VT SUPERIOR COURT
WASHINGTON UNIT

STATE OF VERMONT

2016 DEC 13 P 3:00

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 217-4-16 Wncv

FILED

STATE OF VERMONT
Plaintiff

v.

ARIEL QUIROS, et al.
Defendants

DECISION
Motion to Dismiss filed by Defendant Ariel Quiros

The State, through the Office of the Attorney General and the Division of Financial Regulation, asserts in this case that Defendants Ariel Quiros and William Stenger "have orchestrated a large-scale investment scheme to defraud investors participating in the 'EB-5 Program,' a federal visa initiative designed to give foreign investors a legal path to obtain United States residency." Amended Complaint ¶ 1 (filed June 15, 2016). Mr. Quiros, the State alleges, was the "mastermind." It has brought seven claims of fraud pursuant to the general fraud provision of the Vermont Uniform Securities Act of 2002, 9 V.S.A. §§ 5101–5615, and eight claims of unfair or deceptive acts or practices pursuant to the Vermont Consumer Protection Act, 9 V.S.A. §§ 2451–2481x, against Mr. Quiros, Mr. Stenger, and multiple entities.

Mr. Quiros has filed this Motion to Dismiss. He characterizes the allegations as signifying little more than a garden-variety dispute among partners, suggests that this governmental enforcement action is unwarranted and overblown, and for a variety of reasons seeks Rule 12(b)(6) dismissal of the entire complaint for failure to state a claim. No other defendants have joined or briefed Mr. Quiros's motion. The court has reviewed the memoranda of law filed on behalf of Mr. Quiros and the State. It has not considered correspondence, an attachment, or a request filed with or in letters to the court clerk on November 22, 2016 and December 1, 2016.

The Allegations and the Claims

The 57-page amended complaint consists of 206 separately stated paragraphs describing the alleged fraudulent scheme. No more than a summary for context is necessary here. The thrust of the allegations is as follows.

Jay Peak is a ski mountain that was operated by Jay Peak Resorts starting in 1957. In 1978 it was purchased by Mont St. Sauveur International Inc. (MSSI), which embarked on a plan in the mid-2000s to expand the resort with funding from, to begin, two EB-5 projects. Under the EB-5 Program, a foreign national makes a substantial (in this case, at least $500,000) investment in an EB-5 project, a commercial enterprise, and may qualify for permanent residence if certain

job-creation conditions are satisfied. A potential investor may review the particular EB-5 project's private placement memorandum (PPM) to determine whether to invest. The PPM is the legal document that, among other things, discloses the "objectives, risks, and terms of the offering and the purposes for which investments will be used." Amended Complaint ¶ 2.

In 2007, Mr. Quiros and Mr. Stenger, the longtime president and chief executive officer of Jay Peak, began to plan for Mr. Quiros's acquisition of the resort. Mr. Quiros incorporated Q Resorts. In early 2008, MSSI gave Mr. Quiros functional control over Jay Peak in anticipation of its formal sale. By June 2008, the Phase I EB-5 project was fully subscribed, and Phase II was partially subscribed. On June 13, 2008, Q Resorts entered into a formal stock transfer agreement with MSSI. MSSI transferred Phase I and II investor funds to respective escrow accounts at Raymond James, where Q Resorts had just opened an account. On June 23, Q Resorts' (meaning Mr. Quiros's) acquisition of Jay Peak closed. Counsel for MSSI had expressly told Mr. Quiros that Phase I and II investor funds could not be used as purchase money. Neither of the two EB-5 projects contemplated purchasing the resort, much less by an entity owned exclusively by Mr. Quiros.

On the same day that the deal closed, Mr. Quiros had the EB-5 investor funds transferred to Raymond James margin accounts controlled exclusively by Q Resorts. Soon thereafter, he initiated a series of transactions using those investor funds for the purchase of Jay Peak by Q Resorts. In effect, those investor funds would never go to the EB-5 project for which they had been entrusted, but to buy Mr. Quiros his own ski resort. By the time the first two EB-5 projects eventually had been completed, Mr. Quiros (and Mr. Stenger) had misappropriated many millions of investor funds.

The voluminous allegations go on to describe the creation of, and fraudulent activity related to, several subsequent such EB-5 projects. Each consists of a limited partnership with its own PPM, which explains that it would be run by a general partner owned or controlled by Mssrs. Quiros and Stenger. However, Mr. Quiros took actual control over all limited partnership funds. Mr. Stenger was responsible for the content of the PPMs for the first six projects. Mr. Quiros was familiar with that content and knew he was bound by it. Both Mr. Quiros and Mr. Stenger were responsible for the content of the seventh PPM (the AnC Bio project).

Throughout the series of projects, Mr. Quiros and Mr. Stenger channeled investor funds through at least 100 financial accounts and twenty-six entities. Investor funds would be moved from project-specific escrow accounts to Raymond James accounts controlled exclusively by Mr. Quiros, including margin accounts. Investor funds were used to buy United States Treasury Bills (T-bills). The T-bills were used as collateral for margin loans. Then they were redeemed at maturation for cash. There was no legitimate business purpose. This, among other things, was done to obfuscate the misuse and misappropriation of investor funds.

Funds dedicated to different projects were freely commingled. They were not used as the PPMs said they would be. New funds relating to certain projects were used to cover funding gaps in prior projects. Financial contributions to projects by the "project sponsor," Jay Peak, Inc., (i.e., Mr. Quiros) in most cases, did not occur. Large amounts of money were misappropriated. Mr. Quiros used investor funds to buy luxury condominiums for himself, to

cover the margin loans, and to pay his personal taxes. In all, the State alleges that the defendants have misused more than $200 million and Mr. Quiros himself has misappropriated at least $50 million. Far more detailed project-by-project allegations appear in the amended complaint.

In short, the allegations of the amended complaint describe a pattern of deceiving and defrauding investors that took place from the time Mr. Quiros incorporated Q Resorts and took over Jay Peak, and then led to successive EB-5 projects to keep new money coming in that could be used to backfill holes in the budgets of earlier projects, to replenish the funds available for misappropriation, and to keep the scheme alive.

The EB-5 projects principally at issue in this case are identified in the complaint by project "phase" or the name of the limited partnership:

Phase	Limited Partnership	General Partner	Project sponsor
Phase I	Jay Peak Hotel Suites L.P.	Jay Peak Management Inc.	Jay Peak Inc.
Phase II	Jay Peak Hotel Suites Phase II L.P.	Jay Peak Management Inc.	Jay Peak Inc.
Phase III	Jay Peak Penthouse Suite L.P.	Jay Peak GP Services Inc.	Jay Peak Inc.
Phase IV	Jay Peak Golf and Mountain Suites L.P.	Jay Peak GP Services Golf Inc.	Jay Peak Inc.
Phase V	Jay Peak Lodge and Townhouses L.P.	Jay Peak GP Services Lodge Inc.	Jay Peak Inc.
Phase VI	Jay Peak Hotel Suites Stateside L.P.	Jay Peak GP Services Stateside Inc.	Jay Peak Inc.
Phase VII	Jay Peak Biomedical Research Park L.P.	AnC Bio Vermont GP Services LLC	AnC Bio VT LLC

The claims correspond to the phase number. For instance, the Securities Act and Consumer Protection Act claims corresponding to Phase 1 are Counts 1 and 8, respectively. The Securities Act and Consumer Protection Act claims corresponding to Phase 2 are Counts 2 and 9, respectively. Count 15 appears to be a catch-all Consumer Protection Act claim.

The factual allegations appear in the first 162 paragraphs of the complaint. Each Securities Act claim then includes a paragraph substantially similar in form to this:

> Defendants have violated all subsections of 9 V.S.A. § 5501 by materially misleading investors, including but not limited to engaging in the conduct described above related to the making of material omissions and misstatements to investors, the misappropriation of Phase II investor funds to purchase the Jay Peak Resort, commingling of funds, and use of funds in ways other than those specifically disclosed to investors, or aiding and abetting and knowingly or recklessly substantially assisting in such activities. Under 9 V.S.A. § 5501, it is unlawful for a person, in connection with the offer to sell, the offer to purchase, the sale, or the purchase of a security, directly or indirectly: (1) to employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact 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 an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Amended Complaint at 45. Each Consumer Protection Act claim includes a paragraph more or less similar to this:

> Defendants engaged in unfair or deceptive acts or practices in commerce, in violation of the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a), by making or making use of material misrepresentations and omissions about how Defendants would use Penthouse Suites investor funds, including that investor funds would be expended as set forth in the Source and Use of Investor Funds for the project.

Amended Complaint at 51.

Analysis

Mr. Quiros argues that the complaint fails to state any Securities Act claim because (1) no intent to deceive existing at the same time and in connection with the sale of any securities is alleged, only malfeasance postdating and disconnected from the sale of securities; (2) no asserted misrepresentations with regard to most of the projects are attributable to Mr. Quiros in any event; and (3) no scheme to defraud apart from defective misrepresentation claims has been pleaded. Regarding both the Securities Act and Consumer Protection Act claims, Mr. Quiros argues that any counts related to the sale of Phase 1 partnership interests are time-barred. Regarding all Consumer Protection Act claims, Mr. Quiros argues that the Act simply does not apply to the sale of securities.

The Vermont Supreme Court has been clear that the general pleading standard in Vermont is exceptionally minimal. See *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575 ("the threshold a plaintiff must cross in order to meet our notice-pleading standard is 'exceedingly low'"); *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 13, 184 Vt. 1 ("The complaint is a bare bones statement that merely provides the defendant with notice of the claims against it."). Moreover, it is well established law in Vermont that a motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief. *Powers v. Office of Child Support,* 173 Vt. 390, 395 (2002). The purpose of such a motion is to test the law of the claim and not the facts pertaining to it. All factual allegations are assumed to be true for purposes of analyzing whether the standard for dismissal is met. *Id.*

The Vermont Uniform Securities Act

Each of the Securities Act claims is based on the Act's general fraud provision:

> It is unlawful for a person, in connection with the offer to sell, the offer to purchase, the sale, or the purchase of a security, directly or indirectly:
> (1) to employ a device, scheme, or artifice to defraud;
> (2) to make an untrue statement of a material fact or to omit to state a material fact 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 an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

9 V.S.A. § 5501. "'Fraud,' 'deceit,' and 'defraud' are not limited to common law deceit." 9 V.S.A. § 5102(9). Limited partnership interests are investment contracts and thus securities for purposes of the Act. 9 V.S.A. § 5102(28)(E).

Vermont § 5501 corresponds to § 501 of the 2002 Uniform Securities Act. The Vermont legislature adopted and codified the 2002 Uniform Securities Act in 2005. The legislative act specifically states that it "is the intention of the general assembly that the official comments of the 2002 Uniform Securities Act [are] used to guide administrative and judicial interpretations of this chapter." 2005, No. 11, § 4. The relevant official comments are as follows:

1. Section 501, which was Section 101 in the 1956 Act, was modeled on Rule 10b-5 adopted under the Securities Exchange Act of 1934 and on Section 17(a) of the Securities Act of 1933. There has been significant later case development interpreting Rule 10b-5, Section 17(a), and Section 101 of the 1956 Act. *Section 501 is not identical to either Rule 10b-5 or Section 17(a).*

2. There are no exemptions from Section 501.

3. Section 501 applies to any securities offer, sale or purchase, including offers, sales, or purchases involving registered, exempt, or federal covered securities. It would also apply to a rescission offer under Section 510.

4. The possible consequences of violating Section 501 are many. These include denial, suspension, or revocation of securities registration under Section 306; denial, revocation, suspension, withdrawal, restriction, condition or limitation of a broker-dealer, agent, investment adviser, or investment adviser representative registration under Section 412; criminal prosecution under Section 508; civil enforcement proceedings under Sections 603; and administrative proceedings under 604.

5. Because Section 501, like Rule 10b-5, reaches market manipulation, see 8 Louis Loss & Joel Seligman, Securities Regulation Ch.10.D (3d ed. 1991), this Act does not include the RUSA market manipulation Section 502, which had no counterpart in the 1956 Act.

6. *The culpability required to be pled or proved under Section 501 is addressed in the relevant enforcement context.* See, e.g., Section 508, criminal penalties, where "willfulness" must be proven; Section 509, civil liabilities, which includes a reasonable care defense; *or civil and administrative enforcement actions under Sections 603 and 604, where no culpability is required to be pled or proven.*

7. There is no private cause of action, express or implied, under Section 501. Section 509(m) expressly provides that only Section 509 provides a private cause

of action for conduct that could violate Section 501.

National Conference of Commissioners on Uniform State Laws, Uniform Securities Act 123–24 (last revised or amended in 2005), available at http://www.uniformlaws.org/shared/docs/securities/securities_final_05.pdf (last visited Nov. 30, 2016) (emphasis added).

Misrepresentations, scheme to defraud, and statute of limitations

Mr. Quiros's arguments in support of dismissal of the Security Act claims for lack of any alleged misrepresentations or scheme to defraud depend heavily on his characterizations of what actually has been alleged, anticipated rulings on what, at least in Vermont, are novel and potentially complex legal issues, and the particularity requirement of Rule 9(b).

Resolution of the particularity question makes it unnecessary to address the substance of the securities law issues now. Rule 9(b) requires that in "all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity." No standard for particularity appears in the rule itself. The most commonly asserted rationale for it is that it "is necessary to safeguard potential defendants from lightly made claims charging the commission of acts that involve some degree of moral turpitude," the idea being that it "encourages a greater degree of pre-institution investigation" by the plaintiff. Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1296 (3d ed.). It is also thought to discourage nuisance or strike suits.[1] *Id.*

Assuming Rule 9(b) applies to the State's claims, the detailed allegations of the amended complaint leave no reasonable question about whether the State conducted an adequate pre-suit investigation and is bringing its claims in good faith for legitimate enforcement purposes.[2] Plainly, this is no strike suit. The amended complaint thus wholly satisfies the purposes of Rule 9(b).

Mr. Quiros does not argue that some deficiency in particularity needs to be resolved by repleading with greater particularity. He advances his particularity arguments to help frame the allegations in a manner favorable to dismissal, which he then seeks.

Rule 9(b) is a pleading standard—it is not a rule of dismissal—and like all rules of civil procedure, the court applies it to "secure the just, speedy, and inexpensive determination" of the case, not for this or that party's strategic advantage or to undermine the public interest. V.R.C.P. 1; see also Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1296 ("Courts infrequently dismiss with prejudice for a failure to plead with sufficient particularity, at least not without providing an opportunity to replead. To impose such a drastic sanction for a pleading defect arguably is at odds with the liberal approach the federal rules as a whole take to the pleading phase of litigation [which is all the more liberal in Vermont] and could lead to injustice.").

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[1] A strike suit is a lawsuit "often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement." Black's Law Dictionary 1448 (7th ed. 1999).

[2] Many courts have ruled that the particularity requirement does not apply to allegations of consumer fraud, but the court need not resolve that issue here.

In this case, there is no compelling lack of particularity or any apparent inability on Mr. Quiros's part to understand the acts complained of or to answer the complaint. There is no need to require the State to replead its claims with greater specificity, and Mr. Quiros does not seek such an outcome, as he seeks outright dismissal. The amended complaint, as pleaded, satisfies both the purpose and policy of Rule 9(b) and does not merit either repleading or dismissal.

That matter resolved, the court declines to further address Mr. Quiros's dismissal arguments related to the Securities Act at this stage of the case. At issue is an alleged wide-ranging, long-lived, complex scheme to defraud EB-5 investors that includes, among other things, numerous deceptive actions at odds with representations made in project PPMs. Whether the law better supports characterizing any particular claim as founded on a misrepresentation or a scheme, and whether Mr. Quiros may, with regard to any particular claim, qualify as an aider and abettor, maker, or control person, need not be resolved now. These are potentially nuanced issues that will be more effectively "explored in the light of facts as developed by the evidence." *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309. This is especially so as there is virtually no Vermont case law on point and the parties have not addressed whether any differences between Vermont's Securities Act and its federal counterparts have any effect on the issues. The same analysis applies to the statute of limitations issues as well.

Accordingly, to the extent that Mr. Quiros seeks dismissal based on the argument that there are no grounds for Securities Act violations, the motion must be denied. Once a more specific set of facts has been developed, legal issues may be addressed in the context of motions for summary judgment.

The Consumer Protection Act

Mr. Quiros argues that all the Vermont Consumer Protection Act claims must be dismissed because the Act does not apply in the context of securities fraud. This argument is not persuasive.

Mr. Quiros's principal argument is that the expression in the Vermont Act that may be enforced by the State—"[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce," 9 V.S.A. § 2453(a)—is intended to be interpreted consistently with the corresponding similar expression in Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). See 9 V.S.A. § 2458(a) (authorizing the State to take enforcement action in the event of violations of § 2453(a)). The federal expression generally has not been interpreted to apply to transactions involving securities. See *Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972, 977 (Conn. 1986). Therefore, concludes Mr. Quiros, the similar Vermont expression also should not apply to securities transactions.

Neither the state nor federal statutory scheme defines the breadth of unfair methods of competition in commerce or unfair or deceptive acts or practices in commerce. The literal language of both is extremely broad. In Vermont, however, unlike the federal Act, "goods" and "services" are expressly defined and the definition expressly includes "securities."

Section 2451a(b) of Title 9 sets forth the definition of "goods" and "services" for purposes of the Vermont Act: "Goods" or "services" shall include any objects, wares, goods, commodities, work, labor, intangibles, courses of instruction or training, securities, bonds, debentures, stocks, real estate, or other property or services of any kind."

Section 2453(a) of Title 9 sets forth prohibited practices under the Act: "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared unlawful." The words *goods* and *services* do not expressly appear in 9 V.S.A. § 2453(a). However, the methods, acts, and practices declared unlawful in that subsection must have occurred "in commerce." While the Act provides no statutory definition of commerce, commerce generally refers to the "exchange of goods and services." Black's Law Dictionary 262 (7th ed. 1999); see also *Foti Fuels, Inc. v. Kurrle Corp.*, 2013 VT 111, ¶ 21, 195 Vt. 524, 536 (limiting "in commerce" to the "consumer marketplace").

Thus, even though the Vermont Act does not expressly define commerce, the word must be understood to refer to the exchange of goods and services, which is specifically defined to include securities. The express statutory inclusion of securities as within the concept of goods and services can only reasonably be understood to ensure that the Act generally will apply to transactions involving securities. The general proscription to be guided by the interpretation of the federal law has no place where the legislature has made clear its intent to deviate from that law.

Mr. Quiros observes that the Act expressly uses the words goods and services in the section authorizing individuals to bring a private cause of action, 9 V.S.A. § 2461(b). He argues from that observation that there must be a legal distinction between the scope of a private action and the scope of a State enforcement action, which he maintains cannot include securities transactions.

The relevant portion of § 2461(b) (private cause of action) is as follows:

> Any consumer who contracts for *goods or services* in reliance upon false or fraudulent representations or practices prohibited by section 2453 of this title, or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title, or prohibited by any rule or regulation made pursuant to section 2453 of this title may sue . . . .

9 V.S.A. § 2461(b) (emphasis added).

State enforcement actions are authorized under several sections set forth in §§ 2458 through 2461(a) with various provisions that are pertinent to a variety of enforcement mechanisms.

The court cannot conclude that the differences in language pertaining to private actions versus State enforcement actions demonstrate a legislative intent to exempt securities from State enforcement actions. Not only is there no explicit statement of such an intent, the language of the different provisions does not support an inference of an intent to give State enforcement

actions a more limited scope than private actions. See *Knutsen v. Dion*, 2013 VT 106, ¶ 19, 195 Vt. 512 ("There is no indication that the Legislature intended that a private action be available where the attorney general cannot pursue a public action. The private right of action was intended to supplement the public right of action, not to replace it."); see also 9 V.S.A. § 2457 (describing a rebuttable presumption with express reference to goods and services and not limiting its reach to private actions). The broadest description of what the Act bars is the expression in § 2453, and that may be enforced at its greatest breadth by the State.

Accordingly, the Consumer Protection Act generally extends to transactions involving securities. To the extent that Mr. Quiros seeks dismissal based on the argument that the Act does not apply to securities, the motion must be denied.

ORDER

For the foregoing reasons, Mr. Quiros's motion to dismiss is denied.

Dated at Montpelier, Vermont this 13th day of December 2016.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge