiVittorio*, 822 F.2d at 1247. A plaintiff "may not lump separate defendants together in vague and collective fraud allegations but must inform each defendant of the nature of his alleged participation in the fraud." *Eaves v. Designs for Fin., Inc.*, 785 F. Supp. 2d 229, 247 (S.D.N.Y. 2011) (quotation omitted).

Here, Plaintiffs' allegations make it logically impossible that *all* of the Defendants said *all* of these things to *all* of the Plaintiffs, because it is acknowledged that Defendants worked for the State at different times, and Plaintiffs are alleged to have invested in different projects several years apart. 3d Am. Compl. ¶¶ 10-19 (Defendants' employment dates); ¶¶ 2-6, 40 (Plaintiffs' investment dates). The Complaint nonetheless repeatedly attempts to suggest that every single Plaintiff relied on the same unspecified "representations, omissions, and – ultimately – misrepresentations" made (somehow) by every single Defendant. *Id*. ¶¶ 47-49. Again, this fails to provide adequate notice to Defendants of the statements Plaintiffs contend are fraudulent (and why) and falls well short of satisfying Rule 9(b).

Moreover, examining each individual Defendant in turn makes clear that Plaintiffs' allegations are insufficient. ***First***, three of the ten Defendants (Carrigan, Fullam, and Goldstein) are identified only twice in the 405 numbered paragraphs of the Complaint and never mentioned again. *See id*. ¶¶ 11, 13-14, 43. As to these Defendants, the Complaint effectively does not even attempt to satisfy Rule 9(b); there is absolutely no notice as to why they might be liable for *any* of the claims. Thus, all of the fraud claims against Carrigan, Fullam, and Goldstein should be dismissed.

Second, two other Defendants (Donegan and Miller) are specifically mentioned only one time after being identified by job title and as members of the "VRC Team." Donegan is alleged only to have "coordinated" in an unspecified way with unidentified "representatives of the Jay Peak Projects." *Id*. ¶ 221. Miller is alleged only to have had a "chat" with another Defendant about an EB-5 project (Mount Snow) that no Plaintiff is alleged to have invested in. *Id*. ¶ 107. Those allegations do not put either Donegan or Miller on any notice of how they might have defrauded any Plaintiff.

Third, the allegations as to John Kessler are likewise fatally insufficient. He is alleged to have ignored a warning about possible violations of securities laws by the Jay Peak Projects in 2012, *id*. ¶¶ 85-88, and responded inadequately to a letter from Plaintiff Sutton in 2014. *Id*. ¶¶ 202-03. Kessler is also alleged to have drafted a July 2014 memorandum (its contents are not described in any way) to non-Plaintiffs. *Id*. ¶ 213. In short, Kessler is not alleged to have done or said much of anything. He certainly is not alleged to have made any specific statements that had a particular fraudulent impact on any particular Plaintiff, as Rule 9(b) requires.

Fourth, Mike Pieciak is similarly on no real notice of how he is alleged to have defrauded anyone. He is alleged to have asked Brent Raymond for advice about certain aspects of the EB-5 program and to have "coordinated with" the Jay Peak Projects to "craft private placement memoranda language and offering documents." *Id*. ¶¶ 220-21. Pieciak also is alleged to be a member of the Vermont State Colleges Board of Trustees and to have positively commented on the recent successes of the Mt. Snow EB-5 project (which, again, no Defendant is alleged to have invested in). *Id*. ¶¶ 255-58. But the Complaint does not assert, nor could it, how these allegations amount to fraud on any Plaintiff.

Fifth, Patricia Moulton, former Secretary of Commerce, is alleged to have had a "chat" with certain ACCD employees about a non-Jay-Peak EB-5 project. *Id*. ¶ 107. She is further alleged to now be employed as President of Vermont Technical College. *Id*. ¶ 254. None of these allegations puts Moulton on meaningful notice as to how or when she is alleged to have defrauded any Plaintiff. The remaining allegations against Moulton all involve her alleged same-day response to Plaintiff Sutton's October 10, 2014 communication to the VRC. *Id*. ¶¶ 193-97. It is broadly alleged that Secretary Moulton's response was inaccurate and inadequate. However, no connection is drawn between this response and any action by Sutton or any other Plaintiff.

Sixth, the slightly more extensive allegations about Brent Raymond and James Candido do not satisfy Rule 9(b). For instance, the Complaint alleges that "[d]uring meetings with investors, James Candido touted the VRC's unique state oversight as a reason to choose an EB-5 project overseen by the VRC," and "represented to investors that he had investigated [the dispute between Jay Peak Projects and Rapid USA Visas] and that it was safe to make an investment." *Id*. ¶¶ 113, 124. Likewise, Plaintiffs allege that Raymond created a false narrative to "deflect attention away from VRC's protection of the Jay Peak Projects." *Id*. ¶ 189. These generalized allegations do not satisfy Rule 9(b); they neither identify *when* or *where* these representations took place, to *which* plaintiffs (if any) they were made, nor *why* the statements are alleged to be fraudulent.

Further emblematic of this lack of specificity is the "causation" allegation that *all* of the Plaintiffs (presumably including the potentially hundreds of yet-unnamed putative class-action plaintiffs) were influenced identically by *all* of the actions by *all* Defendants. *See, e.g.*, *id*. ¶¶ 262-68. This allegation is impossible on its face. The Complaint likewise alleges eleven times

that due to "actions, behavior, and representations by the VRC, the Jay Peak Investors each left their home countries, liquidated their assets, displaced their families, and turned over their life savings to the fraud at the Jay Peak Projects." *Id*. ¶¶ 49, 80, 103, 136, 143, 159, 199, 212, 223, 239, 266. This allegation does not become more specific by repetition, and it is the only causation allegation in the Complaint.

The Complaint also fails to adequately allege any Defendant's mental state. At a minimum, "plaintiffs must allege facts that give rise to a strong inference of fraudulent intent," which may be established "either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Eternity Glob*, 375 F.3d at 187 (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)). In a multi-defendant case, this must be done as to each defendant separately. And yet the Complaint's *only* allegation with respect to Defendants' mental state is a single paragraph, which is alleged to apply to the entire "VRC Team":

> The VRC Team's motivation to commit wrongful acts, included, but was not limited to: (i) the notoriety gained as the illusory overseers of hundreds of millions of dollars in foreign investor funds, supposedly used to stimulate the economy of Vermont's most economically depressed region; (ii) the desire to hide their wrongdoing in order to protect their high-level state employment, salaries and benefits; and (iii) the protection of their pecuniary interests by gaining lucrative positions and salaries within the State and the very EB-5 projects in which their illusory oversight was to occur.

3d Am. Compl. ¶ 284. As with the other allegations, this falls far short of Rule 9(b)'s requirement that each Defendant be put on notice of the specific allegations against him or her. Nor does this global allegation give rise to any inference of fraudulent intent with respect to any particular Defendant, as the case law requires. *Eternity Glob.*, 375 F.3d at 187.

Equally problematic, there is no specific allegation that any Defendant gained any "notoriety" or desired to. Further, the idea that Defendants were motivated to "commit wrongful acts" by "the desire to hide their wrongdoing" is circular and illogical, particularly when it is purported to apply to all Defendants and all of their actions. And the third mental-state theory (protection of pecuniary interests) is entirely lacking in specificity as to individual Defendants' mental states. Rather the Court is asked to infer that all Defendants feared losing their jobs if they behaved in a certain way, that they were promised employment with EB-5 projects if they did X but not if they did Y, or that their positions within State government have become more lucrative because of their alleged actions. The Court should not accept Plaintiffs' sweeping conclusory statements and invitation to speculate (as that is all the Complaint contains) with respect to mental state.

Rule 9(b)'s pleading requirement also extends to Count 12's allegations of aiding and abetting fraud, and the analysis above is largely the same as to that claim. "[A] claim for aiding and abetting fraud requires plaintiff to plead facts showing the existence of a fraud, defendant's knowledge of the fraud, and that the defendant provided substantial assistance to advance the fraud's commission." *De Sole v. Knoedler Gallery, LLC*, 137 F. Supp. 3d 387, 411 (S.D.N.Y. 2015) (quotation omitted).

For the reasons set forth above, the Complaint fails almost entirely to make defendant-specific allegations as to any aspect of the aiding-and-abetting claims. *See, e.g.*, *Apace Comm'ns Ltd. v. Burke*, 522 F. Supp. 2d 509, 517 (W.D.N.Y. 2007) (citing cases). In particular, there is no specific allegation of any action amounting to "substantial assistance to advance the fraud's commission." *De Sole*, 137 F. Supp. 3d at 411 (quotation omitted); *see also Attick v. Valeria Assocs., L.P.*, 835 F. Supp. 103, 111 (S.D.N.Y. 1992) (dismissing aiding-and-abetting fraud

claims for failure to plead them with particularity). Plaintiffs cannot simply allege that "defendants" or the "VRC Team" aided and abetted; such a "lumped together" treatment of multiple defendants does not satisfy Rule 9(b).

In sum, Plaintiffs fail by a wide margin to plead fraud in Counts 1, 2, 3, 12, and 15 with sufficient particularity. Such generalized pleadings deny the appropriate notice that Rule 9(b) guarantees each individual Defendant as a matter of due process. Counts 1, 2, 3, 12, and 15 should be dismissed.

B. Plaintiffs Fail To Allege A Claim For Common-Law Fraud (Count 1).

Even if Plaintiffs could satisfy the heightened pleading standards in Rule 9(b), they have failed to state a cognizable claim of common law fraud against any individual Defendant. To plead common-law fraud, plaintiff must allege: "(1) intentional misrepresentation of a material fact; (2) that was known to be false when made; (3) that was not open to the defrauded party's knowledge; (4) that the defrauded party acted in reliance on that fact; and (5) is thereby harmed." *Felis v. Downs Rachlin Martin PLLC*, 2015 VT 129, ¶ 13, 200 Vt. 465, 133 A.3d 836 (quoting *Estate of Alden v. Dee*, 2011 VT 64, ¶ 32, 190 Vt. 401, 35 A.3d 950). Fraudulent misrepresentation can be accomplished affirmatively by false statement or by the concealment of facts by one who has a duty to disclose those facts. *Estate of Alden*, 2011 VT 64, ¶ 32 (citing *Sutfin v. Southworth*, 149 Vt. 67, 69-70, 539 A.2d 986, 988 (1987)). "The duty to disclose arises out of a special relationship of confidence or trust – such as the fiduciary relationship between trustee and beneficiary." *Id.* "The absence of any one element prevents the party from prevailing on a fraud claim." *Id.* (citing *Lewis v. Cohen*, 157 Vt. 564, 568, 603 A.2d 352, 354 (1991)).

To begin, as explained above, Plaintiffs have failed to plead common-law fraud with sufficient particularity pursuant to V.R.C.P. 9(b). The Complaint does not identify the alleged maker of false representations with any specificity beyond "Defendants" or the "VRC Team" or specify when such alleged false representations were made, or to whom, apart from "plaintiffs" or "investors." Because the Complaint does not allege who made the statements or exactly when, it cannot and does not allege that they were known to be false when made, or that they were made intentionally. Thus, the Complaint fails to state the first three elements of a claim for fraud under Vermont law. *See Felis*, 2015 VT 129, ¶ 13 (first three elements of fraud are intentional misrepresentation of a material fact, that was known to be false when made, and that was not open to the defrauded party's knowledge).

In addition, the Complaint does not adequately allege the basis for Defendants' alleged fiduciary duty to Plaintiffs; nor could it. *See* 3d Am. Comp. ¶¶ 332, 342, 343, 350, 352, 354, 372, 381, 386. As more fully discussed below, *see infra* Section VI.A, Plaintiffs do not have (and never had) any special relationship with Defendants, beyond the State's general duty to the investing public at large. Accordingly, the Court should dismiss Plaintiffs' claim of common law fraud against the individual Defendants.

C. Plaintiffs Fail To State A Claim For Fraud Under Vermont Securities Law.

Plaintiffs' Count 2 fails to state claims under Vermont's securities laws and should be dismissed under Rule 12(b)(6). In addition to the lack of particularity described above, there are two other fundamental legal deficiencies that warrant dismissal. First, claims asserted by Sutton and Connors under the Vermont Uniform Securities Act, 9 V.S.A. § 5509, are barred by the applicable statute of limitations. Second, even if the claims were timely, no action is available under § 5509, because the state officials and departments sued here were not, and are not alleged

to have been, "sellers," "broker-dealers," "agents," or "control people" who transacted business with Plaintiffs, nor have Plaintiffs stated a claim under any other provision in § 5509.

1. *Background – Vermont's Uniform Securities Act.*

The Vermont Uniform Securities Act ("VUSA"), represents Vermont's adoption of the 2002 Uniform Securities Act ("Uniform Securities Act") drafted by the National Conference of Commissioners on Uniform State Laws.[28] *See* 2005, No. 11, § 1. In interpreting the VUSA, "[i]t is the intention of the general assembly that the official comments of the 2002 Uniform Securities Act be used to guide administrative and judicial interpretations of this chapter." *Id.* § 4.[29]

Because the VUSA "is a Uniform State Law and is traceable to federal law, federal cases and cases from other states adopting the Uniform Securities Act are helpful in the interpretation of our Securities Act." *Mosley v. Am. Express Fin. Advisors, Inc.*, 2010 MT 78, ¶ 23 n.5, 230 P.3d 479; *see also Booth v. Verity, Inc.*, 124 F. Supp. 2d 452, 460 (W.D. Ky. 2000) ("To interpret provisions of Blue Sky Laws patterned after the Uniform Securities Acts, other state courts have looked to decisions construing parallel federal securities laws."); *cf.* 9 V.S.A. §§ 5605(b), 5608(a) (favoring uniform interpretation of securities laws). "Although these federal cases are not dispositive when we are interpreting our state's securities legislation, reliance on

[28] National Conference of Commissioners on Uniform State Laws, Uniform Securities Act (2002); amended 2005), *available at* http://www.uniformlaws.org/shared/docs/securities/securities_final_05.pdf.

[29] The VUSA's "General fraud" provision, § 5501, is identical to § 501 of the Uniform Securities Act. The official comments to § 501 note that although it "was modeled on Rule 10b-5 adopted under the Securities Exchange Act of 1934 [15 U.S.C. § 78a, *et seq.*] and on Section 17(a) of the Securities Act of 1933 [15 U.S.C. § 77a, *et seq.*]," § 501 "is not identical to either Rule 10b-5 or Section 17(a)." Uniform Securities Act § 501 cmt. 1.

federal cases is certainly proper." *State v. Schwenke*, 2009 UT App. 345, ¶ 12 n.2, 222 P.3d 768 (citations omitted).

2. *To the extent Count 2 attempts to state a claim by Sutton and Connors under § 5509, it is barred by the statute of limitations*.

Because § 5501 does not create a private right of action,[30] if Count 2 is to state a claim, it must do so under § 5509. 9 V.S.A. § 5509, Editor's Notes cmt. 7 ("Section 509(m) expressly provides that only Section 509 provides a private cause of action for conduct that could violate Section 501."). For the reasons stated below, Plaintiffs Sutton and Connors also fail to state a claim under § 5509.

The VUSA provides a specific statute of limitations for private securities claims in Vermont. Section 5509 claims must be brought within two years after discovery or five years after the violation, whichever is *earlier*. 9 V.S.A. § 5509(j)(2). Because securities violations must be "in connection with" a sale, they are said to occur, at the latest, at the time of the sale. *Id*. § 5501(a). In the case of Phase I investors like Sutton and Connors, that was no later than May 2008. 3d Am. Compl. ¶ 40(i). For Phase II investors, that was no later than January 2011. *Id*. ¶ 40(ii). And Phase IV investor claims are untimely as well; all Phase IV investments were made no later than November 2011.[31] *Id*. ¶ 40(iv).

Accordingly, Phase I, II, and IV investor securities claims are untimely under state law (even if such claims were otherwise permissible, which they are not). And so are state-law

[30] 9 V.S.A. § 5509, Editor's Notes cmt. 7 ("There is no private cause of action, express or implied, under Section 501."); *see also* Uniform Securities Act § 501 cmt. 7 (same).

[31] The five-year bar would also eliminate claims by many other putative class members, including most of the investors in Phase III (capital raise alleged to have ended in October 2012), 3d Am. Compl. ¶ 40(iv); Phase V (capital raise alleged to have ended in November 2012, *id*. ¶ 40(v); and Phase VI (capital raise alleged to have ended in December 2012), *id*. ¶ 40(vi).

securities claims by any other investor who invested more than five years before Plaintiffs' Complaint was filed (i.e., before May 30, 2012).

3. *Even if the § 5509 claim were timely, Plaintiffs have failed to state a claim.*

Even leaving aside the statute-of-limitations bar, the § 5509 claim is fatally flawed; simply put, the allegations, even if accepted as true, do not establish § 5509 liability. The only two grounds for such a claim that can even potentially be discerned from the Complaint are "seller" liability under subsection (b) and "control person" liability under subsection (g). Defendants cannot properly be found to have acted as either.

a. The Complaint fails under § 5509(b) because it does not allege that Defendants sold the securities that Plaintiffs purchased.

Section 5509(b) provides a right of action by a buyer against a seller, but the Complaint does not allege that any Defendant was a "seller" with respect to any security purchased by any Plaintiff, nor could it.[32] For example, there is no allegation that any Defendant sold a security or received any consideration from any Plaintiff for any security. At most, the Complaint alleges that Defendants breached a public duty to Plaintiffs and acted in concert with the Jay Peak entities, received gifts or favors from them, and assisted those entities in their sales of securities. *See e.g.*, 3d Am. Compl. ¶¶ 44-45, 50, 209, 354, 361, 386, 393. This does not state a claim under § 5509(b). State regulators, even allegedly negligent ones, are not "sellers" under the federal Securities Act. *See, e.g., Zachman v. Erwin*, 186 F. Supp. 691, 695-96 (S.D. Tex. 1960) (dismissing claims against member of Board of Insurance Commissioners for alleged negligent oversight, including the allegation that the official accepted gifts); *Zachman v. Erwin*, 186 F. Supp. 681, 686 (S.D. Tex. 1959) (same, with respect to Chief Examiner of same Board).

[32] It is well established that an action under § 509(b) (and thus VUSA § 5509) is available only to a buyer against the seller. *See* Uniform Securities Act § 509 cmt. 3.

Nor is there any allegation that any Defendant made any specific communication to any specific Plaintiff with respect to any security. *See, e.g.*, 3d Am. Compl. § I (describing offering documents but not alleging that the VRC sent such documents to any named Plaintiff). The Complaint also repeatedly refers to communications being made to unspecified "investors and would-be investors," but never alleges that any Plaintiff received such communications. *See, e.g.*, *id*. ¶¶ 102, 114, 125, 142, 158, 198, 211, 222, 239.

A securities claim under § 5509(b) simply may not be premised on such a non-relationship between the plaintiff and the putative "seller." *See, e.g.*, *In re Repub. Nat'l Life Ins. Co.*, 387 F. Supp. 902, 905 & n.2 (S.D.N.Y. 1975). In *Republic National*, the court dismissed securities claims where, as here, the plaintiff alleged without elaboration that he had relied on communications from the defendant, and did not specify what the communications were or when they were made. *Id*. ("There is no allegation that [plaintiff] or any other investor did in fact know of and rely on either of these publications or the recommendations contained therein. The omission seems not inadvertent.").

Here, the Complaint is similarly non-particular, and thus the "seller" claims should be dismissed. No Defendants were a seller, and even if they were, there is no allegation that they sold a security to any Plaintiff.

b. Plaintiffs' claims fail under § 5509(g) because regulators and other state administrators are not "control people."

The other potential way to state a claim under § 5509 is under the "control person" provision in subsection (g). In addition to being barred by the statute of limitations and not stated with particularity, the "control person" avenue is unavailable against Defendants as a matter of law. While apparently not an issue that is widely litigated, the few courts that have

addressed the question have uniformly concluded that state administrative and regulatory bodies and their members are not control people.

A pair of Texas cases, *Zachman v. Erwin*, 186 F. Supp. 681 (S.D. Tex. 1959) and *Zachman v. Erwin*, 186 F. Supp. 691 (S.D. Tex. 1960), are closely on point. In *Zachman*, it was alleged that the Chief Examiner for the Texas Board of Insurance Commissioners and a member of the Board had willfully assisted certain defendants in falsifying their company's financial documents, and had been induced to do so by valuable gifts or favors from the company. 186 F. Supp. at 686 (Chief Examiner; 1959 decision); 186 F. Supp. at 695-96 (Board member; 1960 decision). The court found that such allegations, even if true, did not "by the greatest stretch" show that the defendants "controlled a seller." *Id*. at 686. Other federal cases are to similar effect: state administrators and regulators are not liable as control people. *See, e.g.*, *Ferreri v. Mainardi*, 690 F. Supp. 411, 414 (E.D. Pa. 1988) (dismissing "control person" claims against national stock exchange for alleged breach of its regulatory duties; no private right of action against exchange as "control person"); *Baty v. Pressman, Frohlich & Frost, Inc.*, 471 F. Supp. 390, 391 (S.D.N.Y. 1979) (same); *Carr v. N.Y. Stock Exch., Inc.*, 414 F. Supp. 1292, 1303 (N.D. Cal. 1976) (same).

The same conclusion applies here. Even if the § 5509(g) claim surmounted all the other reasons for dismissal, the allegations simply do not suffice to state a "control person" claim against the state entities and employees named. If anything, the allegations imply that Quiros and Stenger were controlling state actors, and not the other way around. *See, e.g.*, 3d Am. Compl. ¶ 43 (Jay Peak Projects "enlisted" and "directed" Defendants "to actively market and solicit investors"); ¶ 45 ("VRC Team . . . made representations on behalf of the Jay Peak Projects"); ¶ 46 ("on behalf of"); ¶ 50 (VRC alleged to "assist the Jay Peak Projects"). These allegations

affirmatively contradict the notion that Defendants controlled the Jay Peak Projects. In fact, Plaintiffs' theory also appears to be that Defendants exerted too *little* control over the Jay Peak Projects, not too much.

c. The Complaint does not, and cannot, state a claim under any other subsection of § 5509.

Subsection (c). Section 5509(c) states: "A person is liable to the seller if the person buys a security in violation of section 5501 . . . ." 9 V.S.A. § 5509(c). This provision is inapplicable because there is no allegation that Plaintiffs sold a security or that Defendants purchased one.

Subsection (d). Section 5509 also provides a right of action by a buyer against a "person acting as a broker-dealer or agent that sells or buys a security." *Id.* § 5509(d). However, the Complaint does not allege, nor could it, that any Defendant violated 9 V.S.A. §§ 5401(a) (broker-dealer registration requirement), 5402(a) (agent registration requirement), or 5506 (misrepresentations concerning registration), at least one of which must be alleged to state a claim under § 5509(d). Indeed, § 5401(a), 5402(a), and 5506 are never mentioned in the Complaint.

The Complaint merely alleges, entirely without elaboration, that the "VRC Team" (comprising every individual Defendant) acted as "marketers of securities who did not acquire the proper broker-dealer registrations or exemptions." 3d Am. Compl. ¶ 263. But it does not allege that a Defendant sold a security or that there was any transaction of business between the "VRC Team" or any member of it and any Plaintiff.

Section 5401(a) requires broker-dealers to register with the State before they "transact business." *See also* 9 V.S.A. § 5102(3) ("'Broker-dealer' means a person engaged in the business of effecting transactions in securities."). To allege that a person was a broker-dealer, the allegations must show that the person was "characterized by a certain regularity of

participation in securities transactions at key points in the chain of distribution." *SEC v. Hanson*, No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) (quoting *Mass. Fin. Servs., Inc. v. Sec. Inv. Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976)). There is no allegation, nor could there be, that any Defendant "transacted business" with any Plaintiff, because no Plaintiff bought any security from any Defendant. Nor is there any allegation, as required, that Defendants' activities involved the sale of securities with "regularity."

Section 5402(a), similarly, requires an "agent" to register with the State before they "transact business." Again, Plaintiffs fail to allege the elements of a violation. They neither allege that any specific Defendant performed any specific act that amounted to representing either another "broker-dealer" or the issuer of securities, "in effecting or attempting to effect purchases or sales of the issuer's securities." And even if the Complaint cited § 5402(a), which it does not, there are no facts alleged that would support a claim.

The last potential avenue to liability under § 5509(d) is via § 5506. Again, there are no specific allegations of a violation, nor could there be. Liability is predicated on a finding that the defendant sold or bought a security, which is missing here. Further, Section 5506 prohibits any person from representing that the Commissioner of Financial Regulation "has passed upon the merits or qualifications of, or recommended or given approval to, a person, security, or transaction." There is no allegation that any Defendant made any such representation to a specific Plaintiff.

Subsection (e). A claim may also be available under § 5509(e) against "a person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of subsection 5403(a) or 5404(a) or section 5506 of this chapter." 9 V.S.A. § 5509(e). However, Defendants here are not investment advisers. On the contrary, all

Defendants are expressly excluded from the definition of investment adviser. *See id*. § 5102(15)(G); 15 U.S.C. § 80b-2(b). Section 5102(15)(G) incorporates into Vermont law the federal law exclusion of "a State, or any political subdivision of a State, or any agency, authority, or instrumentality" of a State. 15 U.S.C. § 80b-2(b).

Nor is any Defendant an "investment adviser representative" ("IAR"). An IAR, by law, is an individual "employed by or associated with an investment adviser." 9 V.S.A. § 5102(16). Plaintiffs do not allege that any Defendant is such an individual, nor, of course, is any such allegation possible, because the individual Defendants are sued as state employees and the State is not an investment adviser as a matter of law. Likewise, the VRC, ACCD, or DFR are not "employed by or associated with" an investment advisor; nor are they alleged to be. Rather, they are alleged to be government agencies. 3d Am. Compl. ¶¶ 7-9.

Subsection (f). As with the other paths to liability under § 5509, Plaintiffs fail to adequately allege facts sufficient to support a claim under subsection (f). As noted above, there is no allegation that any specific Defendant said anything to any named Plaintiff, and thus there is certainly no allegation that any Defendant gave "investment advice" to any Plaintiff. The bare allegation that the "VRC Team" made representations about investments to unidentified "investors and would-be investors" cannot suffice to adequately state a claim under § 5509(f), even if particularity were not required.

Accordingly, for the reasons discussed above, Count 2 should be dismissed. Not only does the statute of limitations preclude the named Phase I, II, and IV Plaintiffs' claims, but the Complaint fails entirely to allege the necessary elements of such a claim.

VII. EVEN IGNORING ALL OF THE ABOVE OBSTACLES, PLAINTIFFS' VARIOUS CLAIMS ARE NOT VIABLE AND SHOULD BE DISMISSED UNDER RULE 12(b)(6).

Even if Plaintiffs could surmount all the obstacles presented by official immunity, jurisdictional bars and the Receiver Order, heightened pleading standards and the insufficiency of scattershot complaints, Counts 5-10, 13, 14, and 16 fail under Rule 12(b)(6).

A. Plaintiffs Fail To State A Claim Because Defendants Owed No Legal Duty To Plaintiffs (Counts 5-7 and 13).

Counts 5, 6, 7, and 13 all allege some form of breach of a duty allegedly owed by Defendants to Plaintiffs. *See* 3d Am. Compl. ¶¶ 332, 342, 350, 381. "Whether a duty exists in particular circumstances is a legal question for the court's consideration." *Wentworth v. Crawford & Co.*, 174 Vt. 118, 126, 807 A.2d 351, 357 (2002). With regard to claims under the Tort Claims Act, "the first question in applying the statute is whether the State owes the plaintiff a duty of care under the circumstances." *Earle v. State*, 2006 VT 92, ¶ 9, 180 Vt. 284, 289, 910 A.2d 841, 846 (2006). It is well settled that

> In determining whether a governmental body has undertaken a duty of care toward specified persons above and beyond its duty to the public at large, we consider (1) whether a statute sets forth mandatory acts for the protection of a particular class of persons; (2) whether the government has knowledge that particular persons within that class are in danger; (3) whether those persons have relied on the government's representations or conduct; and (4) whether the government's failure to use due care would increase the risk of harm beyond what it was at the time the government acted or failed to act.

Sabia v. State, 164 Vt. 293, 299, 669 A.2d 1187, 1191 (1995).

In this case, the Court need look no further than the first criterion to see that Defendants owed no duty specifically to Plaintiffs beyond its duty to the investing public at large. Nowhere do Plaintiffs allege that Defendants violated a statute that sets forth mandatory acts for the protection of a particular class of persons. Instead, Plaintiffs allege, as the basis for their

negligent-misrepresentation claim in Count 5, that based on their "purported unique and special expertise with respect to the EB-5 immigration-based investments generally, and the Jay Peak Projects in particular, Defendants had a special relationship of trust or confidence with Plaintiffs, which created a duty on the Defendants' part to impart full and correct information to Plaintiffs." *See* 3d Am. Compl. ¶ 332. However, these conclusory allegations are insufficient to impose a duty on Defendants under Vermont law because there is no allegation that Defendants failed to perform mandatory acts required by statute.

The duties alleged in Plaintiffs' gross negligence claim (Count 6) and negligence claim (Count 13) are nearly the same. "In providing state oversight, administrative, managerial, and overall regulatory services to the Jay Peak Projects, Defendants had a special relationship with Plaintiffs that gave rise to a duty to exercise due care in the performance of its duties." *Id*. ¶ 381; *see also id*. ¶ 342. Again, there is no allegation of a violated statute, and the regulatory services and oversight involved were meant to protect the public as a whole, not just Plaintiffs. *See Denis Bail Bonds*, 159 Vt. at 489, 622 A.2d at 499-500 (any duty of Department of Banking and Insurance to investigate insurance agents runs to general public, not to any class of insurers); *see also Andrew*, 165 Vt. at 256-57, 682 A.2d at 1390 (State's occupational safety regulatory enforcement scheme is not an undertaking of services to employers or their workers, and thus does not create a duty); *Corbin*, 163 Vt. at 143, 657 A.2d at 172 (no cause of action exists whereby individual plaintiff may recover in tort against government for failure to enforce law whose purpose is protection of public as a whole).

Count 7 alleges a breach of fiduciary duty. *See* 3d Am. Compl. ¶ 350. However, the basis for this purported duty is no different from the basis for the duties alleged in Counts 5, 6, and 13. *Compare id*. ¶ 330 *with* ¶¶ 332, 342, 381. Like the existence of an ordinary duty, the

existence or nonexistence of a fiduciary duty is a question of law to be decided by the Court. *McGee v. Vt. Fed. Bank, FSB*, 169 Vt. 529, 530, 726 A.2d 42, 44 (1999) (mem.). There is no basis for applying a fiduciary duty on governmental actors in this type of setting. Accordingly, for the same reasons as Counts 5, 6, and 13, Plaintiffs' breach of fiduciary duty claim should be dismissed for lack of any specific duty to Plaintiffs.[33]

B. Plaintiffs' Negligence Claims Are Barred By The Economic-Loss Rule (Counts 6 and 13).

The only harms alleged by Plaintiffs in this action are that they lost their investment, and were denied U.S. residency. *See* 3d Am. Compl. ¶¶ 291, 323, 369. There is no allegation of physical injury. "It is well established in Vermont that absent some accompanying physical harm, there is no duty to exercise reasonable care to protect another's economic interests." *Wentworth*, 174 Vt. at 126, 807 A.2d at 356. "The economic loss rule prohibits recovery in tort for purely economic losses." *Long Trail House Condo. Ass'n v. Engelberth Const., Inc.*, 2012 VT 80, ¶ 10, 192 Vt. 322, 59 A.3d 752 (quotations omitted). "Economic loss is defined generally as damages other than physical harm to persons or property." *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 315, 779 A.2d 67, 71 (2001) (quotation omitted) (claims by owners of hydroelectric facilities against Public Service Board's designated purchasing agent,

[33] Further, for Defendants to have become fiduciaries of Plaintiffs, the relationship had to ripen into one in which the law recognizes that Plaintiffs were dependent on, and reposed trust and confidence in, Defendants in the conduct of Plaintiffs' affairs. *McGee*, 169 Vt. at 530, 726 A.2d at 44; *Capital Impact Corp. v. Munro*, 162 Vt. 6, 10, 642 A.2d 1175, 1177 (1992). While Plaintiffs have alleged that they relied on Defendants generally to regulate the Jay Peak Projects, there is no allegation, nor could there be, that Plaintiffs trusted Defendants to determine how to conduct their affairs, or to conduct their affairs for them. To participate as an investor in the Jay Peak Projects, the plaintiffs had to certify that they were wealthy and informed investors. For example, in the Phase I Subscription Agreement, each investor certified that they relied solely on the offering documents, and that they had either a net worth of more than $1 million or an annual income of at least $200,000. *Cf. Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1029 (4th Cir. 1997) (wealth is important factor in determining whether person is sophisticated investor). Therefore, Plaintiffs' breach of fiduciary duty claim must be dismissed along with their other claims of breach of duty.

alleging agent negligently administered power purchase agreement, were barred by economic-loss rule). Accordingly, Plaintiffs' negligence and gross negligence claims (Counts 6 and 13) must be dismissed under the economic-loss rule.

C. Plaintiffs' Implied Contract Claim Fails Because Plaintiffs Have Failed To Allege The Existence Or Breach Of A Contract With Defendants (Count 16).

In Count 16, Plaintiffs allege that Defendants breached an implied contract with them. The theory underlying contracts implied by law grows out of the doctrine of unjust enrichment. *Harman v. Rogers*, 147 Vt. 11, 15, 510 A.2d 161, 164 (1986). "The law implies a promise to pay when a party receives a benefit and the retention of the benefit would be inequitable." *Cedric Elec., Inc. v. Shea*, 144 Vt. 85, 86, 472 A.2d 757, 757 (1984). Thus, for the reasons explained below regarding the claim for unjust enrichment, Plaintiffs have failed to allege either the existence of an implied promise (to oversee the Jay Peak Projects) or the breach of one.

Moreover, despite the fact that no written contract existed between the parties, Plaintiffs' allegations in Count 16 of "agreement," "consideration," and "conditions precedent" suggest they may be attempting state a legal breach of contract claim, and not an equitable breach of implied contract claim. *See* 3d Am. Compl. ¶¶ 399-401. If so, such a claim must fail.

"It is, of course, a basic tenet of the law of contracts that in any agreement there must be mutual manifestations of assent or a 'meeting of the minds' on all essential particulars." *EverBank v. Marini*, 2015 VT 131, ¶ 17, 200 Vt. 490, 134 A.3d 189 (citing Restatement (Second) of Contracts § 17(1) (1981)) (quotation omitted). "In other words, the parties must agree to the same thing in the same sense." *Id.* (quotation omitted).

Plaintiffs allege that "Defendants' representations, acts, and course of conduct evinced an agreement to provide state oversight, administration, management, and overall regulation of the Jay Peak Projects." 3d Am. Compl. ¶ 399. Plaintiffs then allege that "Plaintiffs provided fees

and other good and valuable consideration in order to secure the state oversight, administration, management, and overall regulation that Defendants failed to provide." *Id*. ¶ 400. However, there is no allegation, nor could there be, that Defendants agreed to regulate the Jay Peak Projects *in exchange* for Plaintiffs' fees. *See* Restatement (Second) of Contracts § 17(1) (formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration). As discussed above, any regulation of the Jay Peak Projects was a uniquely governmental function, not undertaken for the benefit of specific individuals. Thus, at the very least, the bedrock requirement of a breach-of-contract claim, that the parties agree to the same thing at the same time, is lacking in this case.

To put it another way, "[t]he manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties." *Id*. § 22(1). "'An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" *State v. Delaney*, 157 Vt. 247, 255, 598 A.2d 138, 142 (1991) (quoting Restatement (Second) of Contracts § 24). "An offer is an expression by one party of his assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express his assent to the identically same terms." 1A Arthur L. Corbin, *Corbin on Contracts* § 11, at 23 (1963), *quoted in Delaney*, 157 Vt. at 255, 598 A.2d at 142. Defendants did not offer to regulate or "oversee" the Jay Peak Projects in exchange for fees, and Plaintiffs did not assent to this offer by paying the fees.

Moreover, as a matter of law, the payment of fees is not adequate consideration to form a contract with the government. For example, federal courts have rejected the argument that the payment of filing fees can serve as consideration. *See, e.g.*, *Garrett v. United States*, 78 Fed. Cl.

668, 671 (Fed. Cl. 2007). Thus, the mere payment of a fee cannot create a contract between a plaintiff and the government. *See Coleman v. United States*, 635 Fed. App'x 875, 878 (Fed. Cir. 2015) (affirming dismissal of breach of contract claim because plaintiff's payment of filing fee to court along with his complaint did not establish contract between plaintiff and court); *see also Sanitary & Improvement Dist. No. 1, Butler Cty. v. Adamy*, 858 N.W.2d 168, 174 (Neb. 2015) (statute allowing county treasurers a fee in exchange for collecting certain assessments and taxes did not create any contractual relationship). Further, 10 V.S.A. § 21 authorizes the VRC to collect administrative fees from project developers; accordingly, no contract was formed through the payment of project fees.

In any event, Defendants' alleged promise to Plaintiffs to regulate the Jay Peak Projects is unenforceable because the State is alleged to have had a pre-existing duty to do so. Not only did Defendants' regulatory functions regarding the Jay Peak Projects pre-exist any purported promise to Plaintiffs, but it would be a duty owed to the general public, not specifically to Plaintiffs. *See Kane v. Lamothe*, 2007 VT 91, ¶ 9, 182 Vt. 241, 936 A.2d 1303 (law enforcement "officer's duty is owed to the community as a whole," and creates no special relationship between crime victims and State). As the Restatement (Second) of Contracts explains:

> A legal duty may be owed to the promisor as a member of the public, as when the promisee is a public official. In such cases there is often no direct sanction available to a member of the public to compel performance of the duty, and the danger of express or implied threats to withhold performance affects public as well as private interests. A bargain by a public official to obtain private advantage for performing his duty is therefore unenforceable as against public policy.

Restatement (Second) of Contracts § 73 cmt. b., *cited with approval in Sanders v. St. Paul Mercury Ins. Co.*, 148 Vt. 496, 505, 536 A.2d 914, 920 (1987). As such, performance of the official's duty is not consideration for a promise, which would be unenforceable as violating public policy. *Id*.

In sum, Plaintiffs have failed to allege the existence of a contract or the breach of a legally enforceable contractual duty, and therefore, Count 16 should be dismissed.

D. Plaintiffs' Breach Of Contract Claim Fails Because They Are Not Intended Third-Party Beneficiaries To The Jay Peak MOU (Count 8).

In implicit acknowledgement that there was no express contract with Defendants, Plaintiffs purport to state a claim for breach of contract "against all Defendants" under a third-party beneficiary theory. 3d Am. Compl. ¶¶ 356-61. However, this claim fails because the MOU between ACCD and Jay Peak, which Plaintiffs rely on, does not manifest an intent that the EB-5 investors would be anything but incidental beneficiaries.

In Count 8, Plaintiffs appear to assert that all Defendants are liable to all investors by virtue of a 2006 MOU relating to Phase I (the "Phase I MOU").[34] A copy of the Phase I MOU is attached hereto as **Exhibit 4**. The fundamental problem is that no intention to benefit particular members of the public is manifested in that MOU; rather, it is meant at most to protect the public at large as incidental beneficiaries.

"Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *McMurphy v. State*, 171 Vt. 9, 18, 757 A.2d 1043, 1050 (2000) (quoting Restatement (Second) of Contracts, § 313 cmt. a). "The determination of whether a party may be classified as a third-party beneficiary, as opposed to an incidental beneficiary, is based on the original contracting parties' intention." *Id.* at 16, 757 A.2d at 1049. "A contract is interpreted foremost to give effect to the parties' intent, which is reflected in the contractual language, if that language is clear." *B&C Mgmt. Vt., Inc. v.*

[34] Plaintiffs do not attach to the Complaint the document which they contend gives them rights as third-party beneficiaries. Defendants understand Plaintiffs to be relying on the Phase I MOU between ACCD and Jay Peak. Defendants note that they are not aware of any "DFR MOU entered into the [sic] by the VRC, DFR and William Stenger." *See* 3d Am. Compl. ¶ 357.

John, 2015 VT 61, ¶ 11, 199 Vt. 202, 119 A.3d 455. The proper interpretation of a contract is a question of law. *Id*.

The Jay Peak Phase I MOU was signed by Kevin Dorn, then the ACCD Secretary, and William Stenger, in late 2006. The Complaint quotes three provisions from this document in support of its third-party-beneficiary claim. 3d Am. Compl. ¶ 359(a)-(c). However, these passages, read in context, are insufficient to establish an intent to specifically benefit particular members of the public or to impose duties on the State that run to third parties. The first passage quoted in the Complaint, ¶ 3 of the MOU, reads in full as follows:

> ACCD will promptly request that USCIS acknowledge ACCD's designation of Jay Peak to assist in the management, administration and overall compliance of the Alien Entrepreneur Project organized by Jay Peak within ACCD's Regional Center with U.S. immigration laws and regulations controlling the investment process and participation in a regional center, and to report upon the activities of the project to ACCD and respond to ACCD inquiries about the project and assist ACCD to comply with its obligations as a regional center with respect to this project.

Ex. 4 at 3, ¶ 3. Plaintiffs improperly omit the first part of the quote (up to "management"), opting instead to replace it with the misleading phrase "The VRC's duties include ensuring." 3d Am. Compl. ¶ 359(a). That phrasing turns the MOU language on its head: ¶ 3 requires ACCD only to "promptly request" that USCIS acknowledge ACCD's designation of *Jay Peak* to assist in the "management, administration and overall compliance" tasks. Even if ACCD had failed to promptly make such a request, which is not alleged, such a failure has no connection to the Plaintiffs' alleged harms in this case, nor does this language suggest any intention to confer benefits on third parties.

Similarly, Plaintiffs' second MOU quotation falls far short of the mark. *See* 3d Am. Compl. ¶ 359(b). The Complaint again takes a provision that imposes an obligation on Jay Peak

and, by replacing the opening clause with a misleading substitute, suggests that it imposes obligations on the VRC. The complete language is as follows:

> Jay Peak will provide support to ACCD including, but not limited to, providing investment-related and supporting documentation to prospective investors, supplying economic analysis and modeling reports on direct and indirect job creation, defining investment opportunities within the Jay Peak project, and assisting ACCD to comply with relevant regulatory or administrative requirements in support of individual petitions filed with CIS by immigrant investors affiliated with the Jay Peak project, such as providing area maps, valid unemployment data, general economic data and demographics concerning the geographic area covered by the Jay Peak project.

Ex. 4 at 3, ¶ 4. The Complaint fails to quote the initial phrase ("Jay Peak will . . ."), which states expressly that this provision imposes a duty *on Jay Peak* – not the State – to support and assist the State in its regulatory and administrative role. While the State and SEC have alleged that Jay Peak did not fulfill this duty, that failure does not support a third-party-beneficiary claim against the State. Nor does the language above manifest any intent that the State intended to be liable to third parties.

Plaintiffs' third quotation from the Phase I MOU comes no closer to stating a claim. *See* 3d Am. Compl. ¶ 359(c); **Ex. 4** at 3, ¶ 5. The provision, like the first two, simply describes what Jay Peak is obligated to do to assist the VRC – in this instance, provide quarterly reports containing certain specified information. *Id*. Again, the State alleges in its civil enforcement case that Jay Peak failed to do this, but that failure does not support Plaintiffs' third-party-beneficiary theory. And MOU ¶ 5, like the preceding two paragraphs, does not manifest an intention to benefit third parties. Thus, Plaintiffs' claim cannot stand.

Further, Plaintiffs' only explanation for *why* the Phase I MOU would have been intended to benefit investors is the allegation that the "Jay Peak Projects' only motivations for executing the Jay Peak MOU were to provide investors with conditional green cards (with a path to

permanent residency) and returns on their investments in the Jay Peak Projects." 3d Am. Compl. ¶ 358. This is, of course, an incomplete picture of the Jay Peak Projects' motivations, which also included Quiros and Stenger's profit motive. *See supra* at 5-8 (developer diverted millions of dollars in investor funds). But more fundamentally, it misses the mark legally; the MOU described the contractual relationship between Jay Peak and ACCD in an economic development program operated by ACCD. Therefore, at most, the MOU could only have been intended to benefit the public at large as an incidental matter.

The analysis in *McMurphy*, 171 Vt. at 16-17, 757 A.2d at 1048-49, is instructive. There, the State of Vermont and the City of Rutland entered into an agreement whereby the City would take over the maintenance of certain town highways. In a subsequent wrongful death suit, the trial court dismissed a breach-of-contract claim against the City, finding that the decedent was not, as a member of the public, an intended third-party beneficiary of the contract. *Id*. The Supreme Court affirmed, basing its analysis in the contract's plain language, despite the contract's statement that it was "in the best public interest." *Id*. Here, the Phase I MOU does not even say that much. On the contrary, the language identified by Plaintiffs evinces only the intent for Jay Peak to provide certain information and assistance to facilitate ACCD's administration of the VRC.

E. Plaintiffs' Claims For "Constructive Trust" And "Mutual Mistake" Are Not Causes Of Action (Counts 9 and 10).

Counts 9 and 10 should be dismissed because they are not proper causes of action. Count 9, labeled "constructive trust," is not an independent cause of action, but is at most a redundant statement of a potential remedy for Plaintiffs' unjust enrichment claim (Count 14). *See* 3d Am. Compl. ¶ 390; *Mueller*, 2012 VT 59, ¶ 29 ("The common remedy for unjust enrichment is imposition of a constructive trust."). Count 9 alleges that a constructive trust should be imposed

for the alleged unjust enrichment of Defendants. *See* 3d Am. Compl. ¶ 365. Thus, Count 9 should be dismissed as a redundant claim, or because it fails to state a claim. *See* V.R.C.P. 12(b)(6) (failure to state claim); V.R.C.P. 12(f) (upon motion made by a party before responding to a pleading, the court may order stricken from any pleading any redundant matter).

Likewise, Count 10, labeled "mutual mistake," is not an independent cause of action. Instead, it is a method by which to void a contract, most commonly employed as a defense in a breach-of-contract case. "Where a contract has been entered into under a mutual mistake of the parties regarding a material fact affecting the subject matter thereof, it may be avoided at the instance of the injured party, and an action lies to recover money paid under it." *Rancourt v. Verba*, 165 Vt. 225, 228, 678 A.2d 886, 887 (1996) (quotation omitted). "The usual remedies applied to mutual mistake in contract formation are rescission and reformation." *Id*. Accordingly, Plaintiffs' Count 10 for "mutual mistake" should be dismissed.

F. Plaintiffs' Claims For Unjust Enrichment And Breach Of Implied Contract Should Be Dismissed Because, As A Matter Of Law, Defendants Were Not Unjustly Enriched (Counts 14 and 16).

Count 14 (and, by implication, Count 9) alleges that Defendants were unjustly enriched by the collection of administrative fees. *See* 3d Am. Compl. ¶¶ 365, 387. The equitable doctrine of unjust enrichment rests upon the principle that people should not be allowed to enrich themselves unjustly at the expense of another. *Weed v. Weed*, 2008 VT 121, ¶ 17, 185 Vt. 83, 968 A.2d 310. Likewise, Plaintiffs' breach of implied contract claim (Count 16) is also based on the doctrine of unjust enrichment, and the analysis is the same. *See Harman*, 147 Vt. at 15, 510 A.2d at 164 (theory underlying contracts implied by law grows out of doctrine of unjust enrichment). The inquiry is whether, in light of the totality of circumstances, it is contrary to

equity and good conscience to allow a party to retain what is sought to be recovered. *Weed*, 2008 VT 121, ¶ 17; *Harman*, 147 Vt. at 15, 510 A.2d at 164.

In this case, Plaintiffs seek the restitution of administrative fees the State of Vermont received from the Jay Peak Projects. The VRC is authorized to collect such fees pursuant to 10 V.S.A. § 21. The Restatement specifically addresses unjust-enrichment claims seeking the recovery of taxes, fees, or other governmental charges claimed to be more than a plaintiff's true legal obligation. *See* Restatement (Third) of Restitution & Unjust Enrichment § 19 (2011).[35] As the Restatement states, "the payment of tax by mistake, or the payment of a tax that is erroneously or illegally assessed or collected, gives the taxpayer a claim in restitution against the taxing authority as necessary to prevent unjust enrichment. *Id*. § 19(1). In other words, any payment of a governmental fee "in excess of the taxpayer's legal liability, correctly determined, gives rise to a prima facie claim in restitution." *Id*. § 19 cmt. c.[36] However, this is not the case here.

Plaintiffs' Complaint does not allege that the administrative fee paid to the VRC was illegal, or incorrectly assessed or collected. Nor was the payment given because of a "mistake" made by Defendants. Instead, Plaintiffs argue that it would be unjust for the State to keep the fees because "the retention of fees [was] predicated on the VRC's fictitious state oversight, administration, managements, and overall regulation of the Jay Peak Projects." 3d Am. Compl. ¶ 365. This is not a legally cognizable reason for the return of a governmental fee. In general, dissatisfaction with government services is not a valid reason for the restitution of administrative

[35] The Vermont Supreme Court has generally followed this volume of the Restatement. *See, e.g.*, *Osier v. Burlington Telecom*, 2016 VT 34, ¶ 19, 201 Vt. 483, 144 A.3d 1024.

[36] Under the Restatement, the term "tax" is used to refer to any assessment, fee, or other governmental charge. *See* Restatement (Third) of Restitution § 19 cmt. a.

fees.[37] *Cf. Crowe v. Comm'r of Internal Revenue*, 396 F.2d 766, 767 (8th Cir. 1968) (taxpayer cannot evade tax obligations because of dissatisfaction with revenue distribution). Accordingly, Plaintiffs' claims for unjust enrichment and implied breach of contract must fail.

CONCLUSION

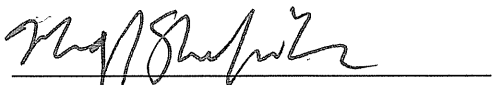
Plaintiffs' Complaint should be dismissed in its entirety. It asserts claims that are clearly subject to sovereign and official immunity and over which this Court has no jurisdiction, such as federal securities law claims. Even more fundamentally, pursuant to a federal court order, Plaintiffs lack authority to bring any of their claims, because they belong to the federal Receiver. Moreover, the "shotgun"-style Complaint fails altogether to put Defendants on notice of any of the claims against them, especially the fraud claims, which must be pled with particularity. And finally, notwithstanding all of the other dispositive hurdles, the Complaint purports to state "causes of action" that are not causes of action at all or that fail to state any valid claims for relief. Accordingly, for all of the foregoing reasons, Defendants respectfully request that this Court grant their Motion to Dismiss.

[37] If Plaintiffs' theory of unjust enrichment were correct, a taxpayer could be entitled to a refund if a special tax were assessed to pay for more police officers and crime later increased, or if education taxes went up and student test scores went down. Such a proposition cannot prevail as a matter of public policy. *Cf.* Restatement (Third) of Restitution § 19(2) (if restitution would disrupt orderly fiscal administration or result in severe public hardship, the court may on that account limit the relief to which the taxpayer would otherwise be entitled).

DATED at Montpelier, Vermont this 9th day of October 2017.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: 

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Appendix: Count-by-Count Bases for Dismissal

Count	Bases for Dismissal	Pages
All Counts, All Defendants	Barred by federal order appointing the Receiver	43 – 46
	V.R.C.P. 8 – failure to provide notice of claims	47 – 49
Count 1 *Common-Law Fraud*	Sovereign immunity/Tort Claims Act ("TCA") – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6) - No private analog	11 – 13, 16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	V.R.C.P 9(b) – all Defendants	49 – 56
	Failure to state claim – all Defendants	56 – 57

Count 2 *9 V.S.A. §§ 5501 & 5509*	Sovereign immunity/TCA – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6)	11 – 13
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	V.R.C.P 9(b) – all Defendants	49 – 56
	Failure to state a claim – all Defendants - Barred by statute of limitations - No "seller" liability - No "control person" liability - No other liability under § 5509	57 – 65
Count 3 *Exchange Act Section 10(B) & Rule 10B-5*	Sovereign immunity / TCA – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6)	11 – 13
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Donegan, Pieciak, Carrigan	42 – 43
	No State Court jurisdiction	46
	V.R.C.P 9(b) – all Defendants	49 – 56

Count 4 *Exchange Act Section 20(A)*	Sovereign immunity / TCA – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6)	11 – 13
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	No State Court jurisdiction	46
Count 5 *Negligent Misrepresentation*	Sovereign immunity – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6) - No private analog	11 – 13, 16 – 18
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Tort Claims Act – Candido, Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan, Fullam, Kessler, Raymond	41 – 42
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	No duty to Plaintiffs – all Defendants	66 – 68

Count 6 *Gross Negligence/Willful Misconduct*	Sovereign immunity/TCA - VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6) - No private analog - Discretionary functions - Barred by 12 V.S.A. § 5602(a)	13 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	No duty to Plaintiffs – all Defendants	66 – 68
	Barred by economic-loss rule – all Defendants	68 – 69
Count 7 *Breach of Fiduciary Duty*	Sovereign immunity/TCA – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6) - No private analog - Discretionary functions	13 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	No duty to Plaintiffs – all Defendants	66 – 68

Count 8 *Third-Party-Beneficiary Breach of Contract*	Sovereign immunity/TCA – VRC, DFR, ACCD - No private analog - Discretionary functions	16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	Failure to state claim – all Defendants - Plaintiffs not intended third-party beneficiaries	72 – 75
Count 9 *Constructive Trust*	Sovereign immunity / TCA – VRC, DFR, ACCD - No private analog - Discretionary functions	16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	Not a cause of action – all Defendants	75 – 76
	No allegation of unjust enrichment, no unjust enrichment as a matter of law – all Defendants	76 – 78

Count 10 *Mutual Mistake*	Sovereign immunity / TCA – VRC, DFR, ACCD - No private analog - Discretionary functions	16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	Not a cause of action – all Defendants	75 – 76
Count 11 *Aiding and Abetting Breach of Fiduciary Duty*	Sovereign immunity / TCA – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6) - No private analog - Discretionary functions	13 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43

Count 12 *Aiding and Abetting Fraud*	Sovereign immunity / TCA – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6) - No private analog - Discretionary functions	11 – 13, 16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	V.R.C.P 9(b) – all Defendants	49 – 56
Count 13 *Negligence*	Sovereign immunity / TCA – VRC, DFR, ACCD - No private analog - Discretionary functions	16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Tort Claims Act – Candido, Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan, Fullam, Kessler, Raymond	41 – 42
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	No duty to Plaintiffs – all Defendants	66 – 68
	Barred by economic-loss rule – all Defendants	68 – 69

Count 14 *Unjust Enrichment*	Sovereign immunity / TCA – VRC, DFR, ACCD - No private analog - Discretionary functions	16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	No allegation of unjust enrichment, no unjust enrichment as a matter of law – all Defendants	76 – 78
Count 15 *Consumer Fraud – Unfair and Deceptive Acts & Violation of the Consumer Fraud Act*	Sovereign immunity / TCA – VRC, DFR, ACCD - Barred by 12 V.S.A. § 5601(e)(6) - No private analog - Discretionary functions	11 – 13, 16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	V.R.C.P 9(b) – all Defendants	49 – 56

Count 16 *Breach of Implied Contract*	Sovereign immunity / TCA – VRC, DFR, ACCD - No private analog - Discretionary functions	16 – 25
	Absolute Immunity – Donegan, Goldstein, Miller, Moulton, Pieciak, Carrigan	26 – 33
	Qualified Immunity – Candido, Carrigan, Fullam, Kessler, Pieciak, Raymond	33 – 41
	Statutory Immunity – Carrigan, Donegan, Pieciak	42 – 43
	No breach of contract allegation – all Defendants	69 – 72
	No allegation of unjust enrichment, no unjust enrichment as a matter of law – all Defendants	76 – 78

EXHIBIT 1

MEMORANDUM OF UNDERSTANDING

BETWEEN

STATE OF VERMONT
AGENCY OF COMMERCE AND COMMUNITY DEVELOPMENT

AND

STATE OF VERMONT
DEPARTMENT OF FINANCIAL REGULATION

This Memorandum of Understanding ("Agreement") is made and entered into on December 22, 2014, by and between:

State of Vermont Agency of Commerce and Community Development, and its successors and assigns ("ACCD"), and

State of Vermont Department of Financial Regulation, and its successors and assigns ("DFR").

WHEREAS

ACCD, a governmental unit of the State of Vermont, is charged with enhancing the Vermont business climate; marketing Vermont to businesses and individuals; and facilitating, promoting, and creating business opportunities within Vermont to contribute to the economic viability and growth of the state;

DFR, a governmental unit of the State of Vermont, is statutorily charged with supervising organizations that offer financial services and products to ensure the solvency, liquidity, stability and efficiency of all such organizations; protecting consumers against certain unfair and unlawful business practices; promoting reasonable and orderly competition; encouraging the development, expansion and availability of financial services and products advantageous to the public welfare; and maintaining close cooperation with other supervisory authorities ("DFR's Mission");

ACCD is an approved and designated Regional Center recognized by the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services ("USCIS") in accordance with the Immigrant Investor Pilot Program pursuant to section 203(b)(5) of the Immigration and Nationality Act, as amended, the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, section 610, as amended, and all applicable regulations promulgated thereunder, (collectively, the "Pilot Program law");

Initial designation as a Regional Center was made in a letter dated June 26, 1997, to Howard Dean, M.D., Governor of the State of Vermont from legacy U.S. Immigration and Naturalization Service (INS), informing him of the ACCD's designation as a Regional Center; reaffirmation of ACCD's Regional Center was given by USCIS in a letter dated June 11, 2007 to Kevin L. Dorn, secretary of ACCD; and the ACCD Regional Center designation was amended and approved for EB-5 investment across a wider range of business sectors by USCIS in a letter dated October 6, 2009 to Kevin L. Dorn, secretary of ACCD;

As a USCIS approved and designated Regional Center within the Immigrant Investor Pilot Program, ACCD is responsible for: (i) actively marketing and promoting the Regional Center as an attractive option for development and foreign investment ("Marketing Activities"); (ii) approving developments that apply for designation as a Regional Center project ("Project Approval"); and (iii) on-going monitoring of approved Regional Center projects to assure compliance with USCIS EB-5 regulations, U.S. immigration laws and regulations and federal and state securities laws ("On-Going Compliance");

ACCD has the personnel, capacity and expertise to effectively carry out the Marketing Activities, and believes the Regional Center would benefit operationally, and obtain a competitive advantage by enlisting the assistance of personnel, capacity and expertise of DFR to carry out the Project Approval and On-Going Compliance functions;

DFR has agreed to assist ACCD in carrying out the Project Approval and On-Going Compliance functions as these functions are within DFR's Mission and DFR has the available resources to effectively carry out these functions; and

NOW, THEREFORE, in consideration of the mutual agreements, and representations set forth herein, the parties agree as follows:

1. Relationship with USCIS.

    a. ACCD shall retain all reporting responsibilities with USCIS including: (i) remaining the principle point of contact with USCIS on all Regional Center matters; and (ii) maintaining responsibility for the annual completion and filing of the Form I-924A.

    b. ACCD Secretary shall remain a Principal Representative and DFR Commissioner shall be added as a Principal Representative.

    c. ACCD General Counsel and EB-5 Regional Center Director shall remain the Principal Administrators.

d. DFR shall cooperate in assisting ACCD with fulfilling its USCIS reporting obligations by providing or obtaining information within its control.

2. Marketing Activities.

a. ACCD shall conduct all Marketing Activities and fulfill any USCIS requirements pertaining to the promotion of the Regional Center.

b. DFR shall assist ACCD with Marketing Activities when requested and if feasible.

c. Any marketing materials that describe DFR and/or DFR's Regional Center functions shall be approved by both ACCD and DFR prior to dissemination.

3. Project Approval.

a. Upon learning of a prospective Regional Center project, ACCD shall promptly inform DFR and as soon as practical obtain a completed preliminary due diligence questionnaire (to be provided by DFR) from the principals of the prospective Regional Center project.

b. ACCD shall promptly forward all materials related to a project seeking Regional Center approval to DFR for review and consideration.

c. DFR shall review the application for compliance with USCIS EB-5 regulations, U.S. immigration laws and regulations and federal and state securities laws and make a final determination to approve or deny the application.

d. If an application is approved, than ACCD and DFR shall work with the project's principals to develop a memorandum of understanding that will govern the parties' relationship through completion of the project (the "Project MOU").

4. On-Going Compliance.

a. DFR shall be responsible for conducting On-Going Compliance of an approved project. Such On-Going Compliance shall include, but not be limited to:

i. Quarterly visits to project sites to monitor and verify the representations made by the project's principals regarding the development;

ii. On-going monitoring of Project to ensure compliance with MOU covenants;

iii. Regularly scheduled meetings with project principals regarding updating on the progress of the development;

iv. Compiling the name, date of birth, petition receipt number, and alien registration number (if one has been assigned by USCIS) of each principal alien investor who has made an investment and has filed an I-526 Petition with USCIS, specifying whether: (i) the petition was filed; (ii) approved; (iii) denied; or (iv) withdrawn by the petitioner, together with the date(s) of such event(s);

v. Compiling the total number of visas represented in each case for the participating principal alien investor identified, plus his/her dependents (spouse and children) for whom immigrant status is sought or has been granted;

vi. Compiling the country of nationality of each alien investor who has made an investment and filed an I-526 petition with USCIS;

vii. Compiling the U.S. city and state of residence (or intended residence) of each alien investor who has made an investment and filed an I-526 petition with USCIS;

viii. Compiling the following information for each alien investor: (i) the date(s) of deposit(s) into escrow; (ii) date(s) of investment(s) in the commercial enterprise; (iii) the amount(s) of investment(s) in the commercial enterprise; and (iv) the date(s), nature, and amount(s) of any payment/remuneration/profit/return on investment made to alien investors by the new commercial enterprise and/or project from when the investment was initiated to the present;

ix. Compiling a list of each of the target industry categories of business activity within the Vermont EB-5 Regional Center that have received alien investors' capital, and in what aggregate amounts;

x. Compiling a list of each of the target industry categories of business activity within the geographic boundaries of the Vermont EB-5 Regional Center that have received non-EB-5 domestic capital that has been combined and invested together, specifying the separate aggregate amounts of domestic investment capital;

xi. Compiling the following information for the total investor capital (alien and domestic), identifying: (i) the name and address of each

"direct" job creating commercial enterprise; (ii) the industry category for each indirect job creating investment activity;

xii. Compiling the total aggregate number of approved EB-5 alien investor I-526 petitions per each federal fiscal year to date made through the Vermont EB-5 Regional Center;

xiii. Compiling the total aggregate number of approved EB-5 alien investor I-829 petitions per each federal fiscal year to date through the Vermont EB-5 Regional Center; and

xiv. Compiling the total aggregate sum of EB-5 alien capital invested through Regional Center for each federal fiscal year to date since your inception.

5. Communication between ACCD and DFR.

a. ACCD and DFR agree to conduct meetings, either in person or by telephone/teleconference, not less frequently than every three months commencing on the Effective Date ("Quarterly Meetings").

b. ACCD and DFR agree to promptly inform the other if one has knowledge of a material change to a project application, and/or suspicious activity, potential or actual securities violation(s), or fraud specific to a project or any activities related to the Regional Center.

c. DFR shall employ best efforts to inform ACCD of the time and date of the project quarterly visits and ACCD may attend DFR scheduled quarterly visits if it so chooses.

6. Investor Relations and Formal Complaints.

a. ACCD shall be responsible for fielding and responding to inquiries from investors or prospective investors or their respective attorneys.

b. DFR shall provide ACCD with a complaint form that investors may use to lodge a formal complaint against a project or its principals.

c. Upon receiving a completed formal complaint, ACCD shall promptly forward the complaint to DFR.

d. DFR shall be solely responsible for investigating the complaint's allegations and determining whether such allegations warrant the filing of administrative or civil charges and/or referral of the matter to another regulatory or law enforcement agency.

7. Revoking a Project's Regional Center Designation.

    a. DFR shall make the final determination, after required notice to the project and discussion with ACCD, as to whether a project's MOU should be revoked due to non-compliance with the Project MOU, USCIS EB-5 regulations, U.S. immigration laws and regulations and federal and state securities laws.

8. Communication between media outlets and ACCD and DFR.

    a. If ACCD or DFR receives a request for comment or information from a media outlet regarding the operations of the Regional Center, the party receiving such a request shall confer with the other party before providing comment or information.

    b. If ACCD or DFR receives an interview request from a media outlet regarding the operations of the Regional Center, a representative from both ACCD and DFR shall participate, if possible.

9. Fees and Cost of the Regional Center.

    a. ACCD and DFR shall develop a fee schedule that is due from a Regional Center project to offset the costs of the Regional Center; such fee schedule shall balance the competitiveness of the EB-5 program with the financial burden of operating the Regional Center; such fee schedule shall be re-examined by ACCD and DFR on the anniversary of the Effective Date.

    b. DFR shall be solely responsible for the expense of DFR Regional Center personnel, both current and to-be-hired, charged with carrying out Project Approval and On-Going Compliance functions commencing on the Effective Date through fiscal year 2016.

    c. DFR's reasonable travel, third party vender and third party professional expenses relating to the operation of the Regional Center shall be reimbursed by ACCD through Regional Center fees.

    d. Notice filing fees due to DFR under state and federal securities laws shall be separate and apart from EB-5 fee schedule and DFR shall retain all such fees.

10. Approval by USCIS.

    a. ACCD shall use its best efforts to have this Agreement approved by USCIS and effectuate any necessary amendments to the current Regional Center designation.

b. DFR shall cooperate with ACCD to obtain USCIS approval and effectuate the necessary Regional Center designation amendments.

c. Effectiveness of this Agreement is subject to and conditioned upon approval by USCIS (the "Effective Date").

11. Miscellaneous.

a. Immigration Filings. DFR shall not have any obligations or responsibilities as to I-526, I-829, I-924, I-924A, G-28 or other USCIS required filings.

b. Regulatory & Law Enforcement Communications. Communications with another regulatory or law enforcement agency shall be fielded by DFR. DFR shall update ACCD Principal Representative and Principal Administrators unless otherwise prohibited by law.

c. Term. This Agreement in its present form or as modified shall be effective as of the Effective Date and shall remain in effect for two years. This Agreement may be extended by the mutual written agreement of the parties. Prior to the expiration of the agreement the parties shall meet to negotiate and execute a successor agreement. In the event a successor agreement is not in place when this agreement is due to expire, this agreement will remain in effect until a successor agreement is concluded.

d. Modification. During the term of the Agreement, either party that is a signatory to this Agreement may submit a written request to amend or modify this memorandum. When such a request is made, the parties shall meet without unnecessary delay to consider the proposed amendment.

e. Change in Law. Any provision in this Agreement may be rendered null and void by changes in federal or state law that prevent either or both parties from fulfilling the terms of the agreement. If this circumstance should arise, each party agrees to promptly notify the other party.

f. Choice of Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Vermont.

[Remainder of Page Intentionally Left Blank]

The parties have executed this Agreement in duplicate originals as of the date of their signatures affixed below.

State of Vermont
Agency of Commerce and Community Development

Dated: 12/22/14

Patricia Moulton, Secretary

State of Vermont
Department of Financial Regulation

Dated: 12/22/14

Susan L. Donegan, Commissioner

EXHIBIT 2

MEMORANDUM OF UNDERSTANDING

BETWEEN

STATE OF VERMONT
AGENCY OF COMMERCE AND COMMUNITY DEVELOPMENT

AND

JAY PEAK HOTEL SUITES L.P.

This Memorandum of Understanding ("the Agreement") is made and entered into, by and between:

State of Vermont Agency of Commerce and Community Development, and its successors and assigns ("ACCD"), and

Jay Peak Hotel Suites L.P., a limited partnership organized under the laws of the State of Vermont, and its successors and assigns ("Jay Peak").

WHEREAS

ACCD, a governmental unit of the State of Vermont, is charged with enhancing the Vermont business climate, marketing Vermont to businesses and investors, facilitating, promoting and creating commercial and business opportunities within Vermont to contribute to the economic viability of and benefit the growth of the state; and,

ACCD is an approved and designated Regional Center recognized by the U.S. Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("CIS") in accordance with the Immigrant Investor Pilot Program pursuant to section 203(b)(5) of the Immigration and Nationality Act, as amended, the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, section 610, as amended, and all applicable regulations promulgated thereunder, (collectively, the "Pilot Program law"); and,

Initial designation as a Regional Center was made in a letter dated June 26, 1997, to Howard Dean, M.D., Governor of the State of Vermont from legacy U.S. Immigration and Naturalization Service (INS), informing him of the ACCD's appointment as a Regional Center; and,

Jay Peak is organized for the purpose of creating an EB-5, Alien Entrepreneur investment project within the Agency's Regional Center and managing and operating the investment project in conformance with 8 U.S.C.§ 1153 (b)(5)(A) - (D); INA § 203 (b)(5)(A) - (D) of the Immigration & Nationality Act (the "Act") and the Pilot Program law; and,

Jay Peak has contracted with Carroll & Scribner, P.C., Attorneys-at-Law, for legal counsel regarding compliance with U.S. immigration and nationality law as it relates to EB-5, Alien Entrepreneur investment projects and to Regional Center Pilot Programs, and for the purpose of advising upon all transactional matters in connection with such a project; and,

ACCD, as the USCIS approved and designated Regional Center will formally designate an ACCD official, as having amongst his/her principal duties and responsibilities the ongoing coordination, oversight and liaison with respect to those activities of the Jay Peak commercial enterprise in the recruitment, assistance, and involvement of immigrant investors through the EB-5 program, and identifying said ACCD official to the USCIS in writing. Pursuant to its responsibilities and obligations as a USCIS approved and designated Regional Center within the Immigrant Investor Pilot Program, ACCD desires to obtain assistance in the planning and management of the Jay Peak EB-5, Alien Entrepreneur investment project within ACCD's Regional Center and to assure the project's compliance with U.S. immigration law and regulations concerning investments within a regional center in the EB-5 visa preference category and, thereby, to have greater assurance of its compliance with regional center requirements; and,

ACCD and Jay Peak desire an arrangement whereby Jay Peak with the on-going benefit of legal counsel will, together with the periodic concurrence of the ACCD's designated Regional Center monitoring official, will assist with the oversight, administration, management and overall compliance of the Jay Peak project with legal and regulatory requirements, and Jay Peak will formally report in writing not less than every three (3) months upon the activities of the project to ACCD and respond to any ongoing ACCD inquiries about the project and assist ACCD to comply with its obligations as a USCIS approved and designated regional center with respect to this project

NOW, THEREFORE, in consideration of the mutual agreements, and representations set forth herein, the parties agree as follows:

1. ACCD will promptly request that USCIS acknowledge ACCD's designation of Kevin L. Dorn, Secretary of the Agency of Commerce and Community Development as the principal representative of ACCD in its capacity as a Regional Center.

2. ACCD will promptly request that USCIS acknowledge ACCD's designation of John Kessler, Counsel to the Agency of Commerce and Community Development as the principal administrator of the Regional Center.

3. ACCD will promptly request that USCIS acknowledge ACCD's designation of Jay Peak to assist in the management, administration and overall compliance of the Alien Entrepreneur project organized by Jay Peak within ACCD's Regional Center with U.S. immigration laws and regulations controlling the investment process and participation in a regional center, and to report upon the activities of the project to ACCD and respond to ACCD inquiries about the project and assist ACCD to comply with its obligations as a regional center with respect to this project;

4. Jay Peak will provide support to ACCD including, but not limited to, providing investment-related and supporting documentation to prospective investors, supplying economic analysis and modeling reports on direct and indirect job creation, defining investment opportunities within the Jay Peak project, and assisting ACCD to comply with relevant regulatory or administrative requirements in support of individual petitions filed with CIS by immigrant investors affiliated with the Jay Peak project, such as providing area maps, valid unemployment data, general economic data and demographics concerning the geographic area covered by the Jay Peak project.

5. Jay Peak will further support ACCD's compliance with regional center requirements by providing on a quarterly basis formal written progress reports on its activities, overseas meetings and other relevant efforts within and outside the United States to promote investment in the Jay Peak project through the EB-5 Alien Entrepreneur Regional Center Pilot Program. The Quarterly reports will set forth for the preceding quarter and year-to-date the number of investors, the status of alien investor capital (in escrow, transfers from escrow to the limited partnership) and activity of the limited partnership in furtherance of the project. The reports will also contain information distinguishing Investor Petitions "in preparation", "filed with USCIS," "approved by USCIS," "denied by USCIS," or "filed with the USCIS office of Administrative Appeals."

6. Jay Peak will support the purpose and goals of ACCD's Regional Center by encouraging investment and employment creation within the Regional Center through marketing at emigration fairs and conferences with individual investors inside and outside the United States; maintaining a website to promote and describe the project; preparing a desirable business plan to encourage individual investments in the project within the Regional Center; establishing escrow accounts to assist orderly investment in the project; facilitating, on a fee basis, the preparation and submission of the I-526, Alien Entrepreneur petition and petitions for other

immigration benefits to USCIS or the Department of State for individual investors; providing the primary entity and related entities to carry out the activities of the project; structuring the enterprise so that it creates requisite employment prior to the investors seeking removal of conditions; seeing to the timely completion and opening of the project; providing operating expertise and personnel to operate the project efficiently; and, if requested by individual investors, making referrals to advisors who may assist with issues arising from relocation by the investor and the investor's spouse and children to the United States.

7. Jay Peak agrees to promote investment in its project and to perform its obligations under this Agreement honestly, consistently and fairly in furtherance of its efforts to assist ACCD with the oversight and management of the Regional Center in connection with the Jay Peak project.

8. Jay Peak will act in an independent capacity and not as officers or employees of ACCD or the State of Vermont. Jay Peak shall indemnify, defend, and hold harmless ACCD, the State of Vermont and its officers and employees from liability and any claims, suits, judgments, and damages arising as a result of Jay Peak's acts and/or omissions performed under this Agreement.

9. This Agreement shall be governed by the laws of the State of Vermont.

10. This Agreement may be modified by written consent of the parties. This Agreement may not be cancelled except upon a material breach of its terms or a material misrepresentation by a party which remains uncured for more than fourteen (14) days after receipt of a Notice of Intent to Cancel that provides specific information justifying the cancellation.

11. ACCD will notify USCIS in writing within thirty (30) days of any change in the designation of the principal representative of ACCD or the principal administrator to ACCD or any significant change in or the termination of this Agreement with Jay Peak.

12. In the event of cancellation of this Agreement, ACCD will provide USCIS a clear explanation as to how services and responsibilities of Jay Peak hereunder will be performed, and by whom, without interruption to the functioning of the Regional Center in connection with the Jay Peak project or any affected alien investor in the Jay Peak project.

13. Notices given hereunder shall be in writing and delivered by courier or by U.S. mail to:

For ACCD:
The ACCD Secretary or ACCD General Counsel
National Life Building, Drawer 20
Montpelier, VT 05620-0501

Jay Peak Hotel Suites L.P.
William Stenger
Jay Peak Resort
Jay, VT 05859-9621

The parties have executed this Agreement in duplicate originals as of the date of their signatures affixed below.

State of Vermont Agency of Commerce and Community Development

Dated: 11/8/06

Kevin L. Dorn, Secretary

Jay Peak Hotel Suites L.P.

Dated: 12/21/06

William Stenger
Duly Authorized Agent of Jay Peak Management, Inc., General Partner

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-cv-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS,
WILLIAM STENGER,
JAY PEAK, INC.,
Q RESORTS, INC.,
JAY PEAK HOTEL SUITES L.P.,
JAY PEAK HOTEL SUITES PHASE II. L.P.,
JAY PEAK MANAGEMENT, INC.,
JAY PEAK PENTHOUSE SUITES, L.P.,
JAY PEAK GP SERVICES, INC.,
JAY PEAK GOLF AND MOUNTAIN SUITES L.P.,
JAY PEAK GP SERVICES GOLF, INC.,
JAY PEAK LODGE AND TOWNHOUSES L.P.,
JAY PEAK GP SERVICES LODGE, INC.,
JAY PEAK HOTEL SUITES STATESIDE L.P.,
JAY PEAK GP SERVICES STATESIDE, INC.,
JAY PEAK BIOMEDICAL RESEARCH PARK L.P.,
AnC BIO VERMONT GP SERVICES, LLC,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC,

Relief Defendants.
_____/

PRELIMINARY INJUNCTION

THIS MATTER is before the Court on Plaintiff Securities and Exchange Commission's ("SEC") Emergency Motion and Memorandum of Law for Temporary Restraining Order, Asset

Freeze, and Other Relief [ECF No. 4], specifically the SEC's request for preliminary injunctive relief. The Court has reviewed the Motion and the record and is otherwise fully advised.

The dispute in this action is between the SEC and Defendant Ariel Quiros ("Quiros"). Each side tells a different story about the development of the Jay Peak Resort in Vermont. The SEC weaves a compelling and well-documented account of one man's use of his control over multiple entities to squander investor funds, enrich himself, and, ultimately, commit securities fraud. Presenting 141 exhibits and the testimony of 5 witnesses, the SEC argues that Quiros was the architect of an eight-year fraudulent scheme designed to loot more than $50 million from investors. Quiros, relying primarily on his own and four other declarations, disputes the SEC's rendition of events and asserts that he and the companies under his control were entitled to use the investor funds at issue. The Court finds that, based on the record before it, a preliminary injunction is necessary to preserve the status quo pending the resolution of this litigation.

I. PROCEDURAL BACKGROUND

On April 12, 2016, the SEC filed its Complaint for Injunctive and Other Relief [ECF No. 1] against Defendants Quiros; William Stenger ("Stenger"); Jay Peak, Inc. ("JPI"); Q Resorts, Inc. ("Q Resorts"); Jay Peak Hotel Suites, L.P.; Jay Peak Hotel Suites Phase II, L.P.; Jay Peak Management, Inc.; Jay Peak Penthouse Suites, L.P.; Jay Peak GP Services, Inc.; Jay Peak Golf and Mountain Suites, L.P.; Jay Peak GP Services Golf, Inc.; Jay Peak Lodge and Townhouses, L.P.; Jay Peak GP Services, Lodge, Inc.; Jay Peak Hotel Suites Stateside, Inc.; Jay Peak GP Services, Stateside, Inc.; Jay Peak Biomedical Research Park, L.P.; and AnC Bio Vermont GP Services, LLC, (collectively the "Defendants") and Relief Defendants Jay Construction Management, Inc. ("JCM"); GSI of Dade County, Inc. ("GSI"); North East Contract Services, Inc. ("NECS"); and Q Burke Mountain Resort, LLC ("Q Burke") alleging the Defendants violated Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a); Section 10(b) of the Exchange

Act of 1934, 15 U.S.C. § 78j(b); and SEC Rule 10b-5, 17 C.F.R § 240.10b-5. The SEC also set forth claims against Quiros for aiding and abetting the other Defendants' violations of Section 10(b) and Rule 10b-5 and for control person liability pursuant to Section 20(a) of the Exchange Act. In conjunction with the Complaint, the SEC filed its Emergency Motion for a Temporary Restraining Order, Asset Freeze and Other Relief [ECF No. 4]. The Court entered the Temporary Restraining Order and froze virtually all of Quiros's known assets [ECF No. 11].[1] On April 13, 2016, the Court appointed Receiver Michael Goldberg (the "Receiver") to administer the affairs of the Corporate Defendants and to take necessary actions to protect the investors [ECF No. 13]. On April 21, 2016, the Court entered consent preliminary injunctions against Stenger and the Corporate Defendants [ECF Nos. 51 and 52]. On September 21, 2016, the Court entered a consent permanent injunction against Stenger [ECF No. 215].

On May 9th and 10th, 2016, the Court held an evidentiary show cause hearing on the SEC's request for preliminary injunctive relief. The SEC relied on 141 exhibits and the testimony of five witnesses: Felipe Vieira, an investor in Stateside Phase VI; Michael Pieciak, the Deputy Commissioner of the Vermont Department of Financial Regulation; Jan Jindra, a financial economist with the SEC's Division of Economic and Risk Analysis; Mark Dee, a staff accountant with the SEC; and Michael Goldberg, the Receiver. Quiros relied on his own declaration and the declarations of George Gulisano, the former chief financial officer of Jay Peak Resort and Jay Peak Biomedical Research Park; William Kelly, the former Chief Operating

[1] Following a hearing on April 25, 2016, the Court modified the asset freeze order and released $41,308.69 of funds jointly held by Quiros and his wife at Merrill Lynch [ECF No. 82]. On May 27, 2016, the Court again modified the freeze order to permit Quiros to sell or otherwise encumber his Setai condominium in New York, with the funds to be held in trust by the Receiver, to cover $15,000 per month for living expenses and reasonable attorney's fees as approved by the Court [ECF No. 148]. On October 20, 2016, the Court released an additional $80,000 to Quiros's attorneys for accrued fees [ECF No. 232].

Officer of JPI and the owner of NECS; Won Gyu Jang, the president of AnC Biopharm, Inc.; and La Kyun Kim, the director of AnC Biophram, Inc.

On May 17, 2016, the SEC filed an Amended Complaint [ECF No. 120]. On June 24, 2016, Quiros moved to dismiss the Amended Complaint [ECF No. 171].

II. FINDINGS OF FACT

A. Investing in the United States

The investments at issue in this litigation arose out of Section 203(b)(5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1153, often referred to as the EB-5 Immigrant Investor Program. Pursuant to the program, visas may be available "to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or [otherwise lawfully admitted immigrants]." 8 U.S.C. § 1153(b)(5)(A). To qualify, the applicant must invest either $500,000 or $1,000,000, depending on the investment's employment area, in the new enterprise. *Id.* Once the applicant makes his or her investment and files the requisite I-526 petition, he or she is granted permanent residence on a conditional basis for two years. *See id.* § 1186b(a)(1). If the investment creates the requisite ten jobs over that two year period, the conditions are removed and the applicant becomes a lawful permanent resident. *See id.* § 1186b(d)(1).

The government sets aside some EB-5 visas for prospective immigrants who invest in a "Regional Center." Applicants investing through Regional Centers only need to invest $500,000 to qualify. Vermont has a federally-designated Regional Center. The Jay Peak Ski Resort is one of the EB-5 projects approved by the Vermont Regional Center. Plaintiff's Exhibit ("PX") 22 ¶¶ 3-4.

B. Financing a Ski Resort: Phases and Development

Jay Peak is a mountain in Vermont, located about five miles south of Canada. Jay Peak Resort, owned by JPI, is located on the mountain and has been in operation for over fifty years. PX 3. In 1972, Mont Saint-Saveur International ("MSSI") purchased JPI, and, in 1985, it recruited Stenger to run the company. PX 58. Beginning in December 2006, while still under MSSI's ownership, JPI began using EB-5 investments to improve and expand Jay Peak Resort.[2]

1. Jay Peak Development Phases

Phase I

In December 2006, JPI began a $17.5 million offering of limited partnership interests in Jay Peak Hotel Suites, LP ("Phase I"). The purpose of Phase I was to expand the resort through the acquisition of new land and the construction of a new fifty-seven–suite hotel. PX 3. By May 2008, Phase I was fully subscribed with thirty-five EB-5 investors. PX 22. The Source and Use of Investor Funds section from the Phase I Private Offering Memorandum sets forth the amounts the project sponsor was entitled to receive from investor funds and includes fifteen percent of the total cost in developer fees ($1,918,500) and five percent of the total cost in expenses/contingency fees ($639,500) upon completion of the project. In addition, the Offering Memorandum details a $1.8 million expenditure for land that Phase I would purchase from JPI. PX 3; PX 30. JPI was the contractor/developer for Phase I. JPI deeded the land to Phase I in December 2009. PX 30.

Phase II

In March 2008, JPI began a $75 million offering of limited partnership interests in Jay Peak Hotel Suites Phase II, L.P. ("Phase II"). The purpose of Phase II was to acquire additional

[2] As detailed in section II.C, *infra*, Quiros, through Q Resorts, purchased JPI in January 2008.

real estate and construct a multi-story hotel, administrative office, clubhouse, and waterpark. PX 4. By January, 2011, Phase II was fully subscribed with 150 EB-5 investors. PX 22. Pursuant to the Phase II Offering Memorandum's "Estimated and Projected Cost of Development and Projected Revenues," the project sponsor was entitled to receive from investor funds fifteen percent of the total cost in developer fees ($5,557,816) and five percent of the total cost in expenses/contingency fees ($3,000,443) upon completion of the project. In addition, the Offering Memorandum lists a $4.2 million expenditure for land that Phase II would purchase from JPI. PX 3; PX 30. JPI was the contractor/developer for Phase II.

Jay Peak Management, Inc., a wholly owned subsidiary of JPI, is the general partner of Phases I and II. Stenger is the sole principal of Jay Peak Management.

Phase III

In July 2010, JPI began a $32.5 million offering of limited partnership interests in Jay Peak Penthouse Suites, L.P. ("Phase III"). The purpose of Phase III was to construct fifty-five penthouse units and a mountain learning center. PX 5. By October 2012, Phase III was fully subscribed with sixty-five EB-5 investors. PX 22. Pursuant to the Phase III Offering Memorandum's "Investor Funds Source and Application," the project sponsor was entitled to receive fifteen percent of the total cost in construction supervision fees ($2,798,075) and five percent of the total cost in expenses/contingency fees ($932,025) upon completion of the project. PX 5. Jay Peak GP Services, Inc., is the general partner of Phase III. Stenger is the sole principal of Jay Peak GP Services.

Phase IV

In December 2010, JPI began a $45 million offering of limited partnership interests in Jay Peak Golf and Mountain Suites, L.P. ("Phase IV"). The purpose of Phase IV was to construct fifty golf and mountain suites, a mountain top café, and a wedding chapel. PX 6. By November

2011, Phase IV was fully subscribed with ninety EB-5 investors. PX 22. Pursuant to the Phase IV Offering Memorandum's "Source and Application of Funds," the project sponsor was entitled to receive fifteen percent of the total cost in construction supervision fees ($3,412,500) and five percent of the total cost in expenses/contingency fees ($1,137,500) upon completion of the project. PX 6. JPI was the contractor/developer for Phase IV. PX 6. Jay Peak Services Golf, Inc., is the general partner of Phase IV. Stenger is the sole principal of Jay Peak Services Golf, Inc.

Phase V

In May 2011, JPI began a $45 million offering of limited partnership interests in Jay Peak Lodge and Townhouse, L.P. ("Phase V"). The purpose of Phase V was to construct thirty vacation rental townhomes, ninety vacation rental cottages, a café, and a parking garage. PX 7. By November 2012, Phase V was fully subscribed with ninety EB-5 investors. PX 22. Pursuant to the Phase V Offering Memorandum, the project sponsor was entitled to receive fifteen percent of the total cost in construction supervision fees ($1,625,355) and five percent of the total cost in expenses/contingency fees ($541,785) upon completion of the project. PX 7. JPI was the contractor/developer for Phase V. *Id*. Jay Peak GP Services, Inc. is the general partner of Phase V. Stenger is the sole principal of Jay Peak GP Services.

Phase VI

In October 2011, JPI began a $67 million offering of limited partnership interests in Jay Peak Hotel Suites Stateside, L.P. ("Phase VI"). The purpose of Phase VI was to build an eighty-four–unit hotel, eighty-four vacation cottages, a guest recreation center, and a medical center. PX 2. By December 2012, Phase VI was fully subscribed with 134 EB-5 investors. PX 22. Pursuant to the Phase VI Offering Memorandum's "Source and Application of Funds," the project sponsor was entitled to receive fifteen percent of the total costs in construction supervision fees ($3,118,500) and five percent of the total cost in supervision expenses ($1,039,500) upon

completion of the project. PX 2. The offering memorandum lists JPI as the developer for Phase VI.[3] *Id.*

The Offering Memorandum estimated that Phase VI would be operational by the 2013/2014 winter season. *Id.* As of May 2016, the hotel is complete and approximately thirty-five of the eighty-four vacation cottages are partially constructed. Hearing Transcript ("HT2") at 159 (Goldberg Testimony) [ECF No. 125]. There has been no visible construction for either the medical center or the recreation center. *Id.* The Phase VI subcontractors have stopped working on the project because Defendants owe them an estimated $2 to $3 million in past due construction costs.[4] Phase VI needs approximately $20 million in additional funds to complete the project, but it has less than $55,000 in its accounts. *Id.*

Jay Peak GP Services Stateside, Inc., is the general partner of Phase VI. Stenger is the sole principal of Jay Peak GP Services Stateside.

Phase VII

In November 2012, JPI began a $110 million offering of limited partnership interests in Jay Peak Biomedical Research Park, L.P. ("Phase VII"). According to the Original Offering Memorandum ("OOM"), the project involved:

> (1) construction of a world class certified GMP (Good Manufacturing Practice) and GLP (Good Laboratory Practice) building and facility in Newport, Vermont; (2) supply of all necessary equipment and technicians in the facility; (3) research, development, manufacture and distribution of the AnC Bio Products under intellectual and property distribution agreements from and with AnC Bio Inc., South Korea (the "Existing AnC Entity") and AnC Bio VT; and (4) operation of clean room spaces in the building by third parties, including without limitation the Existing AnC Entity, so that those third parties may conduct research into certain affiliated industries.

[3] For Phases IV through VI, JPI contracted with JCM to provide construction services.
[4] The Court has authorized a stipulated writ of attachment for the Phase VI subcontractors to perfect their lien rights [ECF Nos. 161, 168, and 177].

PX 56. The OOM provided that Phase VII would cost $118 million to complete, with $110 million raised from 220 EB-5 Investors. When the SEC filed this action in April 2016, Phase VII had raised approximately $83 million from 166 EB-5 investors. PX 22.

Pursuant to the Phase VII OOM's "Estimated and Projected Cost of Development and Projected Revenues," the contractor/developer would receive fifteen percent of the total cost in developer fees and five percent of the total cost in expenses upon completion of the project. PX 56. In addition, Phase VII would purchase land from GSI, one of Quiros's companies, for $6 million. *Id.* AnC Bio Vermont GP Services, LLC, is the general partner of Phase VII. Quiros and Stenger are the managing members of AnC Bio. Stenger and Quiros had ultimate authority over the contents of the Phase VII offering materials, which they reviewed and approved. PX 13; PX 20; PX 32.

The products proposed in the OOM are subject to review and approval by the Food and Drug Administration ("FDA"). PX 66. Defendants knew that (1) the products required FDA approval, (2) the approval process could take years, and (3) Phase VII's success depended on FDA approval. *Id*. As a result, any delay in or failure to obtain FDA approval would greatly reduce the project's projected revenues. *Id.* Despite Defendants' knowledge of the lengthy FDA-approval process, the OOM failed to accurately represent that JPI was nowhere near obtaining FDA approval for the Phase VII products. *Id*. Defendants, in an information sheet attached to the offering documents, represent that the T-PLS and the C-PAK devices are "[c]urrently under process of US FDA approval." PX 56. However, Defendants had not submitted the T-PLS, C-PAK, or any other Phase VII device to the FDA for approval. PX 20; PX 32. To date, the Phase VII products have not been submitted to the FDA for review. PX 20.

The OOM projected that the facility would (1) be complete and operating by April 15, 2014; (2) create three thousand jobs over the two-year period of development and first three

years of operation; and (3) provide revenue of $659,800,208, as well as income before tax and depreciation of $281,042,834, between 2013 and 2018. PX 56. Dr. Jindra testified, with supporting documentation, that the OOM's revenue projections were baseless. *See* HT2 (Jindra Testimony). This was due in large part to the Defendants' representations that Phase VII would begin realizing revenue in the same year that Phase VII began testing and developing products. It was not possible for the company to realize that level of revenue without FDA approved products. Some investors received other documents representing that product development would begin in January 2012, a deadline that had already passed when Defendants first distributed the OOM. At base, Defendants were projecting revenues based on a January 2012 development and testing start date when they knew that was not possible. The result was that projected revenues were off by at least two years. *Id.*

In January 2015, Defendants began distributing a Revised Offering Memorandum ("ROM") to investors.[5] As with the OOM, Quiros reviewed, approved, and had ultimate authority over the ROM. The revised memorandum projected that Phase VII would begin realizing revenues from products requiring FDA approval in 2016 and 2017. PX 57. However, on January 8, 2015, Stenger sent a time schedule to the Vermont Agency of Commerce & Community Development, which represented that the FDA would not approve Phase VII products until one-to-two years after the ROM's projected dates for earning revenue. PX 66. Yet again, there was a conflict between the timing of product approval and projected revenues. Accordingly, both the OOM and ROM's revenue projections lack foundation.

Aside from site preparation and minimal groundbreaking, Phase VII is essentially an idea that never came to fruition. PX 22. Of the $83 million raised, $14 million remains in escrow and

[5] The ROM includes an agreement with NECS to manage the project and includes an agreement with JCM to provide services to the limited partnership. PX 57.

approximately $10 million has been used for Phase VII vendors and related project costs. PX 30. Defendants assert that they sent $24.5 million to AnC BioPharm, Inc—an affiliated Korean firm—for equipment, distribution, and marketing rights. However, the SEC produced the records of JCM, Phase VII, AnC Bio Vermont GP Services, and the Project Sponsor which support a finding that Quiros has sent, at most, only $8 million to AnC BioPharm, Inc.[6] PX 22. There is little evidence to establish that Phase VII has received any equipment, distribution, or marketing rights from AnC BioPharm, Inc.[7]

Defendants seek to raise another $27 million from fifty-four investors for Phase VII. The Receiver testified that, even if raised, these funds would not be sufficient to complete the project. PX 30; PX 20; HT2 at 168. Indeed, Defendants are at least $43 million short of the funds needed to complete Phase VII. Without completion, 166 investors will not realize their promised return and will likely lose their opportunity to obtain permanent residency.

2. Facts Common to All Phases

Accounts

To facilitate the investments, each phase had an escrow account at the People's Bank in Vermont where investors would deposit their initial $500,000. PX 11. Once the United States Citizenship and Immigration Service ("USCIS") approved investors' conditional green cards, Stenger would transfer the $500,000 from the People's Bank account to a Raymond James

[6] The OOM, in introducing Phase VII key management, states that Quiros is "one of the founders and owners of the Existing Asian AnC Entity (AnC Bio of South Korea)." PX 56. This description is absent from the ROM. PX 57.

[7] The SEC, despite multiple attempts, was unable to interview either Dr. Jang or Dr. Kim about the accuracy of their nearly identical declarations. PX 138.

account in the name of the particular phase.[8] Quiros's former son-in-law was the broker for the Raymond James accounts. Quiros was the only signatory on all of the Raymond James accounts, giving him complete control over investor funds.

Limitations on Use of Funds

Each of the limited partnership agreements for Phases I-VII detail how the general partner may use investor money. Section 5.02 of each agreement prevents the general partner from borrowing from or commingling investor funds; acquiring property with investor funds that do not belong to the limited partnership; or mortgaging, conveying, or encumbering partnership property that is not real property. PX 2; PX 3; PX 4 PX 5; PX 6; PX 7; 56; PX 57.

Expected Returns

All of the investors across the seven phases sought permanent green cards pursuant to the EB-5 program. Like most investors, they also sought a return on their investment. *See* PX 46; PX 50; PX 54; PX 55. Jay Peak represented to multiple investors that returns would be anywhere from four-to-six percent annually. *Id.* Many investors never received this level of return. Some investors in the earlier phases did receive a return on their investment, but these returns were often the result of the Defendants using funds from the later phases to pay the earlier phase investors—the quintessential example of taking from Peter to pay Paul. PX 124. Some instances of misrepresentations about returns include:

- B. Patel, a Phase VI investor, receiving project overview materials, which represented a return on investment of up to six percent. PX 54 ex. A.
- B. Nesbit, a Phase VII investor, receiving via his immigration attorney, a letter from Stenger projecting a four to six percent return on investment for Phase VII. PX 55 ex. A.

[8] As detailed below, MSSI transferred Phase I and II funds to Raymond James when Quiros gained control of JPI.

- Investors in Phase II and Phase IV received returns of less than two percent despite promises of almost five percent. PX 5, 6, 124.
- Phase VI offering materials representing returns of four to five percent annually, but investors have only received $3000 (a .6% return). PX 124.

C. Quiros and Company Acquire Jay Peak, Inc.

In addition to his interests in JPI and Phases I-VII, Quiros is the sole owner and director of Q Resorts, JCM, and GSI.[9] PX 8; PX 33; PX 34; PX 35; PX 36. All of these companies have their offices at the same address in Miami. PX 33; PX 36.

Quiros is a self-described "deal maker." PX 10 at 30. After serving in the United States Military, Quiros settled in South Korea, where he helped the Korean government as a "deal maker, an arbitratage, and arbitrator." *Id*. While still living in Korea, Quiros would visit Jay Peak in Vermont, where had a vacation home. *Id.* In 1995, Quiros opened his offices in Miami, Florida. PX 57.[10]

Sometime in 2007, MSSI decided to sell JPI. According to Quiros, MSSI, Stenger, and others implored him to purchase JPI after a deal with a Korean purchaser fell through. PX 10 at 34, 38. In January 2008, Quiros took control of JPI in contemplation of purchasing the company. *Id.* He testified that "[t]hey didn't give it to me by documents, but they let me run it and manage it and let me see how the income is and see how this EB-5 works to get taught, really taught. . ." *Id.* at 39. For the next five months, Quiros learned the details of and became involved in the Jay Peak projects, including Phases I and II. *Id*.

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[9] Quiros is also the managing principal of Relief Defendant Q Burke and the owner of Burke Mountain Resort, another EB-5 offering. PX 39, 41.

[10] The OOM and the ROM both state that, at some point, Quiros had fourteen operating trading, importing, and exporting companies and offices in Seoul, London, Beijing, Sydney, and Hong Kong. PX 56; PX 57.

By June 2008, Quiros had negotiated a stock transfer agreement between MSSI and Q Resorts wherein MSSI agreed to transfer the real estate and other assets of JPI to Q Resorts for a price of $25.7 million. PX 11, PX 32. In preparation for closing, Quiros asked MSSI to open brokerage accounts for Phases I and II at Raymond James. During his hearing before the SEC, Quiros testified that he requested the accounts so he could confirm that the funds for Phases I and II existed. PX 10 at 99. MSSI opened the Raymond James brokerage accounts in the names of Suites Phase I ("MSSI RJ Phase I Account") and Hotel Phase II ("MSSI RJ Phase II Account") limited partnerships. PX 58, PX 11. On June 16 and 17, 2008, MSSI transferred $11 million in Phase I investor funds from People's Bank to Raymond James. PX 11. On June 20, 2008, MSSI transferred $7 million in Phase II investor funds from People's Bank to Raymond James. *Id*. There was no money in the Raymond James accounts prior to these transfers.

On June 18, 2008, MSSI wrote to Raymond James, copying Quiros and Stenger and explained that the funds in the MSSI RJ Phase I and Phase II accounts were investor funds and could not be used to pay for Q Resorts' purchase of JPI, stating:

> You confirmed that [Phase II] funds will not be used in any manner, including as collateral or a guarantee, to finance the purchase of the Jay Peak Resort . . . Once again [Phase I] funds may not be used in any manner, including as collateral or a guarantee, to finance the purchase of the Jay Peak Resort.

PX 11 ex. D-4.

On June 17, 2008, Quiros opened two new accounts at Raymond James: the Quiros Jay Peak Investor Phase I account ("Quiros RJ Phase I Account") and the Quiros Jay Peak Investor Phase II account ("Quiros RJ Phase II Account"). PX 11. Quiros was the sole signatory on these accounts. *Id*.

On June 23, 2008, the parties closed on Q Resorts' purchase of JPI. That same day, Phase I and II investor funds moved through multiple Raymond James accounts. First MSSI transferred

$11 million from the MSSI RJ Phase I Account to the Quiros RJ Phase I Account and $7 million from the MSSI RJ Phase II Account to the Quiros RJ Phase II Account. PX 11. At this point, Quiros had not commingled funds. That changed when Quiros, the sole signatory on the now funded Quiros RJ Phase I and II accounts, transferred $7.6 million from the Quiros RJ Phase I Account and $6 million from the Quiros RJ Phase II Account to the **Q Resorts Raymond James Account.** *Id*. In so doing, Quiros commingled investor funds. Quiros, the sole signatory on the Q Resorts Raymond James Account, then authorized a wire transfer from the Q Resorts Raymond James account to MSSI's attorney's trust account in the amount of $13.544 million to pay for Q Resorts's purchase of JPI. *Id*. In the span of one day, Quiros orchestrated the movement of restricted and segregated funds from MSSI directly to Q Resorts—a company in which he is the sole owner—to finance the purchase of JPI. *See* App. A.

Quiros asserts that MSSI owed JPI over $13 million for supervision and architectural fees and that, therefore, he was entitled to use investor funds to purchase JPI. PX 10 at pg. 49. Having only contributed approximately $2.5 million of his own funds, Qurios recognized that the transaction was the "perfect, perfect, perfect situation." *Id*. However, as detailed above, pursuant to the Phase I and II Offering Memoranda, JPI was only entitled to compensation for cost overruns, developer fees, and the land purchases upon completion of the project. When Quiros took control of and commingled investor funds, JPI had only started construction of Phase I, and it had not started any work on Phase II. In addition, JPI had not paid for the property. As a result, at the time of closing, JPI was only entitled to take approximately $60,000 of the Phase I investor funds and none of the Phase II investor funds. PX 30.

D. ***Quiros Encumbers Investor Funds***

When Quiros opened the RJ Phase I and II Accounts, he signed a credit agreement with Raymond James to allow both accounts to hold margin balances. PX 11. If the accounts

borrowed money and held negative cash balances, they would be in debt to Raymond James. *Id*. Quiros pledged the amounts in both the RJ Phase I and II accounts as well as all of the assets of the Phase I Limited Partnership as collateral for any margin loans that the accounts incurred. *Id.*

For each new phase, Quiros opened new accounts at Raymond James in the name of the limited partnership. PX 10; PX 32; PX 80. As with Phases I and II, Stenger would transfer the funds from the People's Bank account to the new Raymond James account. Quiros had sole signatory authority and control over all of the Raymond James accounts. In making the transfers, Stenger—the principal of the general partners of Phases I-VI—gave up control of the funds to Quiros, in direct violation of the terms of the limited partnership agreements. *See* PX 2–7; PX 56.

For each new phase, and corresponding Raymond James account, Quiros also signed a new credit agreement pledging the account as collateral for the margin loans, in violation of the terms of the limited partnership agreements. PX 30; PX 58; PX 59; PX 60; PX 61; PX 62; PX 63; PX 64. Indeed, each of the agreements specifically prohibits the projects' general partners from encumbering or pledging investor funds as collateral without the express approval of the investors. PX 2–7; PX 56–57. In addition, the offering memoranda for each phase details exactly how the Defendants would utilize investor funds. None of the offering documents indicate that Defendants would use investor funds as collateral or to pay off margin loans. *Id.*

Just after Q Resorts closed on its acquisition of JPI, Quiros ordered the purchase of treasury bills in the amount of $11 million, the same amount MSSI had transferred to the Quiros RJ Phase I Account. However, due to Quiros's prior transfer of $7.6 million of investor funds out of the Phase I Account to the Q Resorts account, the Phase I Account only had $3.4 million in investor funds remaining to purchase the treasury bills. As a result, the Phase I account incurred a margin loan balance of $7.6 million. Quiros pursued a similar strategy with the Phase II

account, purchasing $7 million in treasury bills when there was only $1 million remaining in the Phase II account. Consequently, investors did not have a claim to the $18 million in treasury bills and the remaining investor funds in the two accounts were at risk of being forfeited to Raymond James if there was a margin call. PX 11.

Quiros continued to maintain margin loan balances on the Phase I and II accounts. By February 2009, the combined margin loan balances were $23.8 million, collateralized by investor funds from Phases I and II. PX 30. Quiros then consolidated the two margin loans into one (Margin Loan III), with Phases I and II investor funds as collateral. As the investors funded Phases II-VI, Quiros signed additional credit agreements, pledging the new investor funds as collateral for Margin Loan III. Quiros used more than $105 million of investor funds from Phases I-V to pay down Loan III.

In February 2012, Quiros used investor funds from Phases V and VI to pay off the $23.4 million balance on Margin Loan III. A few days later, he opened another margin loan at Raymond James in the name of Jay Peak (Margin Loan IV). Investor Funds from Phase V and VI served as collateral for Margin Loan IV. Quiros used $6.5 million of investor funds from Phases V and VI to pay down Margin Loan IV. However, because he used approximately $25.5 million in Margin Loan IV for project-related and non-project expenses, the margin loan balance was approximately $19.4 million in February 2014. PX 30.

On March 5, 2014, after Raymond James demanded that Quiros pay off Margin Loan IV, Quiros transferred approximately $18.2 million of investor funds from the Phase VII account at People's Bank to pay off the bulk of the $19.4 million loan. PX 13; PX 42. This $18.2 million transfer contributed to Phase VII running out of funds to complete the project. PX 30; PX 64.

E. Documenting the Misuse of Investor Funds

At the Preliminary Injunction hearing, the SEC introduced a demonstrative exhibit which

traces the movement of funds to and from the various Quiros accounts. *See* App. B. The exhibit is difficult to follow—just like the flow of investor funds. Indeed, the image shows just how much and how often the Defendants commingled investor funds in violation of the limited partnership agreements.

The SEC provided ample evidence of commingling including:

- Quiros and Q Resort's use of different phase investor funds to pay down margin loans;
- Quiros and Q Resort's use of Phase II investor funds to finance the purchase of JPI;
- Quiros and Q Resort's use of $4.7 million of Phase II investor funds for Phase I project costs and their use of $3 million of Phase II investor funds for Phase III project costs. PX 30;
- Defendants mixing funds from the various phases in Q Resort's Raymond James Account. *Id.*;
- Defendants commingling $34.3 million of Phase IV through VII funds by putting them into a JCM account at Raymond James. *Id.*;
- Quiros and the Defendants taking $12.8 million in investor funds out of Phase IV as fees when they were only entitled to $6.3 million in fees. Of this $12.8 million, Quiros used $3.8 million to purchase a condominium at the Setai Fifth Avenue Hotel and Residences. PX 133; HT2 at 80-82 (Dee Testimony); [ECF No. 93] at 84-87 (Pieciak Testimony); PX 133; PX 101;
- Quiros and the Defendants taking $8.6 million in investor funds out of Phase V as fees when they were only entitled to $7.4 million in fees. *Id.*;
- Quiros and the Defendants taking $10 million in investor founds out of Phase VI as fees when they were entitled to much less as the project was not completed. *Id.*;

- Defendants failing to make required contributions to the projects, including a failure to contribute $3.8 million to Phase IV, $6.6 million to Phase V, $7.4 million to Phase VI, and $6 million to Phase VII. *Id.*;
- Quiros using $10.7 million of Phase VII investor funds to back his personal line of credit, of which he used $6 million for personal income taxes, $1.4 million to pay purported returns to investors in earlier projects, and $3.5 million to pay Stateside construction vendors. PX 30;
- Quiros transferring $3 million in Phase VII investor funds to GSI, then six weeks later using $2.2 million of those funds to purchase a Trump Place condominium in New York for personal use. *Id.*;
- Quiros using $7 million of Phase VII investor funds to purchase Q Burke Resort. *Id.*;
- Defendants paying NECS $7.9 million for construction supervision fees on Phase VII when very little construction has taken place. Of this $7.9 million, Quiros or his related entities received $5.5 million. *Id.*'
- Paying GSI a significant markup on the seven acres of land purchased for the Phase VII research facility. Quiros, through GSI, purchased the land in July 2011 for $3.15 million. GSI sold the land to Phase VII in December 2012 for $6 million, despite its appraised value of only $620,000.[11] PX 30; PX 68; PX 70; and
- JCM submitting false invoices for construction of Phase VII Clean Rooms (when they had not been equipped or completed) in the amount of $47 million. PX 30; PX 71. Rather than use the $47 million to construct the Clean Rooms, Quiros used the money to pay $4.2 million in JCM taxes and used $10.7 million as collateral for a $15 million personal

[11] The property deed showing transfer of ownership from GSI to Phase VII has not been recorded. PX 30; PX 68; PX 70.

line of credit at Citibank. Quiros used the personal line of credit to pay $6 million of his personal taxes, $3.5 million for Phase VI vendors, and $1.4 million in returns to Phases III-IV investors. PX 30.

F. Project Managers

Quiros attempts to justify the frequent commingling of investor funds and/or his use of investor funds by arguing that JCM, the construction manager for several of the phases, was entitled to fees and that, once JCM received its fee, it could use the funds in any way it deemed appropriate. While Quiros will certainly be permitted to prove this assertion on a motion for summary judgment or at trial, the current record does not support his claim. First, JCM was not involved in the earlier phases. Second, JCM's role as construction manager for Phases IV through VI was not disclosed to investors. Third, JCM's role was only disclosed to Phase VII investors in the ROM. This ROM, however, like the other offering memoranda, strictly limits the fees a contractor is entitled to take. Finally, Quiros's calculations are not accurate, as JCM has not completed much of the work that would justify a fee.

III. CONCLUSIONS OF LAW

Congress enacted the federal securities laws "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *Affliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972). To adhere to Congress's intent, courts broadly and liberally interpret the federal securities laws. *See id.* (explaining that the Act is "to be construed not technically and restrictively, but flexibly to effectuate its remedial purpose"); *see also SEC v. Shiner*, 268 F. Supp. 2d 1333, 1340 (S.D. Fla. 2003) (citing *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982)). It is with this flexible framework in mind that the Court makes the following conclusions of law.

A. *Standards for Granting a Preliminary Injunction*

The Securities Act and the Exchange Act each authorize the Securities and Commission to bring an action to enjoin any person from engaging in acts that will violate the securities laws. *See* 15 U.S.C. §§ 77t(b) & 78u(d)(1). The purpose of a preliminary injunction is to maintain the status quo pending a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

> Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing . . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at a trial on the merits.

Id. Because the procedures are less formal, the evidentiary rules are relaxed and the Court is permitted to rely on evidence that might not be admissible for a permanent injunction, "so long as the evidence is appropriate given the character and purpose of the injunction proceedings." *Caron Found. of Fla., Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353, 1360 (S.D. Fla. 2012) (citing *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) and *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1310–13 (11th Cir. 1998)).

The SEC is permitted to seek injunctive relief whenever it appears that a person is engaged in or about to engage in acts or practices which constitute a violation of the federal securities laws. 15 U.S.C. §§ 77t(b) & 78u(d). The Court must grant the requested injunction upon a proper showing by the SEC. *Id.* A proper showing exists when the SEC establishes (1) a prima facie case of previous violations, and (2) a reasonable likelihood that the Defendant will re-offend if not enjoined. *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1199 n.2 (11th Cir.

1999).[12] As a guardian of the public interest, the SEC is not required to demonstrate irreparable harm. *Shiner*, 268 F. Supp. 2d at 1340.

B. *Prima Facie Case of Previous Violations*

The SEC's claims against Quiros fall under the antifraud provisions of the Securities Act and the Exchange Act. Specifically, the SEC alleges that Quiros violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5, and that Quiros is liable for aiding and abetting the other Defendants' violations of Section 10(b) and Rule 10b-5 and/or as a control person under Section 20(a) of the Exchange Act.

Section 17(a) of the Securities Act makes it

> unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a).

[12] Quiros argues that the SEC must make a "clear showing" of both its prima facie case and a reasonable likelihood that the wrong will be repeated. Quiros relies on the Second Circuit's opinion in *SEC v. Unique Fin. Concepts, Inc.*, which held that a district court "should bear in mind the nature of the preliminary relief the SEC is seeking, and should require a more substantial showing of likelihood of success, both as to violation and risk of recurrence, whenever the relief sought is more than preservation of the status quo." 910 F.2d 1028, 1039 (2d Cir. 1990). The Court is not bound by the Second Circuit's ruling and the SEC's proposed preliminary injunction is prohibitory as opposed to mandatory. However, even if this heightened standard applied, the SEC has made a clear and substantial showing of likelihood of success on the merits related to the prior violations and the risk of recurrence.

> Rule 10b-5, which implements Section 10(b) of the Exchange Act, makes it
>
> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or by use of the mails or of any facility of any national securities exchange
>
> (a) To employ any device, scheme, or artifice to defraud;
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order the make the statements made, in the light of the circumstances under which they were made, not misleading; or
>
> (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

> And Section 20(a) of the Exchange Act provides:
>
> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. §78t(a)

Liability may attach under both Section 17(a)(1) and (3) and Rule 10b-5(a) and (c) without the defendant making a material misrepresentation. *See SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 796 (11th Cir. 2015) (holding that a defendant may be held liable for a scheme to defraud without a "maker" of an untrue statement of material fact); *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014) ("The operative language of section 17(a) does not require a defendant to 'make' a statement in order to be liable. . . . Likewise, subsections (a) and (c) of Rule 10b-5 'are not so restricted' as subsection (b), because they are not limited to 'the making of an untrue statement of material fact.'") (quoting *Affiliated Ute Citizens*, 406 U.S. at 152-53); *SEC v. Strebinger*, 114 F. Supp. 3d 1321, 1331 (N.D. Ga. 2015)

("[S]ubsection (a) and (c) of Rule 10b-5, unlike subsection (b), do not require an individual to "make" a false statement to establish liability.")

Liability may also attach under Section 17(a)(2) without the primary violator "making" a material misrepresentation or omission. *See Big Apple*, 783 F.3d at 796. In *Janus Capital Corp. v. First Derivative Traders*, the Supreme Court defined what it meant to "make" a statement in the context of Rule 10b-5(b), holding that "[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." 564 U.S. 135, 142 (2011). However, the Eleventh Circuit has held that the holding in *Janus* does not apply to Section 17(a)(2), concluding that "'obtain[ing] money . . . *by means of* any untrue statement' under § 17(a)(2) of the Securities Act encompasses a broader range of conduct than 'mak[ing]' such a statement as defined in SEC Rule 10b-5." *Big Apple*, 783 F.3d at 797-98;[13] *see also SEC v. Radius Capital Corp.*, 653 F. App'x 744, 751 (11th Cir. 2016) (per curiam) ("Based on *Big Apple*, we conclude that the requirement that a defendant "make" the misrepresentations is limited to Rule 10b-5(b) claims.").

Accordingly, under both Sections 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act, it is unlawful to ***either*** (a) employ a scheme to defraud; (b) make a material misrepresentation or omission or obtain money or property by means of a material misrepresentation or omission; ***or*** (c) engage in a fraudulent course of conduct.[14] The same misconduct may give rise to liability for each source of liability. *See VanCook v. SEC*, 653 F.3d

[13] In addition to considering that Rule 10b-5(b) and Section 17(a)(2) utilize different terms, the Eleventh Circuit, in accordance with *Janus*, found it significant that, in contrast to Rule 10b-5, Section 17(a)(2) does not create a private right of action. *Big Apple*, 783 F.3d at 797.

[14] Both sections apply to the selling, offering, and/or purchasing securities through the use of any means or instrumentality of interstate commerce. It is uncontested that the investments at issue are "securities" and were offered and/or sold through the use of an instrumentality of interstate commerce.

130, 138 (2nd Cir. 2011); *In re Altisource Portfolio Solutions, S.A. Sec. Litig.*, No. 14-81156, 2015 WL 11988900 at *5 (S.D. Fla. Dec. 22, 2015) (holding that "conduct falling within the purview of one section my also fall within another" (citing SEC Release No. 3981 at 20 (2014))).

1. Scheme to Defraud/Fraudulent Course of Conduct

To establish prima facie claim under Sections 17(a)(1) and (3) of the Securities Act and subsections (a) and (c) of Rule 10b-5, the SEC must show that (1) the defendant committed a deceptive or manipulative act (2) in furtherance of the alleged scheme to defraud (3) with scienter.[15] *In re Altisource*, 2015 WL 1198890 at *5; *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005).[16]

As detailed above, the record supports a finding that Quiros committed many deceptive and manipulative acts across all seven phases in furtherance of a scheme to defraud the EB-5 investors. The scheme began when Quiros began managing JPI, prior to purchase, to learn about the EB-5 investments and projects. He used that information to enrich himself, misappropriating Phase I and II investor funds to purchase JPI, in direct violation of the use of proceeds documents and limited partnership agreements. Through his control over the Raymond James accounts, Quiros repeatedly misused investor funds, including: (1) taking funds as management fees and cost overruns in excess of that permitted by the Agreements; (2) commingling funds from all seven phases to pay off and pay down Margin Loans III and IV; (3) improperly collateralizing all four margin loans with investor funds from all seven phases; (4) using investor funds from Phase II for Phase I project costs; (5) Using Phase II funds for Phase III costs; (6) directing that Stateside Phase VI spend its funds to cover a shortfall in Phase II project costs;

[15] Section 17(a)(3) requires only a showing of negligence. *See SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1244 (11th Cir. 2012) (per curiam).

[16] Unlike private litigants, the SEC is not required to establish reliance, causation, or damages. *See SEC v. Merch. Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007).

(7) using Phase VII funds to pay off Margin Loan IV; (8) using investor funds from multiple phases for his personal use, including to purchase two luxury condominiums, to back a line of credit and pay personal income taxes; and (9) using Phase VII investor funds to pay Korean affiliates for patents, equipment, and distribution rights that were never received. Quiros's actions violated the terms of the offering documents and limited partnership agreements and ultimately led to extreme shortfalls for Phases VI and VII. As a result, Phase VI is not fully complete and Phase VII is $43 million short of funds. The investors have been left without an adequate return on their investment and with the very real prospect of losing their residency status in the United States.

The Court also finds that Quiros has acted with scienter. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). To establish scienter, the Defendant must have acted, at the very least, with severe recklessness. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1282 (11th Cir. 1999). "Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 961-62 (5th Cir. 1981) (en banc).[17] The record reflects that Quiros acted with the intent to defraud the investors in virtually all of the phases.

The Court recognizes that Phases I–V are complete and operating. However, the existence of an operating business does not negate Quiros's fraudulent conduct. While the typical Ponzi scheme involves earlier investors receiving their returns from the funds of later investors,

[17] The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

often with no underlying business, the facts of this case still sound in fraud. "The likelihood that [the defendant] conducted some legitimate business operations does not counteract the existence of a Ponzi scheme because the distributions made to investors were nevertheless funded by other investors' money." *See SEC v. Helms*, No. 13-1036, 2015 WL 1040443, at *8 (W.D. Tex. Mar. 10, 2015). In addition, commingling funds "is a common characteristic of a Ponzi scheme." *Id.* Quiros commingled funds. Quiros paid obligations from prior phases with later phase funds. Quiros used investor funds for his personal expenses. This all supports the Court's finding that the SEC has established a prima facie case that Quiros was the architect of a scheme to defraud in violation of Section 17(a) subsections (1) and (3) and Rule 10b-5 subsections (a) and (c).

2. Section 10(b) and Rule 10b-5(b) Misrepresentations/Omissions

The SEC also presented evidence that Quiros made materially misleading statements and/or omissions in connection with Phase VII. To establish a violation of Section 10(b) and Rule 10b-5(b), the SEC must prove that the defendant (1) made a material misrepresentation or materially misleading omission, (2) in connection with the sale or purchase of securities, (3) with scienter. *Monterosso*, 756 F.3d at 1333-34. Under Rule 10b-5, the "maker of the statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital*, 564 U.S. at 142. More than one person or entity may have authority over a statement and therefore may be considered the maker of a false statement or responsible for a material omission. *City of Pontiac Gen. Emps' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) ("It is not inconsistent with *Janus Capital* to presume that multiple people in a single corporation have the joint authority to 'make' an SEC filing, such that a misstatement has more than one 'maker.'" (quoting *City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 417 n.9 (S.D.N.Y. 2011)).

Misrepresentations/Omissions

As detailed above, both the Phase VII OOM and ROM contain misrepresentations, including (1) the status of FDA approval for products, (2) how Phase VII would spend funds in the use of proceeds section, and (3) that the general partner could not commingle funds or use investor funds to borrow or collateralize loans or use investor funds for non-approved purposes. The ROM for Phase VII also failed to disclose the Defendants' prior misuse of investor funds.

Quiros, as one of the principals of the Phase VII general partner, reviewed and approved the contents of both offering memoranda. He agreed that he had ultimate authority over the statements in both memoranda. PX 13 at 270-71. Quiros, therefore, is liable as a "maker" of the false statements.

Quiros is also liable for the baseless revenue projections in both the Phase VII OOM and the ROM. The evidence supports a finding that Quiros and the other Defendants knew and/or were extremely reckless in their revenue projections. Indeed, as detailed above, in both of the offering memoranda, the revenue projects did not comport whatsoever with the dates for product testing and development. Projections are actionable as misrepresentations if there is no reasonable basis to support them. *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1298 (M.D. Fla. 2007) (citing *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 766-67 (11th Cir. 2007)). At the hearing, Quiros argued that he cannot be held liable for misstatements based on projections because the offering documents contained cautionary language. However, cautionary statements do not render projections about future performance immaterial where the maker of the projections is aware of adverse information about past performance but fails to disclose it. *Rubenstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994) ("To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen

when they have already occurred is deceit." (quoting *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir. 1981), *rev'd in part on other grounds*, 459 U.S. 375 (1983))).

Materiality

For Quiros to be liable, his Phase VII misrepresentations must be material. The test for materiality is "whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *Merchant Capital*, 483 F.3d at 766. It is not necessary for Quiros's false statements to be outcome determinative. Rather, the investor must only consider the false statement to be significant enough "to change his investment decision." *SEC v. City of Miami*, 988 F. Supp. 2d 1343, 1357 (S.D. Fla. 2013) (quoting *SEC v. Meltzer*, 440 F. Supp. 2d 179, 190 (E.D.N.Y. 2006)). The SEC has provided more than enough evidence to establish that Quiros's false statements are material. Phase VII investors would certainly want to know that the Defendants had not submitted the products to the FDA for review and approval. Indeed, the success of the project, and therefore their investment, depended on the products. Investors would also want to know that Phase VII revenue projections were impossible to attain. Finally, investors would consider it important that Quiros was not using investor funds as described in the OOM or ROM, but rather to pay prior phase investors and to enrich himself. *See SEC v. Cochran*, 214 F.3d 1261, 1268 (10th Cir. 2000); *SEC v. Merrill Scott & Assocs., Ltd*, No. 02-0039, 2011 WL 5834271, at *11 (D. Utah Nov. 21, 2011) (stating that a reasonable investor "would consider it important to know [his] funds were being misappropriated and used for purposes other than those stated when solicited").

Scienter

The evidence also supports a finding that Quiros acted with scienter. At the very least, Quiros's actions in misrepresenting the FDA-approval process, revenue projections, and the use of investor funds constitute an extreme departure from the standards of ordinary care. It is

inconceivable that, when approving the OOM and ROM, Quiros did not know that Phase VII was nowhere near obtaining FDA approval for the products or attaining the stated revenue projections. He also had to have known that he was using Phase VII funds in a manner inconsistent with the representations in the OOM and ROM, particularly because a good portion of those funds paid for Quiros's personal needs.

3. Section 17(a)(2) Violations

Section 17(a)(2) of the Securities Act makes it illegal for "any person in the offer or sale of any securities . . . to obtain money or property ***by means of*** any untrue statement of material fact." 15 U.S.C. §77q(a)(2) (emphasis added). While both Rule 10b-5(b) and Section 17(a)(2) require misrepresentation, the Eleventh Circuit has held that the phrase "by means of" is broader than the term "make," and that under Section 17(a)(2) "it is irrelevant for the purposes of liability whether the seller uses his own false statement or one made by another individual." *Big Apple*, 783 F.3d at 797-8.

Clearly Quiros is liable for his own misstatements and omissions for Phase VII. As detailed above, he was the maker of those statements by virtue of his ultimate authority over the OOM and ROM, in violation of Rule 10b-5(b). The same misrepresentations would trigger liability under Section 17(a)(2). However, Quiros's liability under Section 17(a)(2) goes beyond Phase VII because he obtained money and property by means of his own and the other Defendants' material misrepresentations and omissions in Phases II–VI, including using investor funds to purchase JPI, pay down margin loans, fund his Q Resorts account, and purchase the Setai Condominium. The Court finds that the SEC has established a prima facie case that Quiros, through his personal gain by means of his and the other Defendants' misrepresentations and omissions, violated Section 17(a)(2). *See Big Apple*, 783 F.3d at 797-80.

4. Aiding and Abetting

The SEC has also established a prima facie case that Quiros aided and abetted the other Defendants' violations of Section 10(b) and Rule 10b-5(b) in connection with the offerings, misrepresentations, and omissions in Phases II–VI. To establish aiding and abetting liability, the SEC must show: (1) a primary violation by another party; (2) a general awareness by the aider and abettor that his role was part of an overall activity that is improper; and (3) the aider and abettor provided "substantial assistance" to the violator. *Big Apple*, 783 F.3d at 800 (*citing Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009-10 (11th Cir. 1985)). General awareness can be established by extreme recklessness, "which can be shown by 'red flags,' 'suspicious events creating reasons for doubt,' or 'a danger . . . so obvious that the actor must have been aware of' the danger of the violations." *SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1307 (S.D. Fla. 2008) (quoting *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004)).

The Court finds that the SEC has established a prima facie case for aiding and abetting liability. The record reflects a primary violation by the other Defendants of misrepresentations, including how each phase would use investor funds and restrictions on the general partners' use of funds in the limited partnership agreement. In addition, Quiros provided "substantial assistance" to the other Defendants. "Substantial assistance" can be proved by demonstrating the accused aider and abetter associated himself with the venture, participated in the venture "as something that he wished to bring about," and sought to make the venture succeed. *SEC v. Apuzzo*, 689 F.3d 204, 214 (2d Cir. 2012). Quiros was aware of the limitations of the offering documents regarding use of investor funds, but chose to use them anyway. Indeed, he not only "associated himself with the venture," he was the venture. Finally, Quiros, who controlled JPI and the flow of money between accounts, must have been aware of the danger of violations.

5. Control Person Liability under Section 20(e) of the Exchange Act

The Court also finds that the SEC has established a prima facie case against Quiros for control person liability. Section 20(e) of the Exchange Act provides for liability if the defendant "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws . . . [and] had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." *SEC v. Huff*, 758 F. Supp. 2d 1288, 1343 (S.D. Fla. 2010) (quoting *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 397 (11th Cir. 1996)), *aff'd*, 455 F. App'x 882 (11th Cir. 2012) (per curiam). The Eleventh Circuit has held that the control person is not required to have participated in the wrongful transactions to establish liability. *See Brown*, 84 F.3d at 397 n.5.

At this stage of the litigation, the record reflects that Quiros exercised almost unlimited control over JPI and each of the general partners and limited partnerships in Phases I–VII. He is the sole owner, officer, and director of Q Resorts, which wholly owns JPI. He is also the Chairman of the Board of JPI, which is the umbrella entity that is the project sponsor for all of the projects, and he manages and operates all of the completed projects. He had sole control over the Raymond James accounts. He was the sole JPI link to the Korean entities. He was the principal of JCM, which received significant investor funds from Phases VI and VII. Quiros had a tight grasp on every aspect of the business. Accordingly, the SEC has established a prima face case of §20(a) control person liability.

C. Reasonable Likelihood that Defendant will Re-offend

In addition to finding a prima facie case of previous violations, the Court must also find a reasonable likelihood that Quiros will re-offend if not enjoined. To make this determination, the Court should consider

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of the conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

SEC v. Calvo, 378 F.3d 1211, 1216 (11th Cir. 2004).

The Court finds that each factor weighs in favor of entering a preliminary injunction. The weight of the evidence shows that Quiros's actions are egregious. Indeed, in addition to his misuse of $200 million of investor funds, he used over $50 million for his personal use. The fraudulent conduct has continued over a period of more than eight years and therefore is not isolated. The evidence also establishes a concerted effort by Quiros to perpetrate this fraud—clearly establishing a high level of scienter—despite his denial of wrongdoing. Finally, based on evidence currently before the Court, permitting Quiros to regain control of JPI and the related entities pending trial could have deleterious consequences. When the Receiver took control of the property, it was in poor financial condition, due in large part to Quiros's misuse of investor funds. Accordingly, the Court finds a reasonable likelihood that Quiros will re-offend if not enjoined, and that a preliminary injunction should issue.

D. *Requested Relief*

1. Injunction

The SEC requests a preliminary injunction against Quiros preventing him from (1) further violating, directly or indirectly, Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act; (2) further violating Section 20(a) of the Exchange Act as a control person; (3) participating in any EB-5 offering or sale; and (4) holding management positions or controlling any enterprise that has issued or is issuing EB-5 securities. The Court

finds, as detailed above, that the SEC has met its burden and is entitled to the requested injunctive relief.[18]

2. Asset Freeze

In addition to injunctive relief, the SEC also seeks an asset freeze, based on its request in the Complaint for disgorgement of nearly $200 million.

Courts are permitted to freeze assets pending trial "as a means to preserv[e] funds for the equitable remedy of disgorgement." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005). The "burden for showing the amount of assets subject to disgorgement (and, therefore available for freeze) is light: 'a reasonable approximation of a defendant's ill-gotten gains.'" *Id.* at 735 (quoting *Calvo*, 378 F.3d at 1217). In addition, the SEC does not need to present evidence that the assets will be dissipated; rather, it need only show a concern that the Defendants' assets will disappear. *FTC v. IAB Mktg. Assocs., LP*, 972 F. Supp. 2d 1307, 1313 n.3 (S.D. Fla. 2013); *SEC v. Gonzalez de Castilla*, 145 F. Supp. 2d 405, 415 (S.D.N.Y. 2001). The Court finds that the SEC has established, at this stage of the litigation, that up to $200 million in misused investor funds are subject to disgorgement and that there is a concern that Quiros will dissipate the assets that remain if not enjoined.

Quiros argues that the SEC's request for disgorgement is overly broad because (1) the SEC has not shown that all of the frozen assets can be traced to the fraud, (2) that the SEC cannot claim disgorgement for more than the amounts from which Quiros personally gained ($50 million), and (3) that the allegations relate to activities beginning in 2006, which time-bars disgorgement, as it is subject to a five-year statute of limitations.

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[18] The SEC is seeking, in part, to enjoin the Defendants from further violating federal securities laws. Such "obey the law" injunctions are unenforceable. *See SEC v. Gobles*, 682 F.3d 934, 949 (11th Cir. 2012) (condemning obey the law injunctions "because they lack specificity and deprive defendants of the procedural protections that would ordinarily accompany a future charge of a violation of the securities laws.")

With respect to Quiros's claim that the assets must be "tainted" for the Court to freeze them, the Court disagrees. The Court "may exercise its full range of equitable powers, including a preliminary asset freeze, to ensure that permanent equitable relief will be possible." *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 987 (11th Cir. 1995); *see also SEC v. Lauer*, 445 F. Supp. 2d 1362, 1370 (S.D. Fla. 2006) ("[T]here is no requirement that frozen assets be traceable to the fraudulent activity underlying a lawsuit" (citations and alteration omitted)).

The Court also finds that, if it prevails at trial, the SEC may seek disgorgement of not only the amounts of investor funds that Quiros personally pocketed but also the amount of funds that companies under his control—Q Resorts, Jay Peak, the Relief Defendants, and the Limited Partnerships—gained from fraud. *See Calvo*, 378 F.3d at 1215 (stating that "[i]t is a well settled principle that joint and several liability is appropriate in securities law cases where two or more individuals or entities have close relationships engaging in illegal conduct" and finding that the founder and owner of partnership was jointly and severally liable for all of the partnership's gains where he was a "substantial factor" in illegal securities sales); *see also Monterosso*, 756 F.3d at 1337-38 (holding that defendants were jointly and severally liable for disgorgement amount).

Quiros also argues that the statute of limitations under 28 U.S.C. § 2462 bars many of the SEC's claims and therefore reduces the amount of assets subject to the freeze. Section 2462 provides that "an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years of the date when the claim first accrued." 28 U.S.C. § 2462. The SEC has not disputed that, unless tolled, the five-year statute of limitations would apply to its requests for civil fines and penalties. However, during the initial briefing and argument, the SEC asserted that the five-year

limitations period did not apply to its claim for disgorgement. On May 26, 2016, after the preliminary injunction hearing, the Eleventh Circuit held that disgorgement is the same as forfeiture and therefore subject to § 2462's limitations. *SEC. v. Graham*, 823 F.3d 1357, 1364 (11th Cir. 2016) ("Because forfeiture includes disgorgement, § 2462 applies to disgorgement.").

Section 2462 also applies to any claims for declaratory relief, as "[a] declaration of liability goes beyond compensation and is intended to punish because it serves neither a remedial nor a preventative purpose: it is designed to redress previous infractions rather than stop any ongoing or future harm." *Id.* at 1362. Accordingly, the SEC's claims for civil penalties, declaratory relief, and disgorgement, all of which seek to penalize the Defendants, are subject to the five-year statute of limitations, unless tolled. However, the SEC's claims for prospective injunctive relief are equitable remedies and therefore not subject to the statute of limitations. *Id.* at 1360 ("An injunction requiring (or forbidding) future conduct is not subject to § 2462's statute of limitations.")

Securities fraud claims accrue when the allegedly fraudulent activity occurred. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1221-24 (2013). Therefore, § 2462 generally bars any claims for civil penalties, disgorgement, or declaratory relief that accrued prior to April 12, 2011 – five years before the instant complaint was filed. This would certainly encompass claims related to Quiros's purchase of JPI, Phase I, Phase II, and portions of Phases III and IV. However, § 2462 is subject to equitable tolling where the fraud goes undiscovered because the defendant has taken steps to keep it concealed. *Huff*, 758 F. Supp. 2d at 1339 (citing *IBT Int'l, Inc. v. Northern* (*In re Int'l Admin Servs., Inc.*), 408 F.3d 689, 701 (11th Cir. 2005)). If the defendant has actively concealed the fraud, "the statute of limitations is tolled until the plaintiff actually discovers the

fraud." *Id.* (quoting *In re Int'l Admin. Servs., Inc.*, 408 F.3d at 701).[19] In addition, pursuant to the continuing violations doctrine, the statute of limitations is tolled for a claim that would otherwise be time-barred if the violation continues to occur within the limitations period. *Id.* "In determining whether to characterize a violation as 'continuing,' it is important to distinguish between the 'present consequences of a one-time violation,' which do not extend the limitations period, and 'a continuation of a violation into the present,' which does." *Nat'l Parks & Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007)) (quoting *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 658 (11th Cir. 1993)).

The SEC has established a prima facie case that the Defendants engaged in a scheme to defraud investors, beginning with Quiros's purchase of JPI and continuing through Phase VII. In addition, there is sufficient evidence to suggest that the Defendants actively concealed the fraud. The Court finds, at this stage of the litigation, that the SEC has established a basis to toll the statute of limitations. The Court appreciates that it must balance the need to limit the time period in which the SEC can bring an action for penalties with the need to protect investors. In *Huff*, Judge Rosenbaum aptly summarized the reason the continuing violations doctrine should apply:

> While time passes . . . such violations can inflict significant harm on the investing public. If wrongdoers may continue to reap the benefit of their continuing violations with no threat of punitive enforcement actions, then, for some, the possibility that they may eventually merely have to return what may be left of their ill-gotten gains may become simply a cost of doing business. Such an outcome conflicts with congressional intent to prevent securities fraud. Consequently, the Court finds that the "continuing violations" doctrine may apply where the appropriate facts exist.

[19] The Court notes that the Supreme Court has held that the discovery rule, which tolls the statute of limitations until a private litigant discovers the fraud through due diligence, does not apply to SEC enforcement actions. *Gabelli*, 133 S. Ct. at 1224. The Supreme Court did not discuss the fraudulent concealment or continuing violations doctrine. *Id.*; *see also SEC v. Geswein*, 2 F. Supp. 2d 1074, 1084 (N.D. Ohio 2014) (noting that the Supreme Court "did not discuss these doctrines because the SEC abandoned reliance on the fraudulent concealment doctrine and other equitable tolling principles in the lower court").

Huff, 758 F. Supp. 2d at 1341.

However, the applicability of the equitable tolling and continuing violations doctrines are fact sensitive inquiries. *SEC v. Wall Street Commc'ns, Inc.*, No. 09-1045, 2010 WL 3189976, at *5 (M.D. Fla. Aug. 10, 2010) (finding on motion for summary judgment that disputed facts in the record precluded a finding that there was a continuing scheme). Accordingly, Quiros may refute any tolling of the statute of limitations, following discovery, in a dispositive motion or at trial.

3. Continued Appointment of a Receiver

"The appointment of a receiver is a well-established equitable remedy available to the SEC in its civil enforcement proceedings for injunctive relief." *SEC v. Torchia*, — F. Supp. 3d —, 2016 WL 1650779, at *22 (N.D. Ga. 2016) (quoting *SEC v. First Fin. Grp. of Tex.*, 645 F.2d 429, 438 (5th Cir. Unit A May 1981). The record clearly reflects a continued need for the Receiver in this action. Quiros and the Defendants left the Jay Peak Resort in a precarious financial position. The Receiver is in a position to clean up the Defendants' mess and protect what remains of the investors' assets, and therefore should be permitted to continue his work.

IV. CONCLUSION

The record supports a preliminary finding that Quiros was the architect of a fraudulent scheme to use investor funds to enrich himself. The result is a financially strapped ski resort, unpaid contractors, unfinished projects, and unhappy investors at risk of losing their residency status in the United States. Accordingly, the Court finds a preliminary injunction is necessary to maintain the status quo pending a trial on the merits.

It is therefore **ORDERED AND ADJUDGED** as follows:

A. Defendant Quiros is preliminarily enjoined from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(1) to employ any device, scheme, or artifice to defraud;

(2) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser;

by directly or indirectly (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor; about: (A) any investment in or offering of securities, (B) the registration status of such offering or of such securities, (C) the prospects for success of any product or company, (D) the use of investor funds, or (E) the misappropriation of investor funds or investment proceeds.

B. Quiros is preliminarily enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(1) to employ any device, scheme, or artifice to defraud;

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;

by (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about: (A) any investment in or offering of securities, (B) the registration status of such offering or of such securities, (C) the prospects for success of any product or company, (D) the use of investor funds, or (E) the misappropriation of investor funds or investment proceeds.

C. Quiros is preliminarily enjoined from directly or indirectly, unless he acts in good faith and does not directly or indirectly induce the act or acts constituting the violation, controlling any person who violates Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(1) to employ any device, scheme, or artifice to defraud;

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;

by (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false

or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about: (A) any investment in or offering of securities, (B) the registration status of such offering or of such securities, (C) the prospects for success of any product or company, (D) the use of investor funds, or (E) the misappropriation of investor funds or investment proceeds.

D. The asset freeze set forth in the April 12, 2016, Temporary Restraining Order [ECF No. 11], and as modified by the Court's April 25, 2016, and May 27, 2016, Orders [ECF Nos. 82 and 148] remains pending the outcome of the litigation.

E. Quiros is preliminarily enjoined from, directly or indirectly, destroying, mutilating, concealing, altering, disposing of, or otherwise rendering illegible in any manner, any of the books, records, documents, correspondence, brochures, manuals, papers, ledgers, accounts, statements, obligations, files and other property of or pertaining to any of the Defendants or Relief Defendants, wherever located and in whatever form, electronic or otherwise, until further Order of this Court.

F. Pending further Order of the Court, pursuant to Section 21(d)(5) of the Exchange Act, Section 305(b)(5) of the Sarbanes-Oxley Act of 2002, and the Court's equitable powers, Quiros is prohibited from, directly or indirectly, including through any entity he owns or controls: (a) participating in the issuance, offer or sale of any securities issued through the EB-5 Immigrant Investor Program (provided, however, that such injunction would not prevent him from purchasing or selling securities for his own accounts); and (b) are prohibited from participating in the management, administration, or supervision of, or otherwise exercising any control over, any commercial enterprise or project that has issued or is issuing any securities through the EB-5 Immigrant Investor program.

G. As provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraphs also bind the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Quiros's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Quiros.

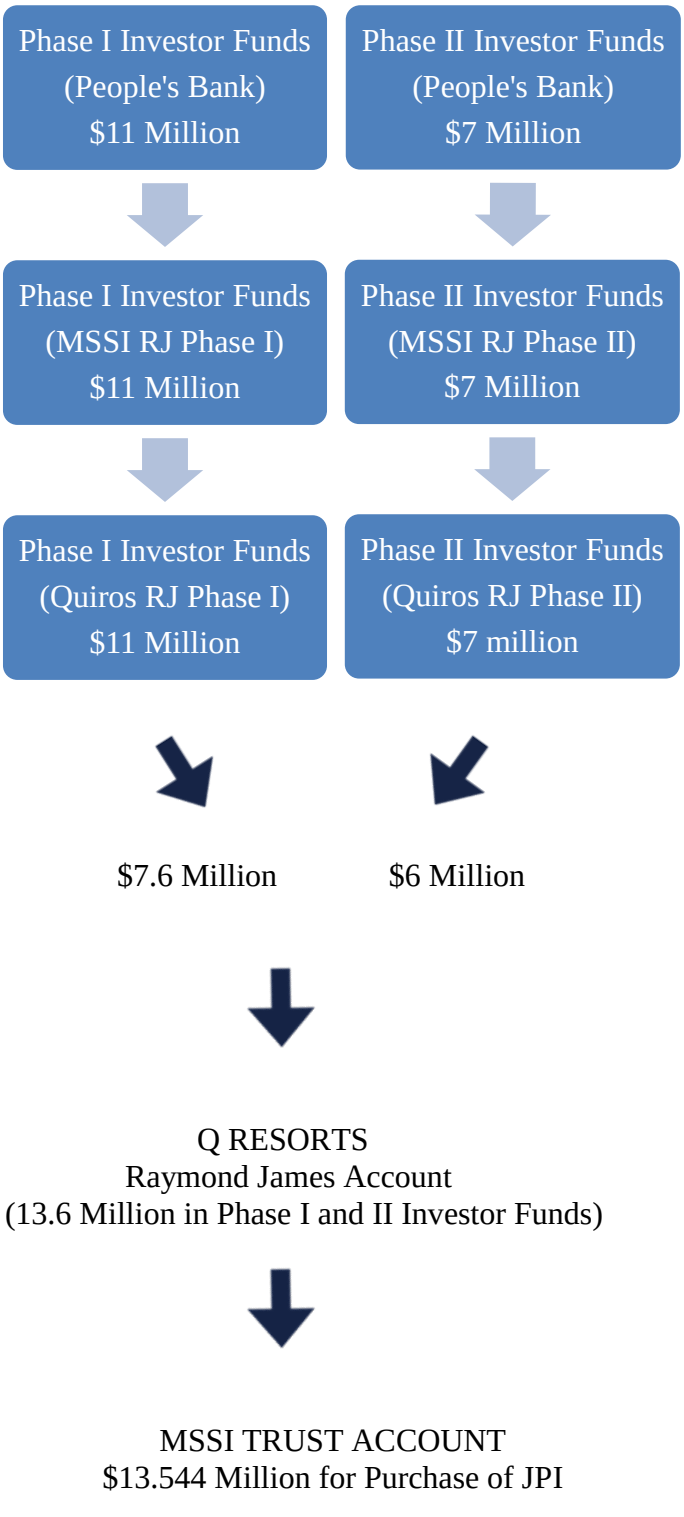
H. This Court shall retain jurisdiction over this matter and Quiros in order to implement and carry out the terms of all Orders and Decrees that may be entered and/or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstances.

DONE AND ORDERED in Chambers at Miami, Florida this 21st day of November, 2016.

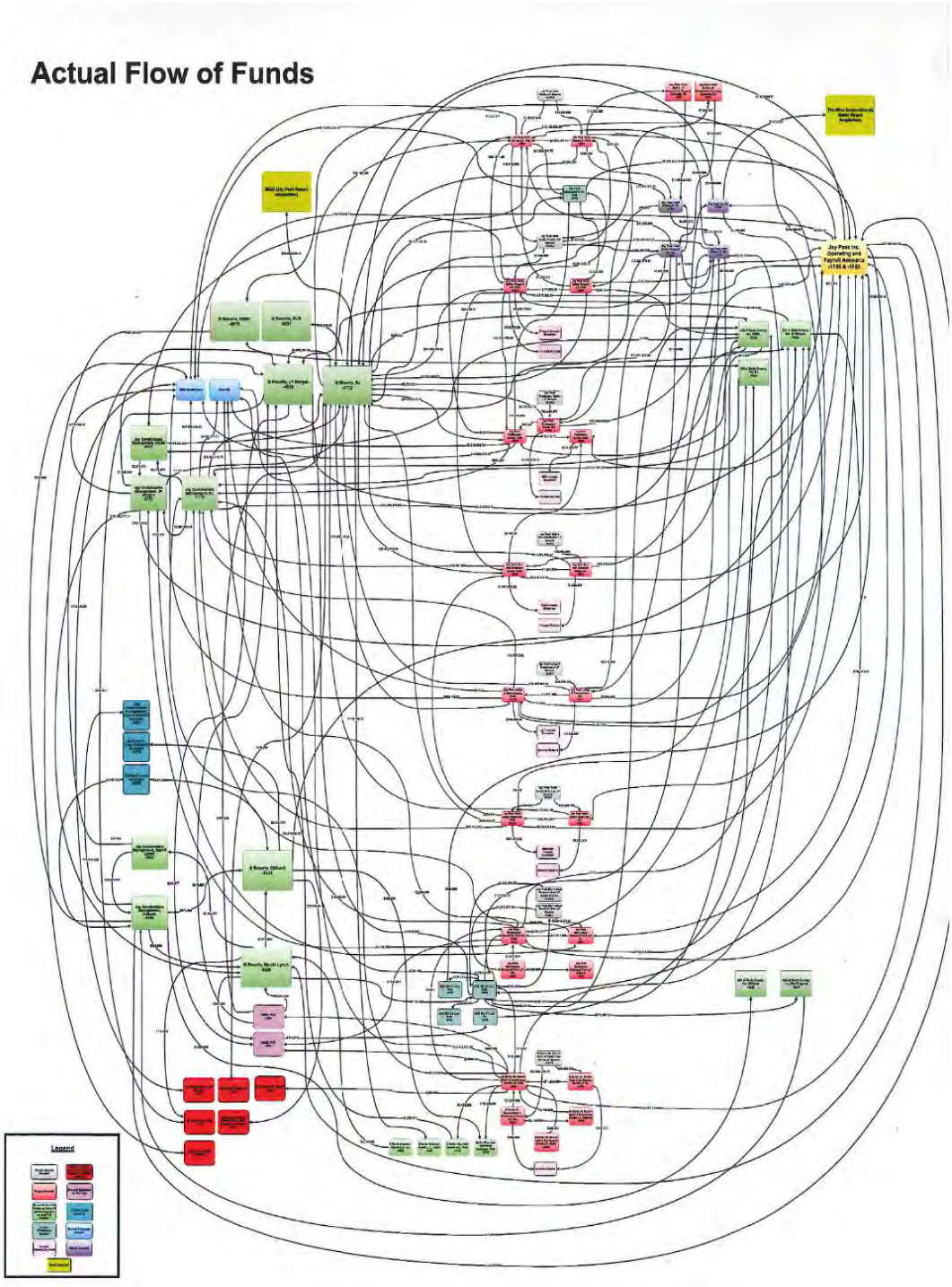
HONORABLE DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

APPENDIX A

FLOW OF INVESTOR FUNDS



APPENDIX B



PX 96.

EXHIBIT 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS,
WILLIAM STENGER,
JAY PEAK, INC.,
Q RESORTS, INC.,
JAY PEAK HOTEL SUITES L.P.,
JAY PEAK HOTEL SUITES PHASE II L.P.,
JAY PEAK MANAGEMENT, INC.,
JAY PEAK PENTHOUSE SUITES L.P.,
JAY PEAK GP SERVICES, INC.,
JAY PEAK GOLF AND MOUNTAIN SUITES L.P.,
JAY PEAK GP SERVICES GOLF, INC.,
JAY PEAK LODGE AND TOWNHOUSES L.P.,
JAY PEAK GP SERVICES LODGE, INC.,
JAY PEAK HOTEL SUITES STATESIDE L.P.,
JAY PEAK GP SERVICES STATESIDE, INC.,
JAY PEAK BIOMEDICAL RESEARCH PARK L.P.,
AnC BIO VERMONT GP SERVICES, LLC,

UNDER SEAL

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC,

Relief Defendants.
_____/

ORDER GRANTING PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR APPOINTMENT OF RECEIVER

WHEREAS Plaintiff Securities and Exchange Commission has filed a motion for the appointment of a Receiver over Defendants Jay Peak, Inc., Q Resorts, Inc., Jay Peak Hotel Suites L.P. ("Suites Phase I"), Jay Peak Hotel Suites Phase II L.P. ("Hotel Phase II"), Jay Peak Management, Inc. ("Jay Peak Management"), Jay Peak Penthouse Suites L.P. ("Penthouse Phase

III"), Jay Peak GP Services, Inc. ("Jay Peak GP Services"), Jay Peak Golf and Mountain Suites L.P. ("Golf and Mountain Phase IV"), Jay Peak GP Services Golf, Inc. ("Jay Peak GP Services Golf), Jay Peak Lodge and Townhouses L.P. ("Lodge and Townhouses Phase V"), Jay Peak GP Services Lodge, Inc. ("Jay Peak GP Services Lodge"), Jay Peak Hotel Suites Stateside, L.P. ("Stateside Phase VI"), Jay Peak GP Services Stateside, Inc. ("Jay Peak GP Services") , Jay Peak Biomedical Research Park L.P. ("Biomedical Phase VII"), and AnC Bio Vermont GP Services, LLC ("AnC Bio Vermont GP Services") (collectively "Corporate Defendants") and Relief Defendants Jay Construction Management, Inc. ("JCM"), GSI of Dade County, Inc. ("GSI"), North East Contract Services, Inc. ("Northeast"), and Q Burke Mountain Resort, LLC ("Q Burke") (collectively, "Relief Defendants") with full and exclusive power, duty and authority to: administer and manage the business affairs, funds, assets, causes in action and any other property of the Corporate Defendants; marshal and safeguard all of their assets; and take whatever actions are necessary for the protection of the investors;

WHEREAS, the Commission has made a sufficient and proper showing in support of the relief requested;

WHEREAS, the Commission has submitted the credentials of a candidate to be appointed as Receiver of all of the assets, properties, books and records, and other items of the Corporate Defendants and Relief Defendants, including any properties, assets and other items held in their names or their principals' names, and the Commission has advised the Court that this candidate is prepared to assume this responsibility if so ordered by the Court;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Michael Goldberg is hereby appointed the Receiver over Corporate Defendants and Relief Defendants, their subsidiaries, successors and assigns, and is hereby authorized, empowered, and directed to:

1. Take immediate possession of all property, assets and estates of every kind of the Corporate Defendants and Relief Defendants, whatsoever and wheresoever located belonging to or in the possession of the Corporate Defendants and Relief Defendants, including but not limited to all offices maintained by the Corporate Defendants and Relief Defendants, rights of action, books, papers, data processing records, evidences of debt, bank accounts, savings accounts, certificates of deposit, stocks, bonds, debentures and other securities, mortgages, furniture, fixtures, office supplies and equipment, and all real property of the Corporate Defendants and Relief Defendants wherever situated, and to administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this Court;

2. Investigate the manner in which the affairs of the Corporate Defendants and Relief Defendants were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Corporate Defendants and Relief Defendants and their investors and other creditors, as the Receiver deems necessary against those individuals, corporations, partnerships, associations and/or unincorporated organizations, which the Receiver may claim have wrongfully, illegally or otherwise improperly misappropriated or transferred monies or other proceeds directly or indirectly traceable from investors in the Corporate Defendants and Relief Defendants, including the Corporate Defendants, the other Defendants, and the Relief Defendants, their officers, directors, employees, affiliates, subsidiaries, or any persons acting in concert or participation with them, or against any transfers of money or other proceeds directly or indirectly traceable from investors in the Corporate Defendants and Relief Defendants; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and/or avoidance of fraudulent transfers under Florida

Statute § 726.101, et. seq. or otherwise, rescission and restitution, the collection of debts, and such orders from this Court as may be necessary to enforce this Order;

3. Present to this Court periodic reports (no less than quarterly) reflecting the existence and value of the assets of the Corporate Defendants and Relief Defendants and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Corporate Defendants and Relief Defendants;

4. Appoint one or more special agents, employ legal counsel, actuaries, accountants, clerks, consultants and assistants as the Receiver deems necessary and to fix and pay their reasonable compensation and reasonable expenses, as well as all reasonable expenses of taking possession of the assets and business of the Corporate Defendants and Relief Defendants, and exercising the power granted by this Order, subject to approval by this Court at the time the Receiver accounts to the Court for such expenditures and compensation. This includes a management company or companies necessary to the continued operation of the Jay Peak and Burke Mountain ski resorts, the Phase I-V projects, and the portion of Phase VI (the Stateside Hotel) that has been fully built, which the Receiver shall continue to operate for the benefit of investors subject to further order of this Court. The periodic reports shall specify to the Court the vendors and legal counsel appointed by the Receiver;

5. Engage persons in the Receiver's discretion to assist the Receiver in carrying out the Receiver's duties and responsibilities, including, but not limited to, the United States Marshal's Service or a private security firm;

6. Defend, compromise or settle legal actions, including the instant proceeding, in which the Corporate Defendants, the Relief Defendants or the Receiver are a party, commenced

either prior to or subsequent to this Order. The Receiver may also waive any attorney-client or other privilege held by the Corporate Defendants and Relief Defendants;

7. Assume control of, and be named as authorized signatory for, all accounts at any bank, brokerage firm or financial institution which has possession, custody or control of any assets or funds, wherever situated, of the Corporate Defendants and Relief Defendants and, upon order of this Court, of any of their subsidiaries or affiliates, provided that the Receiver deems it necessary;

8. Make or authorize such payments and disbursements from the funds and assets taken into control, or thereafter received by the Receiver, and incur, or authorize the incurrence of, such expenses and make, or authorize the making of, such agreements as may be reasonable, necessary, and advisable in discharging the Receiver's duties;

9. Have access to and review all mail of the Corporate Defendants and Relief Defendants and the mail of the other Defendants or Relief Defendants (except for mail that appears on its face to be purely personal or attorney-client privileged) received at any office or address of the Corporate Defendants and Relief Defendants. All mail addressed to the other Defendants or Relief Defendants that is opened by the Receiver and, upon inspection, is determined by the Receiver to be personal or attorney-client privileged, shall be promptly delivered to the addressee and the Receiver shall not retain any copy.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, in connection with the appointment of the Receiver provided for above:

10. The Corporate Defendants and Relief Defendants and all of their directors, officers, agents, employees, attorneys, attorneys-in-fact, shareholders, and other persons who are in custody, possession, or control of any assets, books, records, or other property of the

Corporate Defendants shall deliver forthwith upon demand such property, monies, books and records to the Receiver, and shall forthwith grant to the Receiver authorization to be a signatory as to all accounts at banks, brokerage firms or financial institutions which have possession, custody or control of any assets or funds in the name of or for the benefit of the Corporate Defendants;

11. All banks, brokerage firms, financial institutions, and other business entities which have possession, custody or control of any assets, funds or accounts in the name of, or for the benefit of, the Corporate Defendants and Relief Defendants shall cooperate expeditiously in the granting of control and authorization as a necessary signatory as to said assets and accounts to the Receiver;

12. Unless authorized by the Receiver, the Corporate Defendants and Relief Defendants and their principals shall take no action, nor purport to take any action, in the name of or on behalf of the Corporate Defendants and Relief Defendants;

13. The Receiver further is authorized to take depositions, subpoena records, and other discovery. The Corporate Defendants and Relief Defendants and their principals, and respective officers, agents, employees, attorneys, and attorneys-in-fact shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the conduct of the Receiver's duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the Receiver of the funds, assets, premises, and choses in action described above;

14. The Receiver, and any counsel whom the Receiver may select, are entitled to reasonable compensation from the assets now held by or in the possession or control of or which may be received by the Corporate Defendants and Relief Defendants; said amount or amounts of

compensation shall be commensurate with their duties and obligations under the circumstances, subject to approval of the Court. The Receiver and his counsel shall file with the Court no less than quarterly an application for reasonable compensation and provide to the Commission and the Court a copy of the Commission's Standard Fund Accounting Report.

15. During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from filing a petition for relief under the United States Bankruptcy Code without prior permission from this Court, or from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants;

16. The Receiver is fully authorized to proceed with any filing the Receiver may deem appropriate under the Bankruptcy Code as to the Corporate Defendants and Relief Defendants;

17. Title to all property, real or personal, all contracts, rights of action and all books and records of the Corporate Defendants and Relief Defendants and their principals, wherever located within or without this state, is vested by operation of law in the Receiver;

18. Upon request by the Receiver, any company providing telephone services to the Corporate Defendants and Relief Defendants shall provide a reference of calls from any number presently assigned to the Corporate Defendants and Relief Defendants to any such number designated by the Receiver or perform any other changes necessary to the conduct of the receivership;

19. Any entity furnishing water, electric, telephone, sewage, garbage or trash removal services to the Corporate Defendants and Relief Defendants shall maintain such service and transfer any such accounts to the Receiver unless instructed to the contrary by the Receiver;

20. The United States Postal Service is directed to provide any information requested by the Receiver regarding the Corporate Defendants and Relief Defendants, and to handle future deliveries of the mail of the Corporate Defendants and Relief Defendants as directed by the Receiver;

21. No bank, savings and loan association, other financial institution, or any other person or entity shall exercise any form of set-off, alleged set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets of the Corporate Defendants and Relief Defendants to the Receiver's control without the permission of this Court;

22. No bond shall be required in connection with the appointment of the Receiver. Except for an act of gross negligence or greater, the Receiver shall not be liable for any loss or damage incurred by the Corporate Defendants and Relief Defendants or by the Receiver's officers, agents or employees, or any other person, by reason of any act performed or omitted to be performed by the Receiver in connection with the discharge of the Receiver's duties and responsibilities;

23. Service of this Order shall be sufficient if made upon the Corporate Defendants and Relief Defendants and their principals by personal service, facsimile or overnight courier;

24. In the event that the Receiver discovers that investor funds received by the Corporate Defendants and Relief Defendants have been transferred to other persons or entities, the Receiver shall apply to this Court for an Order giving the Receiver possession of such funds

and, if the Receiver deems it advisable, extending this receivership over any person or entity holding such investor funds; and

25. This Court shall retain jurisdiction of this matter for all purposes.

DONE AND ORDERED in Chambers at Miami, Florida, this 13th day of April, 2016.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE