STATE OF VERMONT

SUPERIOR COURT
Lamoille Unit

CIVIL DIVISION
Docket No. 100-5-17 Lecv

Antony Sutton,
Wei Wang,
Xiaofeng Feng,
Guangyi Xiong,
Robert Connors,
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

FILED

APR 20 2018

VERMONT SUPERIOR COURT
LAMOILLE UNIT

DECISION ON MOTION

Preface

The State has moved to dismiss the Plaintiffs' entire Third Amended Complaint, pursuant to V.R.C.P. 12(b)(1) for lack of subject matter jurisdiction and pursuant to V.R.C.P. 12 (b)(6) for failure to state a claim upon which relief can be granted. Both general grounds for dismissal stand on the law of sovereign immunity and official immunity, absolute and qualified, as well as specific grounds with respect to certain of the causes of action pled. Plaintiffs have replied at length, and the State has in turn replied to the Plaintiffs' reply. In addition, the Court held oral argument on the motion on March 19, 2018, and the parties have both submitted post-hearing memoranda. Finally, Plaintiffs have now submitted a Fourth Amended Class Action Complaint ("FAC") that would delete Defendants State of Vermont Department of Financial Regulation, Michael Piecak, Susan Donegan, William Carrigan and Joan Goldstein and all claims for violation of federal securities law and causes of action for constructive trust, mutual mistake and unjust enrichment. The new complaint would also add new Plaintiffs and two new claims, one for breach of contract and another for breach of good faith and fair dealing. The new

complaint also attaches as exhibits the collection of documents attached to Plaintiffs' Motion for Receiver, previously denied by the Court, and adds some additional documents referred to in the amended complaint. The State opposes the new complaint on a variety of grounds, including the obvious facts that the parties have been litigating the prior complaint for many months, two hundred pages of briefing and two hours of oral argument.

Plaintiffs are represented by the Barr Law Group and specifically Russell Barr, Esq., Chandler Matson, Esq. and Benjamin Novogroski, Esq. The State is represented by the Vermont Attorney General and specifically Benjamin Battles, Esq., Gavin Boyles, Esq. and Philip Back, Esq.

The Court must begin with stating its' frustration with and confusion by Plaintiffs' pleading. Even the proposed amended complaint is substantially inconsistent with the arguments and representations of counsel as recently as oral argument only a month ago. At that argument, when the Court asked Plaintiffs' counsel to clarify what claims they intended to proceed with, counsel stated: "So I can sum this up...This case boils down to three counts; negligence, breach of contract, and state securities law." Transcript at p.18, lines 13-15. Counsel also conceded that "fraud claims against the State are precluded by the Vermont Tort Claims Act." Tr. at p.43, lines 13-14. The new complaint still contains fraud claims against the State and still contains thirteen claims versus the three counts upon which Plaintiffs stood at argument. Given the confusion caused by Plaintiffs' pleading and argument, the Court will wade through the entirety of the Third Amended Complaint, making reference to the newly proposed amended complaint along the way.

By way of final preface, the Court recognizes the extraordinary circumstances of this case and the unprecedented scale of the wrongdoing that is alleged to been done by the Jay Peak developers who are now the subject of a variety of state and federal investigations and resulting legal proceedings. The Court also recognizes the scale of the alleged harm done to investors who sought to buy their way to legal residence in this country by way of the visa program at issue here, although it now appears that four of the five Plaintiffs have actually been fully or mostly reimbursed their investment by way of prior recovery litigation and the fifth opted out of reimbursement for unexplained reasons. See Pages 415-16 of the Exhibits to the FAC. In hindsight, it is easy to see that the hundreds of millions of dollars of investment that caused such promise and excitement for Vermont's economically struggling Northeast Kingdom would prove to be an all-too tempting pile of money for one or more of the players. Significantly, however, despite the suggestion of "grift" (a word first used in oral argument and now in the FAC) on the part of State employees, it is important to note that this case is not about State employees diverting, stealing or otherwise taking investor funds for personal use. There is no such allegation, even taking the broadest view of Plaintiffs' claims. In that broadest view, the question posed by this case is whether the State and various State employees can be held financially responsible for promoting, facilitating and then failing to sooner subdue what came to be a monster of promise gone bad.

<u>Claims to be Analyzed</u>

Given the grounds for dismissal argued by the State, the Court's analysis must start with careful sorting of the claims made and the particular State officials against whom they are

made in Plaintiffs' Third Amended Complaint ("TAC") and the FAC. The Court relies on the revision of claims in the FAC and documents attached to the FAC to aid analysis of the TAC and ultimately to demonstrate the futility of the FAC. In doing so, the Court takes the facts alleged in the TAC and the FAC as true, and otherwise its' inquiry "focuses on the absence of any facts, reasonable factual inferences, and legal bases for recovery alleged in the complaint, attachments thereto, or to matters the court may judicially notice." *State v. Sprague,* 178 Vt. 222, 224 (2005), quoting *Gilman v. Maine Mutual Fire Insurance. Co.,* 175 Vt. 554 (2003). "The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it." *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002). We must "accept as true all *well-pleaded* factual allegations in the complaint." *Richards v. Town of Norwich*, 169 Vt. 44, 48-49 (1999)(italics added).

The Court has previously laid out the big picture painted by the Plaintiffs in the TAC and FAC in the Court's Decision on Motion to Appoint Receiver dated December 5, 2017. It begins with the underlying allegations that over a close to ten-year period starting in 2006, Jay Peak developers William Stenger and Ariel Quiros, acting through a variety of entities, persuaded hundreds of foreign investors to invest $500,000 each, for a total of about $400 million, in exchange for interests in the developments together with immigrant visas for themselves and their families. The federal program that authorized these investments-for-visas is known as the EB-5 program, named after the visa category under federal statute. The State's role from the beginning was to join in promotion of the investments in the name of much needed economic development in the Jay Peak/Newport region. It did so through an office within the State Agency of Commerce and Community Development ("ACCD") that received approval of the United States Customs and Immigration Service ("USCIS") to act as a Regional Center. Known as the Vermont Regional Center ("VRC"), the mission of the office was to promote economic development in Vermont by way of facilitating EB-5 investment here.

The TAC and FAC allege that VRC and ACCD officials joined in promotion of the investments by way of public appearances, written materials circulated to potential investors and by joining the Jay Peak principals in traveling to promotional events in the U.S. and in Asia. Written and spoken statements issued by those officials touted the "legitimacy, viability and overall accountability" of the Jay Peak projects ("JPPs"), including the benefits of State oversight that would include quarterly reviews, financial monitoring and audits to ensure project compliance with all applicable laws and regulations.

The materials prepared and presented to solicit investors included Memorandums of Understanding ("MOUs") between the State and the JPPs. They call for the Jay Peak entities to deliver quarterly reports on their business and financial activity with investor capital and to act "honestly, consistently and fairly" in order to assist ACCD with ACCD's "oversight and management of the Regional Center in connection with the Jay Peak Project." They do not expressly call for the State to conduct any audit of the project. The reporting and honesty obligations fell on the Jay Peak entities. The earliest MOU, or one of the earliest, signed in late 2006, provides in its preamble that the reports were to assist ACCD and specifically "to assure the project's compliance with U.S. immigration law and regulations..." A later MOU, signed in 2012, added "as well as all applicable federal and state securities laws and regulations" to the same section of the preamble.

Although it is not clearly alleged when and how they were actually circulated and used, the materials prepared and presented to solicit investors allegedly also included documents that use State of Vermont logo and tout the advantages and reassurance of having a uniquely state-run regional center that could expedite visa approvals, provide oversight and accountability including quarterly audits of the EB-5 projects invested in. The same kinds of assurances are alleged to have been made in person by a variety of state officials participating in events designed to attract immigrant investors.

Significantly, both the TAC and the FAC allege that these statements "ultimately" proved to be untrue but do not allege that they were false at the time they were made. In oral argument, Plaintiffs' counsel conceded that "no one is upset, on the investor side, that the representations were made." He continued: "What they are upset about is that nothing happened...the representation is not the basis of the claim (for negligence)." The Court pressed on: "It sounds like you are acknowledging that when the representations were made...we shall audit...that they were not false at the time; is that right?" Counsel: "I'm saying that they should have been true." Court: "At the time they were said, they were not false at the time. They became a problem, in the plaintiffs' view, when the State did not live up to what the plaintiffs' viewed as the State's promises." Counsel: "That's correct, Your Honor...That's right, Your Honor. Yep."

The TAC and FAC allege that investors relied on the State's promotional statements as well as those of the private Jay Peak principals, in making their investments and taking the giant steps of seeking to become lawful residents of the United States.

The VRC collected administrative fees of $1500-3000 from each investor, totaling some $1.6 million over the entire decade investment period and used to pay the costs of VRC operations and activity. There is no allegation that the State is currently holding any investor funds or that any such fees were diverted by the Defendants, but rather that they were used to pay the salaries and expenses of VRC officials and travel expenses of the Governor.

The TAC and FAC allege that concern over the actual use of investor funds surfaced in early 2012, initiated by principals of the consulting firm that the State had hired for some time to assist in the VRC effort. That relationship ended in dispute and the consultant warning about a hundred immigration attorneys involved in EB-5 applications that the consultant had lost confidence in the financial integrity of the JPPs. The TAC and FAC allege that the VRC response to the concerns was limited to a site visit to the JPPs by the then VRC Director, James Candido, and an immigration attorney hired by the State, that found "no issues" and continued to tout the State's ongoing oversight and audit functions. The TAC and FAC then allege that Mr. Candido, together with higher-ups in the ACCD, retaliated against the "whistleblower" consultant by blackballing it from participating in other EB-5 projects in Vermont. Mr. Candido proceeded to reassure potential investors that the whistleblower was just a disgruntled businessman and vouched for the ongoing legitimacy and reliability of the JPPs, particularly given ongoing State oversight.

The JPPs continued, both those already in the pipeline in 2012 and more. In May of 2014, approximately two years after the initial red flags raised by the consultant, a group of investors led by Plaintiff Anthony Sutton confronted the successor VRC Director, Brent

Raymond, with evidence of misuse of investor funds and an apparent effort by the Jay Peak principals to frustrate investor inquiry by way of converting their equity interests in the projects to simple debt. Mr. Raymond responded by disclaiming State responsibility for auditing the JPPs and any responsibility for assisting the investors with their complaints of mistreatment other than to convey them to the Jay Peak principals. Mr. Sutton et al continued their effort by hiring their own auditor but his effort was frustrated by delays in response from the Jay Peak principals, allegedly aided and abetted by Mr. Raymond. No private audit was ever accomplished. The investors escalated their complaint about VRC inaction to the Secretary of ACCD, Patricia Moulton, who joined Mr. Raymond in disclaiming State responsibility for any kind of audit of the JPPs.

The TAC and FAC allege that the 2014 VRC and ACCD disclaimers of audit responsibility stand in contrast to the written and spoken assurances given to investors over the several years prior. The State was not, however, ignoring the situation. In December 2014, ACCD and the State Department of Financial Regulation ("DFR") joined forces in the VRC, adding DFR's securities regulation resources to the mix. The legislature, meanwhile, passed the first statute specifically authorizing the VRC and specifically as a joint effort of ACCD and DFR. DFR's subsequent efforts culminated in a securities fraud lawsuit against the Jay Peak principals in April of 2016 that remains pending. The TAC and FAC allege that the VRC, now a joint effort of ACCD and DFR, continued to promote more EB-5 fundraising for the JPPs, even as the investigation and audit identified misappropriation of millions of dollars of investor funds by the Jay Peak principals.

The TAC does not allege any particular wrongdoing by DFR or DFR officials prior to it joining the VRC effort in December 2014. Instead, it focuses on allegations that after DFR joined the VRC team, "DFR's presence further contributed to the fraud" by failing to act immediately to shut down pending investment solicitation, joining in the drafting of investment offering documents "to give the false appearance of state oversight and monitoring," and joining in approval of the last two JPPs for further investment in early 2015. The chronology of DFR's entire effort, including most importantly its eventual investigation culminating in the April 2016 action against the Jay Peak principals, is not set forth in the TAC. As noted above, the FAC drops any claim against DFR or its officials.

The TAC and FAC allege that the various State officials involved were motivated by the notoriety of bringing hundreds of millions of dollars to Vermont's most economically depressed region, desire to protect their jobs and obtain future jobs, and by "lavish benefits and private benefits" that the JPPs provided them, unspecified in the TAC and FAC except as to international travel to investor solicitation events and some hospitality at Jay Peak itself, albeit none alleged to be separate from VRC business. The FAC would add allegations that then Governor Shumlin spent a week for free at a Manhattan apartment owned by Jay Peak principal Ariel Quiros, with "purported guests," that constituted acceptance of bribery. Governor Shumlin is not a defendant here. The FAC, going to the far reaches of reasonable inference and beyond, then "alleges" that the Governor was thus "incentivized, through the VRC, to promote and comment on the VRC's superior auditing and oversight so as to keep his own improprieties hidden..."

Claims Made

All told, the TAC alleges sixteen counts against all of the defendants, including two State agencies and ten individual defendants, for a total of two hundred and eight claims. The FAC alleges eleven counts against the State and now six individual defendants, together with two counts against the six individual defendants, for a total of seventy eight claims.

Count 1 alleges common law fraud by way of communications to Plaintiffs/investors to the effect that the Jay Peak Projects ("JPPs") were legitimate and that they could rely on the State's ongoing oversight of the JPPs in making their investment decisions. Those communications were belied by the fact that actual State oversight was too little and too late and ignored an extended series of red flags that pointed to the JPPs being as illegitimate and fraudulent as they turned out to be.

Count 2 of the TAC alleges essentially the same facts and "common plan or scheme...which operated as a fraud...upon Plaintiffs" in the context of a claim under the Vermont Securities Act, 9 V.S.A. §5501 et seq.

Counts 3 and 4 allege essentially the same facts in the context of claims for fraud under the Federal Securities and Exchange Act, 15 U.S.C.§78j(b).

Count 5 alleges essentially the same facts in the context of a claim of negligent misrepresentation.

Count 6 alleges essentially the same facts in the context of a claim for gross negligence/willful misconduct, adding the further characterization of those facts as creating "a special relationship with Plaintiffs that gave rise to a duty to exercise due care in the oversight and administration of Plaintiffs' assets in the JPP..." which Defendants "grossly failed to exercise..."

Count 7 alleges essentially the same facts in the context of a claim for breach of fiduciary duty arising from the State's "superior position" to oversee the JPPs, its offering of that superior position to the Plaintiffs to rely upon, and then its failure to fulfill that duty.

Count 8 alleges essentially the same facts, adding specific reference to the Memorandums of Understanding ("MOUs") between the State and the JPPs, in the context of a claim that Plaintiffs were the intended third party beneficiaries of those agreements, the State breached those MOUs by failing to provide promised oversight, and Plaintiffs were damaged thereby.

Count 9 alleges essentially the same facts, adding specific reference to the relatively modest administrative fees of $1500-$3000 per investor paid to the Vermont Regional Center ("VRC"), in the context of a claim for unjust enrichment and a request for relief in the form of imposition of a constructive trust.

Count 10 alleges essentially the same facts as Count 9, but seeks recovery of the fees on the basis of mutual mistake as to the reality of State oversight of the JPPs.

Counts 11 and 12 allege essentially the same facts in the context of a claim of aiding and abetting the Jay Peak principals in their breach of fiduciary duty to Plaintiffs by way of committing fraud.

Count 13 alleges essentially the same facts in the context of a simple negligence claim.

Count 14 appears to be a reiteration of Count 9, for unjust enrichment, but expanding the scope of the "enrichment" to include any benefit received by way of the alleged breaches of fiduciary duty.

Count 15 alleges essentially the same facts in the context of a claim for fraud under the Vermont Consumer Fraud Act, 9 V.S.A. §2451 et. seq.

Count 16 alleges essentially the same facts in the context of a claim for breach of implied contract arising from the payment of investor fees "and other good and valuable consideration" to the VRC in exchange for promised oversight.

All counts in the TAC are expressly made against all Defendants. In their Opposition to the Motion to Dismiss, Plaintiffs concede that this Court has no jurisdiction over the federal securities law claims made in Counts 3 and 4. They also concede without explanation Count 9 ("constructive trust") and Count 10 ("mutual mistake"). See Plaintiffs' Reply at page 30. Plaintiffs Reply elsewhere says that "in light of the Court's Decision on Appointment of Receiver, it leaves the viability of the Constructive Trust claim to the discretion of the Court," which raises some question as to its' earlier express concession. Reply at 72. The FAC expressly waives the constructive trust claim. Counts 3, 4, 9, and 10 are therefore dismissed at the outset for failure to state a claim upon which relief can be granted.

Plaintiffs further conceded at oral argument that the State agency defendants are immune from suit for the fraud and misrepresentation claims in Counts 1, 5, 7, 11-12 and 15. They stated that this case now "boils down to" Plaintiffs' claims for negligence, breach of contract and under the Vermont Securities Act. At oral argument, they attempted to preserve Count 2, the Vermont Securities Act claim, against ACCD but not DFR. Their reply to Defendant's Motion to Dismiss argues only that the claims for negligence (Counts 6 and 13) and breach of contract (Counts 8 and 16) survive against the State. Counts 1, 2, 5-8, and 11-16), for varieties of fraud and misrepresentation, breach of contract, unjust enrichment and negligence, remain against the State employees named.

Plaintiffs' FAC now concedes that there should be no claims for unjust enrichment. The remaining claims set forth in the TAC against the State are thus Count 2 (Vermont Securities Act vs. ACCD), Count 6 (gross negligence/willful misconduct), Count 8 (Third Party Beneficiary), Count 13 (Negligence) and Count 16 (Breach of Implied Contract). The remaining claims set forth in the TAC against the individual defendants are those same counts plus the fraud claims- Counts 1, 5, 7, 11-12 and 15. The FAC adds another count for breach of contract and one for breach of the covenant of good faith and fair dealing, both against all defendants.

Plaintiffs' FAC now concedes that there should be no claims against DFR or individual defendants Pieciak, Donegan, Carrigan or Goldstein, leaving ACCD and individual defendants Candido, Fullam, Kessler, Miller, Moulton and Raymond.

<u>The Defendants</u>

The Defendants now fall into three categories: (i) the State agency ACCD (VRC is not a separate entity but rather an agency of ACCD); (ii) VRC Executive Directors James Candido (2004-2012), Brent Raymond (2012-2015) and Eugene Fullam (2015-2016); and (iii) senior officials in ACCD Lawrence Miller (Secretary) and Patricia Moulton (Secretary) and John Kessler, Esq. (General Counsel 1997-).

The Court focuses first on the claims against ACCD and then the claims against the State officials. Different law of immunity applies in each case.

<u>Sovereign Immunity</u>

With respect to claims against ACCD, the State relies on the doctrine of sovereign immunity, deceptively simply stated as follows:

> Lawsuits against the State are barred unless the State waives its sovereign immunity. *Denis Bail Bonds, Inc. v. State,* 159 Vt. 481, 484–85 (1993); see also *American Trucking Ass'ns, Inc. v. Conway,* 152 Vt. 363, 376 (1989) (holding that the doctrine of sovereign immunity precludes the maintenance of actions for the recovery of money against the State unless the State has consented to be sued).

<u>Lane v. State</u>, 174 Vt. 219, 222–23 (2002). Sovereign immunity is a defense available to the State itself, not to State employees personally. *Levinsky v. Diamond*, 151 Vt. 178, 183 (1989). Therefore, this first discussion relates to the claims against ACCD and not to the claims against the State employees.

Sovereign immunity is an absolute defense, except to the extent the State has waived sovereign immunity as set forth in 12 V.S.A. §5601, also known as the Vermont Tort Claims Act. That Act provides as follows:

> The State of Vermont shall be liable for injury to persons or property...caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment, under the same circumstances, in the same manner, and to the same extent as a private person would be liable to the claimant...

The first step in the analysis of sovereign immunity is thus to determine whether there are "private action analogs" for the remaining claims against ACCD. The State challenges all of the remaining claims against the State agencies (Counts 2, 8, 13 and 16), on this basis. The State focuses on the fact that the alleged failure of the State in each of these claims was in a duty of oversight and regulation, which are exclusively governmental functions that no private person could fail to fulfill.

"(T)he purpose of the private analog provision 'is not to bar...suits claiming injuries based on the breach of duties performed by government employees performing government services,' but merely to prevent government from being visited with novel and unprecedented liabilities untethered from any comparable common law action." *Czechorowski v. State,* 178 Vt. 524, 534 (2005), quoting *Sabia v. State,* 164 Vt. 293, 302 (1995). "Governmental liability may arise only if a plaintiff's cause of action is comparable to a cause of action against a private citizen and his allegations, taken as true, will satisfy the necessary elements of that comparable state cause of action." *Denis Bail Bonds, Inc. v. State,* 159 Vt. 481, 486 (1993). This analysis in this case is essentially whether Plaintiffs have stated a claim under the law of each of their apparent theories.

Contract Claims

Plaintiffs' "Contract claims" in the TAC, Counts 8 and 16, allege breach of contract by way of a third party beneficiary theory (Count 8) and an "express" contract arising from the payment of fees and other good and valuable consideration in exchange for State oversight (Count 16). New Count 3 in the FAC for Breach of Contract appears to be an amalgam of those two theories. The Court cannot discern any new or separate theory. New Count 4 in the FAC, for Breach of Covenant of Good Faith and Fair Dealing, is also dependent on the existence of an underlying contract claim.

Count 8 stands on the MOUs between the State and the JPPs and common law recognition that a third party may have a claim for breach of a promise made in a contract between two other parties where it is "appropriate to effectuate the intention of the parties and...the circumstances indicate that the promise intended to give the beneficiary the benefit of the promised performance." Plaintiffs' Reply at page 44, quoting *Herbert v. Pico Ski Area Management Co.,* 180 Vt. 141, 149-150 (2006), quoting the Restatement (Second) of Contracts §302(1). The fatal flaw in Plaintiffs' theory, and specifically the lack of a private analog, is apparent from looking at the very authority primarily relied upon by Plaintiffs.

In the case of *Bayerische Landesbank v. Aladdin Capital Management, LLC,* 692 F.3d 42 (2d Cir. 2012), investors sued a management entity for breach of its contractual promise to an intermediary entity to properly manage a portfolio of property. There was no direct contract between the management entity and the investors, but it was clear that the contract that did exist-between the management entity and the intermediary-was directly for the benefit of the investors. The plaintiffs' claim in that case was against the promisor, i.e. the management entity, not the intermediary. In this case, the claim is against the *promisee*, not the promisor, and it does not appear that the contract in this case was intended for the benefit of the investors but rather to assure USCIS that it would be getting the information it needed to continue to qualify the regional center (see analysis below).

In *Doe v. Walmart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009), also a Rule 12(b)(6) case, employees of foreign companies that sold goods to Walmart had sued Walmart for failing to enforce its agreements with the foreign companies in which the foreign companies promised to respect certain worker rights and protections. The facts and allegations in that case have much in common with the instant case, as the workers claimed to be third party beneficiaries, and

also brought negligence and unjust enrichment claims against Walmart. As to the third party beneficiary claim, the Court first quoted the Restatement (Second) of Contracts Section 302 and 304, as requiring that the plaintiff be an "intended beneficiary" of the relevant promise, and "a beneficiary is only 'an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties." The Walmart supply contracts included the language "Walmart will undertake affirmative measures, such as on-site inspection of production facilities, to implement and monitor said standards." But the Court, recognizing its authority to interpret the contract as a matter of law, determined that "the language and structure of the agreement show that Walmart reserved the right to inspect the suppliers, but did not adopt a duty to inspect them...Because...Walmart made no promise to monitor the suppliers, no such promise flows to Plaintiffs as third party beneficiaries. "*Id.* at 681-682. The Court then recognized prior authority that "a 'donee' third party beneficiary may recover only against the party that undertook a promise under the contract for the benefit of the beneficiary." *Id.*

The Vermont Supreme Court has recognized some of the same principles in *McMurphy v. State*, 171 Vt. 9 (2000), in which the representatives of a woman killed in a car accident sought to claim she was the third-party beneficiary of a contract between the State and the City of Rutland for maintenance of the intersection where she died. "In order to sue on the contract between the State and Rutland, plaintiffs must establish that their daughter was a third-party beneficiary to the contract rather than an incidental beneficiary...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.

Applying these principles here, we see nothing in the MOUs that indicates they were entered into for the direct benefit of the investors, i.e. that they were the intended beneficiaries. Rather, they were entered into in satisfaction of USCIS requirements to ensure that certain information was available to USCIS to fulfill its' mission of ensuring that foreign investor funds went into job creation as intended. (see longer discussion below re statutory duty). Meanwhile, like Walmart, the State did not promise to do anything by way of oversight and regulation in the MOUs. It was the JPPs who promised to deliver a variety of reports and information. There is no allegation of a promise by the State to the JPPs that was breached to the detriment of the Plaintiffs. Any third-party action arising under common law from the MOUs lies against the JPPs, not the State. Absent a promise by the State in the MOUs, there could be no promissory duty to enforce for the benefit of the Plaintiffs.

In short, *Doe* and *McMurphy* appear right on point to this Court, and Plaintiffs Count 8 as against the State is dismissed for failure to state a claim with any private analog.

That leaves the "implied contract" claim, which stands on the proposition that the totality of circumstances "evince an agreement" that the State promised to provide comprehensive "oversight, administration, management and overall regulation" in exchange for administrative fees of $1500-3000 per investor, and "other good and valuable consideration." No other such "good and valuable consideration" is actually alleged in the TAC. The Court does not consider this rote tail language, oft used in deeds and elsewhere without significant meaning, to allege any specific fact or suggest any reasonable inference that the investors gave the State anything more than their fees. See <u>Weed v. Weed</u>, 185 Vt. 83

(2008)(rote recitation of "ten and more dollars" in a quit claim deed does not constitute actual consideration).

The focus here must then be in the reality of the alleged "exchange" of fee for services. The Court accepts as true that the State made the promise, as alleged, but there is no coherent allegation that it made that promise in the context of an exchange for payment of the modest processing fee. *Cf. Richards*, supra, regarding "well-pleaded factual allegations." To the contrary, the TAC expressly alleges that "Some regional centers provide little more than administrative functions (submitting proper information to the USCIS for a project and its investors), while others take a much more active role in administration, oversight, auditing and consultation." TAC at para. 33. There is no allegation in the TAC that the fees charged here were any higher than the fees charged for the simple "administrative functions" that are the alleged baseline of regional center responsibility. There was no assurance of success on the merits of the filing or that any one of a number of variables to achieving the objective of legal residency would fall into place, much less that the State would do anything in particular by way of overseeing the JPPs, specifically because the visa filing fee was paid. From that perspective, they are precisely like the court filing fees in the authorities cited by the State, i.e. there is no rational correlation between the fee paid and the alleged consideration claimed. The filing fees paid by investors in this case were more than court filing fees to be sure, but were not remotely in proportion to the obligation of years of oversight etc. that Plaintiffs allege was purchased. There is no written contract between the State and investors. There is no allegation of any bargaining or negotiation between the State and the investors. This scenario falls far short of a "meeting of the minds" in which "the parties...agree to the same thing in the same sense." *Everbank v. Martini,* 200 Vt. 490, 500 (2015).

"The existence of sufficient consideration for a contract is a question of law and is evaluated at the time the contract was formed." *Bergeron v. Boyle,* 176 Vt. 78, 838 (2003)...We have frequently held that "[t]o constitute consideration, a performance or a return promise must be bargained for." Restatement (Second) of Contracts § 71(1) (1981)(citations omitted). *Weed v. Weed*, supra, at 88. This Court can make no more sense of the fee for service theory alleged here than the Courts could make sense of the theories that a court filing fee bought a private attorney general from the state. See, *Garrett v. United States*, 78 Fed. Cl. 668 (2007).

Not surprisingly, Plaintiffs do not cite any authority for their "implied contract" claim other than the third party beneficiary law discussed above. Plaintiffs' Count 16 as against the State is dismissed for failure to state a claim in any private analog.

New Count 3 in the FAC, being an amalgam of Counts 8 and 16, states no more of a claim and would therefore be futile. Likewise, new Count 4 in the FAC, for "Breach of Good Faith and Fair Dealing," fails to state a claim for lack of any underlying contract to which it attaches as an implied term. "A cause of action for breach of the covenant of good faith can arise only upon a showing that there is an underlying contractual relationship between the parties...." *Harsch Properties, Inc. v. Nicholas*, 182 Vt. 196, 202 (2007), quoting *Monahan v. GMAC Mort. Corp.,* 179 Vt. 167 (2005).

Negligence Counts

The remaining Counts 6 and 13 are for gross negligence and negligence. Both require a common law duty of care to begin with, and then vary as to the degree of culpability in its breach. Count 6 alleges that the State's various representations to investors created "a special relationship with Plaintiffs that gave rise to a duty to exercise due care..." Count 13 makes no specific additional allegation as to the source of such a duty, once again referring to "a special relationship."

Plaintiffs seek to avoid sovereign immunity on their negligence claims by way of reference to a line of Vermont Supreme Court cases that recognize a State duty sufficient to sustain a claim of negligence and thereby a private analog that satisfies that that threshold requirement under §5601. See, e.g. *Kennery v. State,* 191 Vt. 44 (2011)(police officers who had no statutory duty to perform a wellness check assumed a duty just as a private person would under State Good Samaritan law). Plaintiffs allege throughout the TAC a negligent and grossly negligent failure to perform oversight of the JPPs. They seek to avoid another line of Vermont Supreme Court cases that find no duty and thus no private analog in claims that the State failed in its' performance of "uniquely governmental functions." See, e.g. *Lafond v. Vt. Dept of Soc. & Rehab. Servs.,* 167 (1998)(licensing and inspection of private service providers).

The ship Plaintiffs are trying to sail is what might be called the Good Samaritan theory. It stands on the seminal case of *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), in which the U.S. Coast Guard was held liable for negligent operation of a lighthouse causing wreck of a barge, absent an obligation to operate the lighthouse to begin with, on the fundamental tort principle "that one who undertakes to warn the public of danger and thereby induces reliance must perform his...task in a careful manner." *Id.,* at 64-65. The Vermont Supreme Court followed this analysis in *Kennery,* finding that the State could be liable for police officers' negligence in conducting a welfare check, despite no governmental obligation to conduct it, where they agreed to do it. Their duty arose not by statute or general duty of care but by way of the clear undertaking, citing Restatement (Second) of Torts §324A (1965) and *Indian Towing.* The officers were obligated to use the same care a private person would be obligated to use if the private person had agreed to do the welfare check. See also *McMurphy v. State,* 171 Vt. 9 (2000)(allowing an injured motorist to proceed on a negligence claim based on alleged failure to comply with design standards that the State clearly intended to comply with).

By analogy in this case, the Plaintiffs' argument is that by choosing to operate a regional center, the State accepted a duty to oversee the JPPs in a careful manner and failed to do so. "The VRC was unequivocally duty bound to comply with the standards set by USCIS regulations (and) by the standards established by its own creation." Opposition at 35. Plaintiffs argue in their post-argument memorandum that this theory of "non-delegable and non-discretionary duties " is "heightened by the marketing materials given to investors," but does not depend upon them. The Plaintiffs' negligence theory thus largely if not entirely sets aside Plaintiffs' claims for fraud and misrepresentation and looks instead only at the State's failure to sufficiently oversee and audit the JPPs until it was too late, having allegedly undertaken to do so from the beginning by way of creating the VRC, not because of VRC communications to investors.

The authorities cited in Plaintiffs' post-hearing memorandum do not stand for their theory. In the primary case cited by Plaintiffs, a New York court found that an accountant had a common law duty in negligence to the limited partners of a limited partnership for which he agreed to perform audit services, focusing on the established identity of the limited partners. "The instant situation did not involve prospective limited partners, unknown at the time and who might be induced to join, but rather actual limited partners, fixed and determined" *White v. Guarente*, 43 N.Y.2d 356, 361, 372 N.E.2d 315, 318 (1977). In this case, the investors were clearly only prospective as the marketing materials were given to them.

Plaintiffs instead stand primarily on the analysis set forth in *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481 (1993), to establish the duty upon which any negligence claim would be based in this case. In that case, the Vermont Supreme Court recognized a list of "indicia in determining whether a governmental body has undertaken a duty of care toward certain persons" as follows:

(1) Whether an ordinance or statute sets forth mandatory acts clearly for the protection of a particular class of persons, rather than the public as a whole;
(2) Whether the government has actual knowledge of a condition dangerous to those persons;
(3) Whether there has been reliance by those persons on the government's representations and conduct; and
(4) Whether failure by the government to use due care would increase the risk of harm beyond its current potential.

Id. at 487.

Denis did not reach the sovereign immunity exceptions discussed below and was decided instead on whether there was any duty on the State that could have been breached in that case. The Court in *Denis* decided that there was no such duty in that case, so that there was a failure to state a claim to begin with and the waiver exceptions analysis did not need to be done. *Id.* at 489. Based on the relevant allegations in the TAC, together with "attachments thereto, or...matters the court may judicially notice," *Sprague,* supra, we consider the indicia identified in *Denis* for the same purpose.

Taking judicial notice of the relevant statutes and regulations, the VRC was created in 1997, within ACCD, pursuant to its' responsibility "...for the promotion of Vermont as great place to live, work, and do business in order to increase the benefits of economic development marketing, including: (1) attracting additional private investment in Vermont businesses;...(5) promoting and supporting Vermont businesses, goods, and services. 3 V.S.A.§2476(c) (added 1995).

Under federal law, as an approved EB-5 program regional center, VRC was obligated to do the following:

(3) Requirements for regional centers. Each regional center...shall submit a proposal...which:

(i) Clearly describes how...it will promote economic growth...;

(ii) Provides...how jobs will be created...;

(iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of...promotional efforts...;

(iv) Contains a detailed prediction (of)...positive impact on the regional or national economy...; and

(v) Is supported by ...valid forecasting tools...

(6) Continued participation requirements for regional centers.

(i) Regional centers approved for participation in the program must:

(A) Continue to meet the requirements of section 610(a) of the Appropriations Act.

(B) Provide USCIS with updated information annually, and/or as otherwise requested by USCIS, to demonstrate that the regional center is continuing to promote economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment in the approved geographic area, using a form designated for this purpose;

8 C.F.R. § 204.6.

The reference to section 610(a) is to the following:

SEC. 610. PILOT IMMIGRATION PROGRAM.—(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Attorney General, shall set aside visas for a pilot program to implement the provisions of such section. Such pilot program shall involve a regional center in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS ACT, 1993., PL 102–395, October 6, 1992, 106 Stat 1828.

The Court is aware from prior pleading in connection with the Plaintiffs' Motion for a Receiver that USCIS has taken the position, in its Notice to Terminate the VRC as an approved regional center, that:

...a regional center that takes actions that undermine investors' ability to comply with EB-5 statutory and regulatory requirements such that investors cannot obtain EB-5 classification through investment in the regional center...(and/or) fails to engage in proper monitoring and oversight of the capital investment activities...*may* no longer serve the purpose of promoting economic growth in compliance with the Program and its authorities.

Notice of Intent to Terminate dated August 14, 2017, at page 16, attached to Plaintiffs' Emergency Motion to Appoint Receiver (italics added).

In their post-argument memorandum, Plaintiffs also quote at length from the instructions for the regional center application form known as Form I-924 and Form I-924A, including demonstration of how:

1. The regional center will promote economic growth…;
2. EB-5 investors will be recruited.;
3. The capital investment opportunities will be offered;
4. Potential investors will subscribe or commit to the investment;
5. The regional center will conduct its due diligence to ensure, among other things, that only lawful sources of immigrant invest funds are associated with the regional center's new commercial enterprises; and
6. Any and all fees…that will be paid to the regional center…through the new commercial enterprises into which EB-5 investors will invest capital.

However, as best the Court can tell, nothing in the state or federal law, nor any of the I-924 form or instructions quoted above obligated the State to audit or regulate in any particular depth the inner workings of an EB-5 funded project and the actual use of investor funds. To the contrary, they are all about demonstrating ongoing commitment to economic growth and lawful immigrant investment. There is not even the suggestion, much less requirement, that a regional center look out for the investors themselves. The entire focus is economic growth by way of lawful immigrant investment, not securities investment protection.

The fact that the USCIS has expressed its view that the listed failures *may* indicate that the VRC is failing in its required mission of promoting economic growth does not translate into an established audit requirement. Meanwhile, the USCIS is of course the federal agency responsible for enforcement of federal immigration law, not securities regulation that is the province of the federal Securities and Exchange Commission ("SEC"). Plaintiffs have not pointed to any involvement of the SEC in authorizing or establishing the VRC, nor can the Court find any such statutory role.

In short, the Court cannot identify any state or federal statute or regulation that sets forth any specific mandatory acts of a regional center during the relevant time period in this case that are directed at protection of the commercial interests of investor immigrants. Both the state and federal authorizing legislation are all about promoting economic growth and immigration law, not securities regulation.

It was not until 2015 that any statute or regulation the Court can find imposed any express obligation of the VRC as a joint effort of ACCD and DFR to conduct audits and/or use other means to actively regulate EB-5 projects that ACCD had been promoting. In 2015, immediately after the December 2014 MOU between ACCD and DFR, a specific statute was enacted for the "EB-5 Program; regulation; oversight." 10 V.S.A. §20. That appears to be the first clear expression of obligations for "ongoing oversight and compliance of approved projects, including annual audits," "the establishment of escrow accounts for capital investments and third-party oversight of requisitions," and "investor relations and a formal complaint protocol." That new law, together with the December 2014 MOU that added DFR to the mix, were clearly responses to the last eight years of Jay Peak activities. An evidently good

idea, however, based on hindsight and experience, does not translate into a pre-existing legal obligation and undertaking.

Another potential source of undertaking was in the MOUs referred to above. As discussed above, however, the MOUs did not set forth a duty of the State to audit the JPPs but rather imposed a set of obligations on the JPPs not originally intended for the benefit of the investors but rather to satisfy USCIS interests in economic development and lawful immigrant investment.

The Court now turns to the other *Denis* indicia. Whether, or more aptly when, the government had actual knowledge of a dangerous condition appears to be a question of disputed fact, but taking the Plaintiffs' allegations in their best light, the earliest that knowledge allegedly existed appears to be 2012 when the dispute arose with the VRC consulting firm and the firm disclaimed confidence in the JPPs. The TAC alleges that "Beginning in 2012, if not earlier, additional individuals (besides the consultant) put the VRC...on notice of the Jay Peak Projects' fraud." Para. 139. That was six years into the situation, although four years from the State filing suit against the Jay Peak principals.

The final indicia of reliance on government representations and conduct is of course highlighted throughout Plaintiffs' complaint, as is the allegation that State investigation at an earlier stage would have reduced the ongoing risk of harm.

A close look at *Denis* tells this Court that the absence of any statutory basis for a duty to protect a particular class of persons was the determining factor. It clearly was "the heart of" the matter. *Denis*, 159 Vt. at 487. In that case, the State had a clear statutory duty to regulate insurance agents in the State, and even to report to their "appointing insurers" (which the plaintiff was in that instance) if an agent's license was suspended or revoked. But there was no specific statutory duty to report to those appointing insurers prior to suspension or revocation. Nor could the Court find such a duty in the State's obligations to protect the general public from untrustworthy agents. The Supreme Court's conclusion that there was no duty in that case was bolstered by the fact that there were no allegations that the State knew of the plaintiff's existence as the bondsman's principal or that the principal had relied on the State to supervise its' bondsman agent. Perhaps the crux was essentially a social policy consideration that "it would be a great expansion of the concept of duty to allow the principal to pass the obligation to supervise an insurance agent on to the state..." 159 Vt. at 489.

By contrast, the Vermont Supreme Court in *Sabia v. State*, 164 Vt. 293 (1995), found that a private analog for negligence existed for a claim against the State Department of Social and Rehabilitative Services for failure to protect two sisters from reported sexual abuse. In that case, the Court recognized that the State had a clear statutory duty to protect children from abuse, and that there is a "very special" relationship between a specifically identified abused child and the agency such that "social policy considerations warrant the imposition of liability" on the State. Those considerations included both compensation to the abused children and encouragement of the agency to perform it duty diligently in the future. 164 Vt. at 306. Plaintiffs' negligence counts stands on the allegation of just such a "special relationship." TAC at p.87.

In this case, however, we do not see a statutory duty to oversee or regulate the JPPs for the benefit of the investors, at least until Section 20 of Title 10 was adopted in 2015. "The statutes do not set forth any mandatory acts, much less mandatory acts for the benefit of a particular class of persons." *Kane v. Lamothe,* 182 Vt. 241, 246-47 (2007)(holding no duty of state trooper to individuals to prevent crime). Moreover, we see that no dangerous condition alleged to be known to the State for the first six years or so of VRC involvement with the JPPs, other than the obvious fact that the potential investment was in the millions of dollars. That danger, however, was the jurisdiction of the SEC and DFR in their general regulatory functions, not within the economic development jurisdiction of the USCIS, ACCD and the VRC. We do see the later indicia set forth in *Denis*, but we also see a similar crux consideration that dictates against finding a duty here.

It would be a great expansion of the State's statutory duty to promote economic development, and even its statutory duty to regulate securities, to recognize a statutory duty to protect private economic investment in private economic development, enforceable by the investors. In fact, the legislature has expressed its clear intent to the contrary by way of assuring all officials and employees of the Department of Financial Regulation that they are immune from liability in any civil action for any act done or omitted in good faith. 8 V.S.A. §17. To find such a duty would be the equivalent of finding such a duty in all law enforcement such that the State could be sued when any law enforcement agency was allegedly neglectful in investigating crime based on the time-honored assurance of "To Protect and To Serve," something the Vermont Supreme Court has expressly refused to do. *Kane v. Lamothe*, supra. With respect to promoting economic development, the express mandate of ACCD, finding such a duty would effectively tie the State's hands by way of exposing it to claims arising from any private development project it supported by way of endorsement or otherwise.

This analysis does not diminish or ignore the State's undertaking to regulate securities and securities fraud by way of the Vermont Securities Act, Consumer Fraud Act and law enforcement generally. The question here is whether ACCD can be sued by private investors for alleged negligence in its job of promoting economic development. In answer, the Court cannot find any statutory source of a State duty of care to investors with respect to how their investment funds were actually used by the Jay Peak principals. By simply creating the VRC, the State did not build and operate the equivalent of a lighthouse to warn shipping, cf. *Indian Towing,* or an air traffic control system, cf. *Ingham v. Eastern Air Lines, Inc.,* 373 F.2d 227 (2d Cir. 1967)*(*also cited by Plaintiffs). Nor did the State take over the JPPs and assume responsibility for their operation as the FDIC did with the bank at issue in the other authority relied upon by Plaintiffs. Cf. *In Re Franklin National Bank Securities Litigation,* 445 F.Supp. 574 (E.D.N.Y. 1978). The State built a promotional agency in order to bring investment and economic development to the State, and it had a Department of Financial Regulation that had jurisdiction to investigate and seek remedies for securities fraud.

The facts alleged here thus appear to fall into the category of cases in which the injuries arose "from the plaintiffs' commercial decisions based on the government's misrepresentations" rather than the cases that recognize a duty independent of a duty of truthful communication. See *Zelaya v. United States,* 781 F.3d 1315, 1337 (11th Cir. 2015). The Eleventh Circuit in *Zelaya,* in its survey of caselaw, recognized a series of cases in which courts chose not to apply the misrepresentation (fraud) exception even where a governmental

misrepresentation was alleged, where the courts found an independent duty had been breached. "It is true that misrepresentation exception 'does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty.'" 781 F.3d at 1335, quoting *Block v. Neal,* 460 U.S. 289, 297 (1983). In this case, however, the Court can find no such independent duty.

Therefore, the Court concludes that absent a duty, the Plaintiffs have failed to establish a private analog and thus both failed to avoid sovereign immunity and failed state a claim for negligence or gross negligence against the State.

State Securities Act

Plaintiffs argue that their State Securities Act fraud claims in Count 2 survive against ACCD because the language of the Act includes "government" in the definition of "Persons" who can be liable to private investors for securities fraud. 9 V.S.A. §5102 and 5501 et seq. Essentially, they argue that the State waived the fraud exception to the waiver of sovereign immunity (follow that if you dare) by way of its definition of "person" under that Act. They go on to argue that the allegations support conclusions that the VRC was effectively a "broker-dealer," an "aider and abettor" and a "control person" under the Act such that it became jointly and severally liable for the acts of the JPPs as the primary issuer of securities.

The Court concludes that all of Plaintiffs' creative efforts to find a waiver of the fraud exception to waiver of sovereign immunity fail in this context. To begin with, "(s)overeign immunity protects the state from suit unless immunity is expressly waived by statute." *McMurphy v. State*, 171 Vt. 9, 11 (2000) quoting *Lashay v. Department of Social and Rehabilitative Services*, 160 Vt. 60, 67 (1993). The Court does not see such an express waiver in the definition of "person" in §5102. Nor does the Court see that even viewing the allegations in the TAC and FAC in the most favorable light, the State could be found to be a "broker-dealer" or "control person" as would be required to hold the State to liability even if an express waiver could be found. ""Broker-dealer" means a person engaged in the business of effecting transactions in securities for the account of others of for the person's own account." §5102 (3). Whatever else the TAC alleges, it does not allege that. There is no allegation that the State was "engaged in the business" in the sense of private entities like Charles Schwab or Merrill Lynch. Nor does the TAC allege that the State effectively controlled the JPPs by way of having the actual power to direct the management and policies of the JPPs. See *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450 (2d Cir. 1998). Nor can the State be considered a "seller" even if it was a "substantial factor" in bringing about the sales of JPP securities. *Pinter v. Dahl*, 486 U.S. 622 (1988)(addressing Section 12(1) of federal securities act).

In oral argument, Plaintiffs referred a Missouri case on point that was "wrongly decided" by a "pro-government" judge. The Court tracked it down and actually finds it quite persuasive. *Cromeans v. Morgan Keegan*, 1 F.Supp.3d 994 (W.D. Missouri 2014). In that case, the underwriter of a municipal bond issuance sought to bring a third party claim against the city that had issued bonds to finance an industrial development project that went defunct, claiming that the underwriter was entitled to indemnity and/or contribution from the city. The city

defended on the ground of sovereign immunity. The underwriter argued that the Missouri Securities Act a/k/a Blue Sky Law accomplished a waiver of sovereign immunity by way of including "government subdivision, agency or instrumentality" in the definition of "Person" who could be held liable for making untrue statements in connection with securities offerings. Vermont statute reads likewise. The Court stood on the requirement, also in Vermont common law, that any waiver of sovereign immunity must be express. The Court noted the statutory preface to its definitional section "unless the context otherwise requires." 9 V.S.A. 5102 has the same preface. The Court proceeded to find that the preface rendered the Missouri statute ambiguous as to the legislature's intent with respect to sovereign immunity, which counseled in favor of retained immunity given the absence of clearly expressed waiver. It also found that there was nothing inherently inconsistent about concluding that the legislature intended government "persons" to be required to comply with the Securities Act, complying with decisions of the State Commissioner and being subject to State sanctions for non-compliance, but did not intend such government "persons" to be exposed to private action by way of waiver of sovereign immunity. The Court then cited the Ninth Circuit's identical conclusion that inclusion of public entities within the definition of "person" that may be held liable for securities violations "did not provide a 'clear indication' of legislative intent to withdraw immunity." *Id.* at 999, quoting *Nuveen Mun. High Income Opportunity Fund v. City of Alameda, Cal.* 730 F.3d 1111, 1126-27 (9th Cir. 2013).

In this case, for the reasons set forth in *Cromeans* and further in the particular light of the express exclusion of fraud and misrepresentation claims from the VTCA (discussed more particularly below), this Court does not see an express waiver of sovereign immunity in the Vermont Securities Act. Plaintiffs have therefore failed to state a claim against ACCD/VRC for violation of the Vermont Securities Act.

<u>Analysis of the Exceptions to the Waiver of the Vermont Tort Claims Act</u>

In case the Court has been mistaken in its analysis of duties set forth above, and since the parties have thoroughly briefed them, the Court also addresses two exceptions to the State's waiver of sovereign immunity that would bar Plaintiffs' claims against ACCD even if there are private analogs for them.

Following the language of Section 5601 quoted above, the statute proceeds to list various exceptions, as follows:

> This section shall not apply to:
>
> (1) Any claim based upon an act or omission of an employee of the State...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...
>
> (6) Any claim arising out of alleged...misrepresentation, deceit, fraud, or interference with contractual rights.

The Court concludes that all of Plaintiffs' claims are barred by these "exceptions to the exception" under Section 5601.

Fraud and Misrepresentation Exception

The State stands first on the misrepresentation and fraud exception set forth above in §5601(e)(6) with respect to Counts 1, 2, 5, 6, 7, 11, 12 and 15. The State argues that all of those counts are essentially for fraud or misrepresentation and therefore no waiver of immunity exists. Plaintiffs do not expressly concede that argument in their Opposition, but do not contest it in their Opposition and did not contest it at oral argument except as to Count 2 (State Securities Act fraud) and Count 6 (gross negligence/willful misconduct). Given the express titles of the counts and the facts alleged in support of them, the Court agrees with the State. Counts 1, 2, 5, 11, 12 and 15 are expressly for fraud or misrepresentation. Counts 6 and 13, for negligence, gross negligence or willful misconduct, to the extent that they stand on the concept of a duty the State allegedly undertook by way of its continuing representations to investors, breached by its gross failure to follow through on its assurances, also fall under this exception. The same holds for Count 7 for breach of fiduciary duty where the alleged duty arose from the alleged fraud or misrepresentation. Counts 11 and 12 for aiding and abetting fraud stand on the concept of holding the State liable for the fraud committed by the Jay Peak principals, but the underlying claim is still for fraud.

The Court looks to federal caselaw to find comparable circumstances and claims. The Vermont Supreme Court has recognized that such caselaw interpreting the Federal Tort Claims Act is particularly useful as it so close parallels the language and intent of the Vermont Tort Claims Act. See *Kennery,* supra at 44 ("the relevant analytical approaches of the FTCA and VTCA are the same"); *Lane v. State,* supra at fn. 2 ("This Court therefore looks to case law interpreting the federal provision to guide us in analyzing 12 V.S.A.§5601(e).")

In *Zelaya v. United States,* 781 F.3d 1315 (11th Cir. 2015), the plaintiffs brought a claim for negligence against the Securities and Exchange Commission ("SEC") for failing to tell investors that a certain investment fund was actually a PONZI scheme. That Court began by noting the long standing interpretation of "arising out of" in both federal and state waiver exemptions for misrepresentation claims.

> The phrase 'arising out of' is interpreted broadly to include all injuries that are dependent upon on of the listed torts having been committed. *United States v. Shearer,* 473 U.S. 52,55 (1985)...So, a claim will be deemed to have arisen from (an) excepted tort if the governmental conduct that is essential to the plaintiff's cause of action is encompassed by that tort. And this is so even if the plaintiff has denominated, as the basis for the cause of action, a tort not found within...the list of excepted torts.

Id. at 1333, relied upon in *Alvarez v. United States,* 862 F.3d 1297 (11 Cir. 2017)(where plaintiffs brought a claim against the government for negligence and aiding and abetting a private retirement fund advisor in promoting another PONZI scheme).

In both *Zelaya* and *Alvarez*, the plaintiffs tried to avoid the misrepresentation exception by way of pleading negligence. The Federal Tort Claims Act does not expressly mention fraud like the Vermont Act does, but the caselaw on misrepresentation under the FTCA clearly speaks to both misrepresentation and fraud as those terms are used in the Vermont Act. In both of those cases, the allegations were that the government had been negligent by failing to stop a private actor in committing fraud and in endorsing a private actor in committing fraud. The plaintiffs' claims sounded not only in negligence but also in "aiding and abetting" a fraud and breach of a fiduciary duty. On each of those counts, the Court turned again and again to the principle that where the basis for each of the allegedly breached duties was conduct fundamentally known as misrepresentation under the common law, i.e."the communication of misinformation on which the recipient relies," *Alvarez* at 1305, the waiver exception applies.

This Court concludes that the "arising out of" language of the intentional tort exception thus extends to Counts 2 (State Securities Act fraud), 6 (gross negligence), 7 (breach of fiduciary duty arising from State promoting reliability and integrity of investment), 8 (third party beneficiary theory based on inclusion of MOUs in offering materials), 11 and 12 (aiding and abetting fraud), 13 (negligence), and 14 (unjust enrichment) as well as the Counts that sound expressly in fraud or misrepresentation. All stand in whole or in large part on the same allegations that the State made fraudulent misrepresentations to the Plaintiffs.

<u>Discretionary Acts Exception</u>

The State further argues that Counts 6-16 are also barred by way of the exception set forth in §5601(e)(1) quoted above, also known as the "discretionary acts" exception. "The purpose of this exception is to ensure that the courts do not 'pass judgment on legislative or administrative policy decisions through tort law." *Kennery v. State,* 191 Vt. at 60, quoting *Sabia v. State,* 164 Vt. 293, 307 (1995). The Vermont Supreme Court has adopted a two step test from *United States v. Gaubert,* 499 U.S. 315 (1991).

First, "a court must determine whether a statute, regulation, or policy mandates certain acts, or whether performance of a duty involved an element of judgment or choice." *Kennery,* 191 Vt. at 60, citing *Searles v. Agency of Transportation,* 171 Vt. 562, 563-4 (2000). Based on the analysis above as to the statutory and regulatory requirements for the VRC, the Court does not see a clear mandate to the VRC/ACCD to perform oversight and regulation of EB-5 projects until the enactment of 10 V.S.A. §20 in 2015. To the contrary, its mandate was the broad strokes of 3 V.S.A. §2476(c) that were all about economic development and promotion and not about regulation and clearly involved enormous elements of judgment and choice.

Second, the court must determine "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* "The exception protects only governmental actions and decisions based on considerations of public policy." *Kennery,* 191 Vt. at 60, citing *Gaubert.* "However, 'when a statute, regulation or policy vests discretion in the (government) employee, it is presumed that the employee's acts are grounded in (public) policy when exercising that discretion.'" *Id.,* quoting *Johnson v. Agency of Transportation,* 180 Vt. 493 (2006).

It is hard to imagine a scenario in which State employees have ever been vested with more discretion than in this instance. Wisely or unwisely, the authorizing legislation for the ACCD was a virtual carte blanche to promote investment in Vermont, with no corresponding obligation to regulate it. ACCD employees were guided only by the broad declarations of public policy in favor of fostering economic growth. How they went about it necessarily involved establishing priorities, allocation of resources and determination of strategies for private/public partnerships that involved balancing a variety of concerns. This was not how to determine the speed and plow angle of snowplow operation. See *Morway v. Trombley*, 173 Vt. 266, 273 (2001). The fact that the Legislature found it necessary to adopt Section 20 in 2015 only confirms how much of an open range ACCD had had with the VRC until that point.

Plaintiffs argued in oral argument that their claim for breach of contract in count 16-the fee for regulation claim- avoids this exception just as any other State contract avoids this exception. As discussed above, the Court concludes that Plaintiffs have not stated a valid claim for breach of contract here, but addresses this argument just in case.

Based on the foregoing analysis, the Court further concludes that Counts 6-16 are all barred by the discretionary acts exception and thereby the doctrine of sovereign immunity, and fail to state a claim as pled against VRC/ACCD.

Official Immunity-Claims Against the State Employees

The Court first notes the rule of 12 V.S.A. 5602, which provides that "when the act or omission of an employee of the state acting within the scope of employment is believed to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the State of Vermont; and no such action may be maintained against the employee...(unless the act or omission constitutes) gross negligence or willful misconduct." For all the reasons set forth above with respect to the lack of statutory or common law duties to the investors, the Court sees no prospect of a claim for gross negligence. "To maintain a claim of gross negligence, a plaintiff must present facts that show an individual defendant heedlessly and palpably violated a legal duty owed to plaintiff." *Amy's Enterprises v. Sorrell*, 174 Vt. at 624, citing *Powers*, supra. Plaintiffs' claim for gross negligence stands on an alleged duty of "due care" in the oversight, management and regulation of the JPPs. Having found no such duty, as discussed above, the "grossness" of any violation is immaterial.

Plaintiffs do allege "willful and wanton conduct" as grounds for punitive damages in Count 6, but only in the context of their negligence claim. There is no claim for violation of constitutional rights as in cases for unlawful arrest, e.g. *Long v. Esperance*, 166 Vt. 566 (1997). Plaintiffs have now alleged in the FAC that there were various acts of associated misconduct, including payments to immigration lawyers by the JPP principals and then Governor Shumlin making free use of a Manhattan apartment owned by one of the JPP principals, but none of that conduct was engaged in by the named individual defendants. The only relevant conduct here is the conduct of the defendants. The worst they are alleged to have done is to overpromise and underdeliver, to the point of slow-walking complaints and denying any obligation to audit the JPPs, and then continuing to promote the JPPs even as major questions

arose about their integrity. Promotion of economic development was their *job*, and absent a violation of duty or right, the Court does not see how Plaintiffs avoid the bar of Section 5602.

Turning to the common law of official immunity, there are two levels of protection to State officials. Judges, legislators and the highest executive officers have absolute immunity for acts performed within their respective authorities. Lower-level officers and employees are immune to the extent their actions alleged: (1) were performed within their scope of authority; (2) performed in good faith; and (3) were discretionary versus ministerial acts. *Id.,* citing *Libercent v. Aldrich,* 149 Vt. 76, 81 (1987).

Absolute Immunity

As to the higher level of absolute immunity, the doctrine recognizes the potential that the covered officials could be dishonest and otherwise guilty of bad motive and intention such that on the one hand "it would be monstrous to deny recovery." *Id.,* quoting Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d. Cir 1949). On the other hand, however, it is "better to leave unrepressed the wrongs done by dishonest officers than to subject those to try to do their duty to the constant dread of retaliation," particularly where it is generally impossible to know whether the claim is well founded until the case has been tried. *Id.*

Applying that doctrine, the Vermont Supreme Court has found the Attorney General, the Commissioner of the Department of Social Welfare, the Commissioner of the Department of Liquor Control and State's Attorneys protected by absolute immunity. *Levinsky,* supra; *Amy's Enterprises v. Sorrell*, 174 Vt. 623 (2002); *O'Connor v. Donovan,* 191 Vt. 412 (2012). By contrast, general counsel to a Department, assistant and deputy attorneys general, and state troopers were entitled only to the lesser protection of qualified immunity. *Czechorowski v. State,* 178 Vt. 524 (2005); *Levinsky,* supra; *Kennery v. State,* 191 Vt. 44 (2011).

Applying that doctrine in the instant case, we look first at the executive officer defendants here. As the Secretaries of the Agency of Commerce and Development, Defendants Miller and Moulton were protected by absolute immunity so long as their acts alleged were performed within their authority. Secretary Miller is alleged to have joined in the promotion of the JPPs by attending trade shows soliciting investors. Secretary Moulton is alleged to have stonewalled investor concerns by disclaiming responsibility to the investors when their concerns were brought to her in 2014. Plaintiffs argue that both Secretaries were acting outside their authority because there was no statutory authority for the VRC activity until Section 20 was enacted in 2015 ("In this instance, Plaintiffs agree that she (Moulton) did not have the statutory authority to vet the Jay Peak Projects." Reply at 67). To the contrary, the Court sees the broad authority to promote Vermont business opportunities and support Vermont business set forth in 3 V.S.A. 2476(c) quoted above. Both Secretaries were clearly acting within their authority in promoting the JPPs and trying to clarify the extent of ACCD responsibility and are therefore immune from suit in this case. Again, allegations as to their motives or honesty are irrelevant under the doctrine of absolute immunity. It is the scope of their responsibilities that matters. *Levinsky*, supra.

Qualified Immunity

The Court has not yet addressed defendants Kessler (ACCD General Counsel), Candido, Raymond and Fullam (all Directors of the VRC at various times). They are all entitled to qualified immunity. The question is whether they are actually immune given the elements of the defense, as a matter of law.

Addressing the elements of qualified immunity as to all of these defendants, the Court considers whether for each Defendant, the acts alleged were within the scope of their authority, were performed in good faith and were discretionary versus ministerial acts. *Levinsky*, supra.

As to the first element, there does not seem to be much by way of in depth analysis in Vermont caselaw. The first step, however, seems to be to focus on the acts complained of, not their subjective motivation, in light of the statutory authority under which the actors were acting. See *Levinsky*, 151 Vt. at 187.

Further, at least some analogy may be made to the common law of scope of employment.

> The Vermont Supreme Court has established that an employee was acting within the scope of his employment if the conduct "(a) is of the kind the servant is employed to perform; (b) occurs substantially within the authorized time and space limits; (c) is actuated, at least in part, by a purpose to serve the master;...." *Doe v. Forrest,* 176 Vt. 476, (2004) (quoting Restatement (Second) of Agency § 229(1) (1958)). The conduct of an employee falls outside the scope of employment if it is "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Forrest,* 853 A.2d at 54 (quoting Restatement (Second) of Agency § 228(2)). Whether an employee was acting within the scope of his employment tends to be a question of fact to be resolved by a jury but can be resolved as a matter of law if the facts and inferences drawn are not in dispute. *See Sweet v. Roy,* 173 Vt. 418, (2002) (citing *Ploof v. Putnam,* 83 Vt. 252 (1910)).

Wyatt v. City of Barre, 885 F.Supp. 2d 682, 692 (D.Vt. 2012)(apply law of scope of employment in context of respondeat superior liability to scope of employment in context of statutory immunity under 24 V.S.A. 901).

One of the challenges posed by Plaintiffs' Complaint on this point is to try to identify the specific conduct by each Defendant alleged to be outside the scope of authority. Several ACCD Defendants are alleged to have traveled to tradeshows to promote the JPPs. Surely that was within the scope of their authority as employees of the ACCD, even if the most favorable inference to the Plaintiffs-that they were motivated in part by the lure of the opportunity-is taken as true. The VRC Directors and others are alleged to have participated in oral and written statements to investors to the effect that state oversight and regulation of the JPPs made the JPPs distinguishably better investments than other EB5 opportunities. Again, given the breadth of their respective authorities to foster and promote economic development, the Court also sees no significant dispute that all were acting within the scope of their authority in that

conduct alleged in the TAC and FAC, even if they were motivated in part by the excitement of the projects, promoting their own careers and the lure of travel and entertainment.

Various of the named officials are also alleged to have engaged in foot-dragging, denial of responsibility, token investigation and obstruction of efforts of investors to obtain information and action to address complaints about conduct by the JPP principals. Yet again, however, these actions, and inactions, all appear within the scope of the various officials' authority given the breadth of their authorities to foster and promote economic development. The gist of the complaint is that the individual defendants failed to do their jobs and/or did them irresponsibly to the investors, but *not* that they stepped outside their roles in doing so.

The crux consideration in the Court's mind here is that the conduct complained of, as described above, stands in stark contrast to sexual assault, *Doe v. Forrest*, supra, gender-based hostility and harassment, *Wyatt,* supra, or requiring students to pray in public school, *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), all actions that clearly lay outside the scope of the defendants' job descriptions. Instead, the conduct complained of was promotion of economic investment and development, on the job, and "actuated, at least in part, by a purpose to serve the master." There can be no dispute about that, even given the suggestions of other misbehavior in the FAC.

At oral argument and now in the FAC, Plaintiffs have suggested the possibility that one or more unnamed state officials may have engaged in illegal activity (what Plaintiffs' counsel calls "grift") while traveling to promote the JPPs, such as asking for receiving free ski passes and other hospitality at Jay Peak and in New York. None of those allegations are made specifically in the TAC but the Court cites them by way of example of irrelevant events. The relevant question is whether the named defendants were acting within the scope of their authority when they did what the TAC and FAC theories of liability complain of, namely to promote the JPPs by way of assurances of State oversight and regulation, to fail and/or refuse to do that oversight and regulation, and then to deny the obligation. The possibility that one or more of them did something else bad (and as noted above, none of the named defendants are alleged to have done anything along these lines), and obviously outside their authority, does not mean that the core conduct complained of was outside their authority.

In their post-argument memorandum, Plaintiffs argue that "disseminating falsities in the promotion of a security cannot be viewed as being within the scope of employment of a government employee." They make that argument in the context of arguing that "nothing in the ACCD enabling statutes provided it, or its VRC wing, with the authority to manage, oversee or administer the EB-5 program." Here the Court must fundamentally disagree. The EB-5 program is above all an economic development program, and the ACCD is above all an agency of economic development. See 3 V.S.A. 2476(c) quoted above. Making statements to potential investors, promoting investment in Vermont, is clearly within that mission. Assuming, arguendo, that the statements were false at the time (which even Plaintiffs conceded at oral argument was not the case), the truth or falsity of statements made in the context of economic development cannot be the test of whether they were made in the scope of authority or employment. Few people would be willing to serve in public office of any kind if the test of their personal liability for the failure of government initiative is the truth or falsity of what they say in support of it. See *Osier v. Burlington Telecom*, 201 Vt. 483, 499 (2016)(considering standard of

"bad faith" necessary to find a public official responsible for misappropriation of public funds). That is particularly so given the reality that public officials come and go just as the VRC Directors and others did in this case, and they are rarely able to control the conduct of their successors or masters that have control over the "truth or falsity" of assurances made earlier.

The second element of the defense of qualified immunity is good faith. "The determination of good faith depends upon the objective reasonableness of the official's conduct. '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." *Amy's Enterprises v. Sorrell,* supra, at 617, quoting *Long v. L'Esperance*, 166 Vt. 566, 571 (1997). There were no such clearly-established rights in play here. As the caselaw directly states, the subjective motivations of the individual defendants-jobs, notoriety, perks-are irrelevant on this point. The Court sees no legitimate question of *objective* good faith here.

Finally, the Court sees no legitimate argument that all were exercising discretionary duties with respect to the conduct alleged in the TAC or FAC. There was nothing rubber stamp-like about this history.

The Court therefore concludes that all of the individual defendants are entitled to immunity from suit in this case.

<u>Motion to Amend Complaint</u>

Plaintiffs' proposed Fourth Amended Complaint requires analysis under V.R.C.P. 15. The Court recognizes the liberal amendment policy directed by the Supreme Court, and its rationale.

> The principal reasons underlying the liberal amendment policy are (1) to provide maximum opportunity for each claim to be decided on its merits rather than on a procedural technicality, (2) to give notice of the nature of the claim or defense, and (3) to enable a party to assert matters that were overlooked or unknown to him at an earlier stage in the proceedings.

Lillicrap v. Martin, 156 Vt. 165, 170 (1989), quoting *Bevins v. King,* 143 Vt. 252, 255 (1983). The principally recognized reason that may overcome this liberal policy is undue prejudice to the other party.

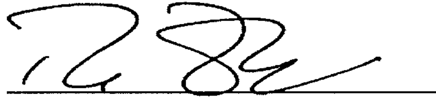
In this case, as reflected in the analysis above, the Court appreciates that the greatest impact of Plaintiffs' proposed amended complaint is to narrow the claims and number of defendants, and to attach a variety of documents that were somewhat orphaned in the prior state of the pleadings. Meanwhile, despite a bit of fanfare, the Court does not see that it adds any material factual allegations other than some particulars as to the actual financial losses and immigration status of the named plaintiffs, none of which are particularly prejudicial to Defendants. The prejudice the Court can see lies in the prospect of the Defendants having to file yet another brief, but perhaps issuance of this decision will cut that off at the pass.

<u>Conclusions</u>

For the reasons stated above, Plaintiffs' motion to amend their complaint is **granted** but Defendants' motion to dismiss the complaint is also **granted** as to Plaintiffs' complaint, as amended.

So Ordered.

Electronically signed on April 19, 2018 at 09:27 AM pursuant to V.R.E.F. 7(d).



Thomas Carlson
Superior Court Judge

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ENTRY REGARDING MOTION

Sutton et al vs. The Vermont Regional Center et al 100-5-17 Lecv

Title:

Motion to Dismiss Plfs' 3rd Amended Complaint,

No. 8

Filed on: October 9, 2017

Filed By: Boyles, Gavin, Attorney for:
party 5 Co-counsel
party 6 Co-counsel
party 7 Co-counsel
party 8 Co-counsel
party 9 Co-counsel
party 10 Co-counsel
party 11 Co-counsel
party 12 Co-counsel
party 13 Co-counsel
party 14 Co-counsel
party 15 Co-counsel
party 16 Co-counsel

FILED

APR 20 2018

VERMONT SUPERIOR COURT
LAMOILLE UNIT

Response filed on 01/31/18 by Attorney Barr

Response filed on 03/16/18 by Attorney Back

Response filed on 04/02/18 by Attorney Back

Response filed on 04/02/18 by Attorney Barr

✓ Granted Compliance by________________

___ Denied

___ Scheduled for hearing on: ________ at _______;Time Allotted _____

___ Other

See Decision on Motion

[signature] 4/19/18