

STATE OF VERMONT

VT SUPERIOR COURT
WASHINGTON UNIT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO. 217-4-16 Wncv

2016 AUG -3 P 3:20

STATE OF VERMONT,)
)
THROUGH MICHAEL S. PIECIAK,¹)
IN HIS OFFICIAL CAPACITY)
AS COMMISSIONER OF THE)
VERMONT DEPARTMENT OF)
FINANCIAL REGULATION,)
)
and)
)
ATTORNEY GENERAL)
WILLIAM H. SORRELL,)
)
Plaintiffs,)

FILED

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

**STATE OF VERMONT'S OPPOSITION
TO MOTION TO DISMISS**

¹ On June 30, 2016, Susan L. Donegan resigned as Commissioner of the Vermont Department of Financial Regulation. Her successor as Commissioner, Michael S. Pieciak, who was appointed July 5, 2016, is automatically substituted as a Plaintiff by operation of V.R.C.P. 25(d)(1).

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STATE OF VERMONT'S OPPOSITION TO MOTION TO DISMISS

Plaintiff, the State of Vermont (the "State"), by and through its undersigned counsel, hereby opposes the motion to dismiss filed by Defendant Ariel Quiros ("Motion"). In support of this Opposition, the State submits the following Memorandum of Law:

MEMORANDUM OF LAW

Quiros' claim that the State's "allegations, if true, would be the stuff of everyday private commercial disputes" (Motion at 9) is patently untrue. To the contrary, the State's enforcement action alleges a massive public fraud in which, for almost a decade, Quiros masterminded a wide-ranging 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. Am. Compl. ¶ 1.² As part of the alleged scheme, Defendants³ misused over \$200 million of investor funds and Quiros personally misappropriated over \$50 million of investor funds for his own benefit. Am. Compl. ¶¶ 1, 4. Further, as a result of Quiros' fraudulent conduct, many investors have not received their EB-5 visas and/or their EB-5 visas have been placed at risk, and there is an increased risk that investors will not be repaid their capital contributions. *Id.* ¶ 86.

² On April 12, 2016, the United States Securities and Exchange Commission (the "SEC") filed a civil enforcement action in the United States District Court for the Southern District of Florida (the "District Court") against the same Defendants alleging 52 counts of securities fraud. *See* Compl., *SEC v. Jay Peak, Inc.*, No. 16-CV-21301 (S.D. Fla. Apr. 12, 2016), ECF No. 1. The SEC also filed a motion for a temporary restraining order, which the District Court granted on April 13, 2016 (the "TRO"). *See* Order Granting Pl. Sec. and Exch. Comm'n's Mot. for T.R.O., Asset Freeze, and Other Emergency Relief, *SEC v. Jay Peak, Inc.*, No. 16-CV-21301 (S.D. Fla. Apr. 13, 2016), ECF No. 11. On May 17, 2016, the SEC filed an Amended Complaint against Defendants alleging the same 52 counts of securities fraud. *See* Am. Compl., *SEC v. Jay Peak, Inc.*, No. 16-CV-21301 (S.D. Fla. May 17, 2016), ECF No. 120. A motion for preliminary injunction by the SEC and a motion to dismiss by Quiros are pending in the federal action.

³ Like the Amended Complaint, "Defendants" refers to the defendants collectively: Quiros, Stenger, and the various corporate and partnership entities for the projects in which they are involved.

Quiros' motion to dismiss fundamentally misunderstands securities and consumer protection law. His assertion that the State's securities claims should be dismissed because he did not make actionable misrepresentations or omissions (Motion at 12) is incorrect. Two of the three bases of the State's securities claims are premised on Quiros' participation in the fraudulent scheme and in the fraudulent course of conduct. *See* 9 V.S.A. § 5501(1) and (3). His liability under these subsections is not dependent on him personally making a misrepresentation or omission. Even under 9 V.S.A. § 5501(2), which does require a misrepresentation or omission, the State alleges that Quiros controlled the limited partnerships which issued the private placement memoranda ("PPMs") and is responsible for the misrepresentations and omissions. That suffices under Section 5501(2).

Quiros also contends that his alleged fraud was not "in connection with" the sale or offer of sale of a security because most of the alleged wrongdoing involved misuse or misappropriation of investor funds. Motion at 2. Yet, he ignores direct United States Supreme Court precedent, (*SEC v. Zandford*, 535 U.S. 813 (2002); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006)), addressing the standard and the State's express allegations that he perpetrated a long running fraudulent scheme of offering securities in order to raise investor funds for his personal enrichment and misuse, beginning in 2008 and continuing through April 2016 when the SEC sought and received the TRO from the District Court. Under securities law, this ongoing fraudulent scheme easily meets the "in connection with" requirement.

Quiros' contention that the Vermont Consumer Protection Act does not cover securities is flatly incorrect. Section 2451a(b) of the Vermont Consumer Protection Act expressly extends to securities, and Section 5509(m) of the Vermont Uniform Securities Act contains a savings clause

preserving all other rights and remedies, including those under consumer protection law. Quiros' final assertion that the claims pertaining to Phase I are untimely fails because he ignores the discovery rule which, at minimum, precludes dismissal of Phase I claims on statute of limitations grounds without factual development.

RELEVANT BACKGROUND

I. PROCEDURAL HISTORY

On April 14, 2016, following the unsealing of the SEC's complaint and the issuance of the TRO, the State, through the Commissioner of the Department of Financial Regulation and the Attorney General, filed this lawsuit against Quiros, William Stenger, and the fifteen entities they used to carry out the fraudulent scheme, alleging violations the Vermont Uniform Securities Act (the "VUSA") and the Vermont Consumer Protection Act (the "VCPA"). On June 15, 2016, the State filed an Amended Complaint against the same Defendants alleging the same violations of the VUSA and the VCPA. Quiros filed a motion to dismiss on July 1, 2016.

II. FACTUAL BACKGROUND

a. The EB-5 Projects

During the last eight years, Defendants solicited and raised at least \$350 million from investors, claiming that their funds would finance and build certain investment projects located within the Vermont Agency of Commerce and Community Development Regional Center ("EB-5 Projects"). Am. Compl. ¶¶ 1-2. The investments took the form of limited partnership interests (securities) offered in seven PPMs, one for each of the seven EB-5 Projects (Phases I-VII). *Id.* ¶ 2.

The first two EB-5 Projects, Jay Peak Hotel Suites ("Phase I") and Jay Peak Hotel Suites Phase II ("Phase II"), were initiated by Mont St. Sauveur International Inc. ("MSSI"), a ski resort

company based in Quebec that owned Defendant Jay Peak, Inc. (“Jay Peak”) until 2008, when Quiros, through Defendant Q Resorts, Inc., purchased Jay Peak from MSSSI. *Id.* ¶¶ 50, 53, 57, 60. The PPM for Phase I sought to raise \$17.5 million from 35 investors, and was fully subscribed by June 2008. *Id.* ¶¶ 54, 59. The PPM for Phase II sought to raise \$75 million from 150 investors, and was not fully subscribed until approximately January 28, 2011, well after Quiros purchased Jay Peak and acquired control over Phases I and II investor funds. *Id.* ¶¶ 55, 61, 63, 65.

Following the purchase of Jay Peak, Quiros and Stenger initiated five additional EB-5 Projects financed through project-specific PPMs:

1. Jay Peak Penthouse Suites (“Phase III”), a real estate project initiated by Quiros and Stenger, through the Penthouse Suites Limited Partnership, that raised \$32.5 million from 65 investors. *Id.* ¶ 75.
2. Jay Peak Golf and Mountain Suites (“Phase IV”), a real estate project initiated by Quiros and Stenger, through the Golf and Mountain Limited Partnership, that raised \$45 million from 90 investors. *Id.*
3. Jay Peak Lodge and Townhouses (“Phase V”), a real estate project initiated by Quiros and Stenger, through the Lodge and Townhouses Limited Partnership, that raised \$45 million from 90 investors. *Id.*
4. Jay Peak Stateside (“Phase VI”), a fully-subscribed real estate project initiated by Quiros and Stenger, through the Stateside Limited Partnership, that raised \$67 million from 134 investors. *Id.* The Stateside project has not been completed and has approximately \$26 million in outstanding construction obligations, despite the

exhaustion of all but approximately \$58,000 of the entire \$67 million offering amount. *Id.* ¶¶ 75, 143.

5. Jay Peak Biomedical Research Park (“Phase VII”), an incomplete biomedical project initiated by Quiros and Stenger in 2012, through the AnC Bio Limited Partnership, that has raised at least \$83 million from 166 investors, and seeks to raise an additional \$27 million for a total offering of \$110 million. *Id.* ¶ 75. Phase VII is not near completion, and further, there remains approximately \$84 million in construction obligations while the Phase VII limited partnership has only \$41 million left in available funds and fundraising capacity, leaving the project with a hole of at least \$43 million. *Id.* ¶ 160.

Before investing in a particular EB-5 Project, potential investors were given an opportunity to review the project-specific EB-5 Project PPM, all of which contained representations—on which investors could reasonably rely—regarding the purposes for which investor funds would be used. *Id.* ¶ 46. Each EB-5 Project PPM also represents that the respective EB-5 Project will be managed and controlled by a general partner that is owned and/or controlled by Quiros and Stenger. However, in reality, Quiros personally took full control of all limited partnership funds. *Id.* ¶ 76.

b. The State’s Allegations

The Amended Complaint alleges that Quiros violated the VUSA and the VCPA by engaging in the following unlawful conduct: (1) misusing investor funds by using them in ways other than those specifically disclosed to investors in the EB-5 Project PPMS; (2) misappropriating investor funds; and (3) and making or making use of material misrepresentations and omissions to investors.

i. Misuse of Investor Funds

Although Stenger was the *de facto* general partner for Phases I through VI, Quiros controlled investor funds because Stenger moved the funds from the project-specific escrow accounts to Raymond James brokerage accounts controlled exclusively by Quiros. *Id.* ¶¶ 89, 106. In addition to the project-specific brokerage accounts, Quiros held several accounts at Raymond James with margin features, which allowed him to borrow funds from the broker-dealer, secured by investor funds, to purchase securities for other purposes. *Id.* ¶ 90. Quiros used investor funds to purchase short term United States Treasury Bills (“T-bills”), used margin loans for various expenses with the T-bills serving as collateral, and redeemed the T-bills at maturation for cash. *Id.* ¶ 93. The use of margin accounts and the purchase of T-bills were never disclosed to investors, placed investor funds at substantial risk by pledging investor funds from multiple Phases as collateral required for the borrowing of funds, and caused investors to incur significant margin interest expenses totaling over \$2.3 million. *Id.* ¶ 99-100.

In addition to pledging investor funds as collateral for margin loans and misusing funds to purchase T-bills, Quiros misused funds by:

- Improperly taking investor funds during the build out of Phases I and II. *Id.* ¶¶ 111, 115.
- Misusing Phases I and II investor funds to pay off margin loan interest. *Id.*
- Misusing Phase II investor funds to pay for Phases I and III costs. *Id.* ¶ 115.
- Commingling Phases I through VII funds. *Id.* ¶¶ 111, 115, 121, 126, 132, 138, 144.
- Misusing \$18.2 million of Phase VII investor funds to pay off a margin account. *Id.* ¶ 144.

- Taking fees for construction supervision of all Phases except for Phase III in excess of the amounts specified in their respective PPMs. *Id.* ¶¶ 71, 72, 74, 124-26, 130-32, 136-38, 144, 159.

ii. Misappropriations of Investor Funds

In addition to misusing funds, the Amended Complaint alleges that Quiros misappropriated investor funds in the following ways, none of which were disclosed to investors:

- Quiros misappropriated \$12.4 million of Phase I investor funds and \$9.5 million of Phase II investor funds to finance the acquisition of Jay Peak Resort. *Id.* ¶¶ 4, 111.
- Quiros misappropriated \$3.8 million of Phase IV and V investor funds to assist in the purchase of a condominium at the Setai Fifth Avenue Hotel and Residences located in New York City. *Id.* ¶¶ 4, 125, 131.
- Quiros misappropriated \$2.2 million of Phase VII investor funds in May 2013 to purchase a condominium at 220 Riverside Boulevard in New York City (also known as “Trump Place New York”). *Id.* ¶¶ 4, 154.
- Quiros misappropriated \$4.2 million of Phase VII investor funds in 2013 to pay the taxes of an unrelated company he owned. *Id.* ¶¶ 4, 144.
- Quiros misappropriated \$10.7 million of Phase VII investor funds to back a personal line of credit for up to \$15 million. *Id.* ¶¶ 4, 153.
- Quiros misappropriated approximately \$7 million of Phase VII investor funds to purchase the Burke Mountain Resort. *Id.* ¶¶ 4, 155.

iii. Material Misrepresentations and Omissions

Each EB-5 Project PPM included a section specifically describing the source of project funds and how those funds would be used to complete the EB-5 Project (“Source and Use of Investor Funds”). *Id.* ¶ 104. Investors for all Phases were never informed through the Source and Use of Investor Funds or in any other part of any offering document that their funds would be used in the ways described above and as further detailed in the Amended Complaint. *Id.* Additionally, with the exception of Phase I, each Source and Use of Investor Funds set forth specific representations regarding the contribution required to be made by Jay Peak or the AnC Bio Project Sponsor to the respective EB-5 Project. *Id.* ¶ 80. Jay Peak (Quiros and Stenger) was supposed to contribute approximately \$58 million to help construct Phases II through VI. *Id.* ¶ 5. Instead, however, Jay Peak received a net amount of approximately \$15 million more from the projects than it contributed. *Id.* Further, the AnC Bio Project Sponsor (again Quiros and Stenger) failed to contribute at least \$6 million to Phase VII. *Id.*

The PPMs for each EB-5 Project also contained specific representations regarding the general partner’s authority, including, for example:

1. That the general partner is “responsible for the overall management and control of the business assets and affairs of the Partnership,” *id.* ¶ 105; and
2. That “the prior Consent of the Limited Partner is required before the General Partner may . . . borrow from the Partnership or commingle Partnership funds with the funds of any Person,” *id.*

However, as noted above, Stenger transferred all investor funds to Quiros-controlled Raymond James accounts for which Stenger did not have signatory authority or control. *Id.* ¶ 106. Thus, for Phases I through VI, the representation that the general partner (Stenger) was

responsible for partnership assets was materially misleading. Further, neither Stenger nor Quiros obtained the prior consent of the limited partners before borrowing from the Partnership or commingling Partnership funds for each of the seven EB-5 Projects. *Id.* ¶ 107.

Finally, Defendants made direct material misrepresentations and omissions in both the initial and amended Phase VII PPMs regarding the status of the United States Food and Drug Administration approval process, revenue projections, the financial health of AnC Bio Pharm, and the value of the land purchased by the AnC Bio Limited Partnership. *Id.* ¶¶ 148-50, 152, 157. Quiros is a member of the entity that serves as the general partner for Phase VII and controlled its operations. *Id.* ¶¶ 10, 27.

At all times material to this action, along with Stenger, Quiros was responsible for all representations to investors, except for Phase I, and all material investment and expenditure decisions with respect to investor funds raised through the EB-5 Projects. *Id.* ¶ 8.

SUMMARY OF ARGUMENT

Quiros' motion to dismiss seeks dismissal of the Amended Complaint in its entirety. However, Quiros' dismissal arguments are based on a fundamental misunderstanding of the relevant law, flawed case law analysis, failure to acknowledge the plain language of the VUSA and the VCPA, and an attempt to mischaracterize the State's claims.

Quiros' arguments and the State's responses are summarized as follows:

First, Quiros seeks dismissal of the State's VUSA claims, arguing that he did not "make" the misrepresentations or omissions at issue. As discussed in greater detail below, the State may allege violations of the antifraud provision of the VUSA, Section 5501, by pleading one or more of three distinct theories—fraudulent schemes (Section 5501(1)), misrepresentations and omissions (Section 5501(2)), and fraudulent or deceitful courses of conduct (Section 5501(3)).

Quiros ignores the first and third bases for liability which do not require proof that a defendant personally made a misrepresentation or omission. The Amended Complaint alleges that Quiros violated Sections 5501(1) and (3) of the VUSA for Phases I through VII by engaging in a fraudulent scheme or fraudulent course of conduct in the sale of securities by serially misappropriating and misusing investor funds belonging to each of the Phases.

For all Phases except for Phase I, the State also has alleged that Quiros violated the misrepresentations and omissions provision of the VUSA, Section 5501(2), based on his control of the limited partnerships that issued the PPMs. Such control makes Quiros responsible under Section 5501(2) for the misrepresentations and omissions in the PPMs.

Second, Quiros seeks dismissal of the State's VUSA claims, arguing that the State has failed to allege fraud "in connection with" the sale of a security. Quiros mischaracterizes the State's claims and ignores relevant law. As discussed below in greater detail, the "in connection with" requirement is met whenever fraudulent activity "touches" or "coincides" with a securities transaction. With regard to Quiros' liability under Section 5501(2) of the VUSA for the various material misrepresentations and omissions contained in the Phases II through VII PPMs, the State's allegations easily meet the "in connection with" requirement: the representations contained in the PPMs, which were reasonably calculated to influence potential investors, were made directly "in connection with" the offer to sell or the sale of a security. Similarly, the State has satisfied this requirement with regard to the State's claims under Sections 5501(1) and (3) of the VUSA for all seven Phases. Quiros' serial misappropriation and misuse of investor funds was an integral part of the fraudulent scheme and course of conduct and thus "in connection with" securities transactions.

Third, Quiros seeks dismissal of the State's VCPA claims, arguing that the VCPA does not provide a remedy for allegations of securities-related fraud. Quiros' argument is flawed for several reasons, chiefly because he ignores the plain language of the VCPA, which expressly applies to securities. *See* 9 V.S.A. § 2451a(b) (defining "[g]oods' or 'services'" to include "any objects, wares, goods, commodities, . . . securities, bonds, debentures, stocks, real estate, or other property or services of any kind" (emphasis added)).

Instead, Quiros' argument rests on his analysis of dissimilar consumer protection statutes from jurisdictions outside Vermont. Not a single case cited by Quiros involves a consumer protection statute that, like the VCPA, expressly defines "goods or services" (or an equivalent term) to include "securities" or the like. Quiros ignores the entire body of case law holding that a consumer protection statute with statutory language similar to the VCPA applies to securities.

Quiros also ignores the plain language of the VUSA in claiming that it provides the sole statutory remedy for fraud claims involving securities. The VUSA contains a savings clause specifically stating that "[t]he rights and remedies provided by this chapter are *in addition to* any other rights or remedies that may exist." 9 V.S.A. § 5509(m) (emphasis added). Thus, the plain language of the statute, which Quiros fails to address, belies his argument.

Quiros is unable to prevail on any of his arguments and his motion to dismiss should be denied.

ARGUMENT

I. LEGAL STANDARD

In Vermont, plaintiffs face "an 'exceedingly low' threshold" for withstanding a 12(b)(6) motion to dismiss, and such motions "are disfavored and should be rarely granted." *Prive v. Vt. Asbestos Grp.*, 2010 VT 2, ¶ 14, 187 Vt. 280, 992 A.2d 1035 (quoting *Bock v. Gold*, 2008 VT

81, ¶ 4, 184 Vt. 575, 959 A.2d 990). A 12(b)(6) motion to dismiss should be granted “only when it is beyond doubt that there exist no facts or circumstances, consistent with the complaint, that would entitle the plaintiff to relief.” *Id.* (quoting *Bock*, 2008 VT 81, ¶ 4) (alteration marks omitted). On a motion to dismiss, the Court must assume “that all factual allegations pleaded in the complaint are true” and “accept as true all reasonable inferences that may be derived from plaintiff’s pleadings and assume that all contravening assertions in defendant’s pleadings are false.” *Richards v. Town of Norwich*, 169 Vt. 44, 49, 726 A.2d 81, 85 (1999).

II. QUIROS IS LIABLE UNDER THE VERMONT UNIFORM SECURITIES ACT

a. Prohibited Conduct Under Vermont’s Uniform Securities Act

Counts 1 through 7 of the State’s Amended Complaint allege that Defendants Quiros and Stenger, as well as various corporate Defendants under their control, violated the “General fraud” provision of the VUSA, which states that:

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. Under the VUSA, “[f]raud,’ ‘deceit,’ and ‘defraud’ are not limited to common law deceit.” 9 V.S.A. § 5102(9).

Thus, the express language of Section 5501 of the VUSA creates three distinct types of violations: fraudulent schemes (Section 5501(1)), misrepresentations and omissions (Section 5501(2)), and fraudulent or deceitful courses of conduct (Section 5501(3)). Each form of

conduct furnishes a separate and independent basis for Defendant Quiros' liability under Section 5501.

The VUSA, enacted in 2005 and codified as chapter 150 of title 9 of the Vermont Statutes Annotated, represents Vermont's adoption of the 2002 Uniform Securities Act ("Uniform Securities Act") drafted by the National Conference of Commissioners on Uniform State Laws.⁴ See 2005 Vt. Acts & Resolves No. 11 (enacted Apr. 28, 2005, eff. July 1, 2006). The Vermont Legislature directed that, in interpreting the VUSA, "[i]t is the intention of the general assembly that the official comments of the 2002 Uniform Securities Act be used to guide administrative and judicial interpretations of this chapter." *Id.* § 4.

The VUSA's "General fraud" provision, Section 5501, is identical to Section 501 of the Uniform Securities Act. The official comments to Section 501 note that it "was modeled on Rule 10b-5⁵ adopted under the Securities Exchange Act of 1934 [15 U.S.C. § 78a, *et seq.*] and on

⁴ National Conference of Commissioners on Uniform State Laws, Uniform Securities Act (2002; amended 2005), available at http://www.uniformlaws.org/shared/docs/securities/securities_final_05.pdf.

⁵ SEC Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

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

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

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

Section 17(a)⁶ of the Securities Act of 1933 [15 U.S.C. § 77a, *et seq.*]; however, “Section 501 is not identical to either Rule 10b-5 or Section 17(a).” Unif. Sec. Act § 501 cmt. 1.⁷

The State’s authority to bring this action for violation of the VUSA’s “General fraud” provision, Section 5501, derives from Section 5603, “Civil enforcement,” which states:

If the Commissioner [of Financial Regulation] believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter . . . or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this chapter . . . the Commissioner may maintain an action in the Superior Court of Washington County to enjoin the act, practice, or course of business and to enforce compliance with this chapter

9 V.S.A. § 5603(a). “[O]ther appropriate or ancillary relief” necessary to enforce compliance with the VUSA “may include . . . (C) imposing a civil penalty up to \$15,000.00 for each violation and not more than \$1,000,000.00 for more than one violation; [and] an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this chapter.” *Id.* § 5603(b)(2). Section 5603 of

⁶ Section 17(a) states:

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly

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

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

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

15 U.S.C. § 77q.

⁷ Because the VUSA “is a Uniform State Law and is traceable to federal law, federal cases and cases from other states adopting the Uniform Securities Act are helpful in the interpretation of our Securities Act.” *Mosley v. Am. Express Fin. Advisors, Inc.*, 230 P.3d 479, 485 n.5 (Mont. 2010); *see also Booth v. Verity, Inc.*, 124 F. Supp. 2d 452, 460 (W.D. Ky. 2000) (“To interpret provisions of Blue Sky Laws patterned after the Uniform Securities Acts, other state courts have looked to decisions construing parallel federal securities laws.”). “Although these federal cases are not dispositive when we are interpreting our state’s securities legislation, reliance on federal cases is certainly proper.” *State v. Schwenke*, 222 P.3d 768, 771 n.2 (2009) (internal citations omitted).

the VUSA is substantively identical to Section 603 of the Uniform Securities Act, “Civil Enforcement.” *See* Unif. Sec. Act § 603.

The official comments to the Uniform Securities Act explain that “[t]he culpability,” that is, the scienter or mental state of the defendants, “required to be pled or proved under Section 501”—the Act’s “General Fraud” provision—“is addressed in the relevant enforcement context.” Unif. Sec. Act § 501 cmt. 6. For “civil and administrative enforcement actions under Sections 603 and 604,” such as the State’s civil enforcement action under Section 5603 of the VUSA, “no culpability is required to be pled or proven.” *Id.* Thus, the State need not plead or prove Defendant Quiros’ mental state to establish his liability under Section 5501 for participating in fraudulent schemes and courses of conduct in connection with securities sales, or alternatively, making or directing others to make misrepresentations and omissions to securities investors. *See id.*

b. Quiros is Liable Under the VUSA for His Fraudulent Scheme and Course of Conduct

Like SEC Rule 10b-5 and Securities Act Section 17(a) that it was modeled on, VUSA Section 5501 reaches beyond misrepresentations or omissions to encompass any wrongdoing by any person that rises to a deceptive act or practice in connection with a securities sale. *See Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 10 (1971); *see also SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011) (“Scheme liability under subsections (a) and (c) of Rule 10b-5 hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement.”). A defendant violates Section 5501(1) and (3) of the VUSA when he or she commits any manipulative or deceptive act or acts that are part of a fraudulent or deceptive course of conduct, or are in furtherance of a scheme to defraud. *See SEC v. Capital Cove Bancorp LLC*, No. SACV 15-980-JLS, 2015 WL 9704076, at *6 (C.D. Cal. Sept. 1, 2015)

(defendant engages in an inherently deceptive act or transaction where his conduct or role “had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme”); *SEC v. Fraser*, No. CV-09-00443, 2010 WL 5776401, at *7 (D. Ariz. Jan. 28, 2010) (defendant “must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme” (quotation omitted)). Scheme liability recognizes that “[c]onduct itself can be deceptive.” *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 158 (2008).

Contrary to the assertion in his motion to dismiss, Quiros need not have personally made any misrepresentation or omission to investors to incur liability for securities fraud under VUSA Section 5501(1) and (3). In *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014), the Eleventh Circuit affirmed summary judgment against defendant executives found liable for federal securities fraud for their role in a revenue-raising scheme by submitting fake invoices to their company’s accounting department, but who personally made no misrepresentations about the company’s revenues in public securities filings. The *Monterosso* Court held the defendants “liable under section 17(a), section 10(b), and Rule 10b-5, because they made deceptive contributions to an overall fraudulent scheme,” and “[t]he case against [defendants] did not rely on their ‘making’ false statements, but instead concerned their commission of deceptive acts as part of a scheme to generate fictitious revenue for [their company].” *Id.* (quotation omitted). The court then concluded that *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011) “has no bearing on this case.” *Id.*; see also *IBEW Local 90 Pension Fund v. Deutsche Bank AG*, No. 11 CIV. 4209 KBF, 2013 WL 1223844, at *11 (S.D.N.Y. Mar. 27, 2013) (“One can be held liable in connection with such a [fraudulent or deceptive] scheme even if he did not himself make a material misstatement in connection with it.”).

This form of securities fraud liability is well established. *See, e.g., SEC v. Lee*, 720 F. Supp. 2d 305, 333 (S.D.N.Y. 2010) (“Section 10(b) and Rule 10b-5 impose primary liability on any person who *substantially participates* in a manipulative or deceptive scheme by directly or indirectly employing a manipulative or deceptive device (such as the creation or financing of a sham entity) intended to mislead investors, even if a material misstatement by another person creates the nexus between the scheme and the securities market.”) (emphasis added); *SEC v. Simpson Capital Mgmt., Inc.*, 586 F. Supp. 2d 196, 205-08 (S.D.N.Y. 2008) (denying motion to dismiss because SEC had alleged that defendants were “architects” or “conductors” of a fraudulent scheme even though others in the scheme made misstatements to third parties).

The Amended Complaint alleges that Quiros is liable under Sections 5501(1) and (3) for his misappropriation and misuse of investor funds in all seven Phases because he “employ[ed] a device, scheme, or artifice to defraud” and “engage[d] in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.” Am. Compl. Counts ¶¶ 1-21. Quiros’ “elaborate scheme . . . employed a complex web of financial accounts to improperly commingle funds, backfill funding gaps from previous projects, and misuse investor funds” which gave Quiros cover to surreptitiously “misappropriate[] millions in investor funds to enrich himself.” *Id.* ¶ 3. While Quiros depended upon the misleading PPMs to continually raise new investor money, this “longstanding fraudulent scheme” that “Quiros masterminded,” *id.* ¶ 8, was inherently deceptive and larger than the PPMs’ mere misstatements. *See SEC v. Sullivan*, 68 F. Supp. 3d 1367, 1378 (D. Colo. 2014) (noting that defendant’s actions in “furtherance of the Ponzi scheme” to maintain flow of investor money were “inherently deceptive”).

Specifically, Quiros’ commingling of investor monies from different EB-5 Projects and backfilling of funding gaps with monies raised for newer projects kept construction going at Jay

Peak and created an additional false appearance that was distinct from the PPMs' initial misrepresentations—that investor funds were only being used for their intended and authorized purposes when, unknown to investors, Quiros was improperly siphoning off millions in investor funds for his personal enrichment. *See SEC v. China Ne. Petroleum Holdings Ltd.*, 27 F. Supp. 3d 379, 392 (S.D.N.Y. 2014) (where “core misconduct alleged by the SEC is that defendants raised money under false pretenses and then channeled the proceeds to corporate insiders,” denying motion to dismiss scheme liability claim and reasoning that although “[t]he misstatements and omissions . . . were essential both to the plan's commencement and its concealment . . . the SEC has competently pled the existence of a larger scheme, one that went beyond mere misrepresentations to investors, whereby defendants enriched themselves and their families at shareholders' expense”); *id.* (“While the misstatements and omissions certainly furthered that scheme, they do not comprise the scheme in its entirety.”).

As to Phase I, the State has alleged Quiros' substantial participation in a scheme to defraud investors through deceptive acts in violation of Sections 5501(1) and (3) of the VUSA, albeit without personally making any misrepresentations or omissions to such Phase I investors. Specifically, the State alleges that after assuming pre-closing functional control over Jay Peak in January 2008, Quiros effectively became the employer of Stenger, who was President and CEO of Jay Peak, as well as President of the Defendant Phases I and II General Partner entity with control over Phases I and II investor funds. *See Am. Compl.* ¶¶ 11, 16, 56-57.

Because thereafter “Stenger and Jay Peak employees took direction from Quiros,” *id.* ¶ 6, Quiros was able to personally orchestrate and direct the June 2008 wrongful transfers of Phases I and II investor funds from escrow accounts at People's United Bank into Raymond James brokerage accounts controlled by Quiros and his company, Q Resorts. *See id.* ¶¶ 12, 56, 61, 63,

66-67. Quiros then wrongfully directed that these Phases I and II funds be used, in a series of June through September of 2008 payments, to complete the purchase of Jay Peak for his sole benefit, despite being previously admonished by the seller's counsel that this would be a misuse and misappropriation of investor funds. *See id.* ¶¶ 12, 62, 68-70, 111.

After purchasing Jay Peak with misappropriated Phases I and II investor funds, Quiros continued his scheme to defraud, also in violation of Sections 5501(1) and (3) of the VUSA, by misusing and misappropriating investor funds raised in the five subsequent securities offerings for Phases II through VII that he and Stenger "initiated." *See id.* ¶ 75; *see also id.* ¶¶ 5-8. "Quiros masterminded the longstanding fraudulent scheme with substantial assistance from Stenger." *Id.* ¶ 8.

"The misuse of millions of dollars of [Phases I and II] investor funds to purchase Jay Peak created a funding gap within the EB-5 Projects." *Id.* ¶ 5. The five subsequent securities offerings and their associated EB-5 Projects "were an integral part of Defendants' scheme to defraud investors because the projects were used as vehicles to transfer investor funds, as funding sources to cover the shortfalls of other projects or resort operating costs, and as sources of funds to misuse for personal benefit." *Id.* ¶ 6.

"Each EB-5 Project consists of a limited partnership that is offered in a project-specific PPM." *Id.* ¶ 76. Although Stenger was "the *de facto* general partner and sole officer" for six out of the seven Defendant limited partnership entities, *id.* ¶¶ 106, 11, "in reality, Quiros personally took full control of all limited partnership funds," *id.* ¶ 76, because "[u]pon satisfaction of the escrow conditions, Stenger generally moved investor funds from the project-specific escrow accounts to a Raymond James brokerage account held in the name of the corresponding limited partnership but controlled exclusively by Quiros." *Id.* ¶ 89. For the seventh EB-5 Project, AnC

Bio, Quiros was not content to merely act through Stenger, but became a formal member and co-owner, with Stenger, of the Defendant AnC Bio General Partner limited liability company that acted as controlling general partner of Defendant AnC Bio Limited Partnership. *See id.* ¶ 26.

As a consequence of Quiros acquiring exclusive control over the investor funds raised in the Defendants' EB-5 securities offerings, he has personally

misappropriated at least \$50 million of investor funds to, among other things: (1) purchase Jay Peak Resort; (2) purchase Burke Mountain Resort; (3) back a personal line of credit to pay his personal income taxes; (4) pay taxes for an unrelated company Quiros owns; and (5) purchase two luxury condominiums in New York City. Quiros also improperly used investor funds to pay for margin loan interest and fees (\$2.5 million) and to pay down and pay off margin loan debts.

Id. ¶ 4. Quiros has already admitted in a pre-suit deposition taken by the SEC that he misused investor money raised through securities sales. *See id.* ¶ 94 (“Quiros admitted under oath that he commingled funds between projects and used what he called a ‘one-window’ approach to consolidate all investor funds in one place.”); *id.* ¶ 96 (“Quiros testified . . . that \$21 million (of which the \$18.2 million [of AnC Bio investor money] was a part) was ‘direct[ed] to Jay Peak . . . because I had to pay down the margins at Raymond James’ and that the source of that money came from AnC Bio investors.” (first ellipsis and first alteration marks added)); *id.* ¶ 139 (“Quiros testified to the SEC that they lent ‘money back to Jay Peak’ because he ‘needed the [Stateside investor] funds in Jay Peak’”).

Quiros' serial misappropriation and misuse of investor funds, as alleged, constitutes a scheme to defraud, a series of deceptive acts, and/or deceptive course of conduct that subject Quiros to liability under Sections 5501(1) and (3) of the VUSA, independent of his responsibility and liability under Section 5501(2) for misrepresentations and omissions made to investors by limited partnership Defendants controlled by Quiros. Quiros' personal misappropriation and misuse of investor funds are inherently deceptive and fraudulent toward investors because:

(1) “[e]ach EB-5 Project PPM sets forth specific representations regarding the purposes for which investor funds will be used,” *id.* ¶ 79, as well as “restrictions on the authority of the general partner,” *id.* ¶ 103;

(2) “[a] reasonable investor relies on the statements contained in a PPM as a basis for deciding whether to purchase securities,” *id.* ¶ 81;

(3) Quiros either “reviewed” or “reviewed and approved” the PPMs for all seven of the Defendant limited partnership entities and was therefore “familiar with them, and understood he had to abide by them,” *id.* ¶ 82; for the ANC-Bio PPM, Quiros was a member of the general partner for the limited partnership that issued the PPM, *id.* ¶¶ 10, 26;

(4) Quiros’ misappropriation and misuse of investor funds for all seven EB-5 Projects at issue in this action, as alleged, “materially differed” from the PPMs’ specific representations about the allowed uses of investor funds and exceeded the PPMs’ promised limits on the authority of the general partner, *see id.* ¶¶ 104-07, 111, 115, 121, 126, 132, 138, 144;

(5) However, “[i]nvestors were not informed” of Quiros’ misappropriation and misuse, *id.* ¶ 104, and “Defendants did not obtain the prior consent of the investors” for Quiros’ actions with respect to investor funds for any of the seven EB-5 Projects at issue here. *Id.* ¶¶ 112, 116, 122, 127, 133, 140, 145.

Thus, the Amended Complaint pleads sufficient facts to state claims against Quiros, under Counts I through VII, for violation of Section 5501(1) and (3)’s prohibitions on “employ[ing] a device, scheme, or artifice to defraud” and “engag[ing] 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.

c. Quiros is Liable Under the VUSA for Misrepresentations and Omissions Made by Defendants He Controlled

Section 5501(2) of the VUSA generally prohibits any person from “directly or indirectly . . . mak[ing] an untrue statement of a material fact or . . . omit[ting] 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.” *Id.* The VUSA provision that creates a private right of action for securities fraud, Section 5509, clarifies that Section 5501’s general prohibition of “indirect” misconduct means that “a person that directly or indirectly controls a person liable” for securities

fraud may be held “liable jointly and severally with and to the same extent as” the controlled person. 9 V.S.A. § 5509(g).

Under the federal securities fraud statutes that the Uniform Securities Act and, by extension, the VUSA are modeled after, a defendant may be found, in either a private civil action or an SEC civil enforcement action, to be a secondarily liable “control person.”⁸ The purpose of control person liability is “to prevent people and entities from using ‘dummies’ to do the things that they were forbidden to do by the securities laws.” *Ross v. Bolton*, No. 83 CIV. 8244 (WK), 1989 WL 80428, at *3 (S.D.N.Y. Apr. 4, 1989), *order vacated in part on other grounds*, 1989 WL 80425 (S.D.N.Y. Apr. 10, 1989), *and aff’d*, 904 F.2d 819 (2d Cir. 1990).

“Control person liability is to be liberally construed,” *IBEW Local 98 Pension Fund v. Best Buy Co.*, No. CIV. 11-429 DWF/FLN, 2014 WL 1757840, at *4 (D. Minn. Apr. 30, 2014), since it “is remedial in nature.” *In re Oppenheimer Rochester Funds Grp. Sec. Litig.*, 838 F. Supp. 2d 1148, 1180 (D. Colo. 2012) (quotation omitted).⁹ As one court summarized:

Allegations of control are not averments of fraud and therefore need not be pleaded with particularity. Thus, at the pleading stage, the extent to which the control must be alleged will be governed by Rule 8’s pleading standard. In the Second Circuit, the control person provisions are broadly construed as they were meant to expand the scope of liability under the securities laws. Whether a person is a controlling person is a fact-intensive inquiry, and generally should not be resolved on a motion to dismiss.

In re Tronox, Inc. Sec. Litig., 769 F. Supp. 2d 202, 208 (S.D.N.Y. 2011) (internal quotations and footnotes omitted).

⁸ See 15 U.S.C. § 78t (providing for control person liability under Section 20 of the Securities Exchange Act); 15 U.S.C. § 77o(a) (establishing control person liability under Section 15 of the Securities Exchange Act); Unif. Sec. Act § 509(g) (control person liability under Uniform Securities Act).

⁹ See also *Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 922-23 (D. Ariz. 2011) (“Like other portions of the Arizona Securities Act, [the control person liability] section should be liberally construed to effect its remedial purpose of protecting the public interest.” (quotation omitted)), *aff’d*, 593 F. App’x 723 (9th Cir. 2015).

Under federal securities law, for control person liability “a plaintiff at a minimum must allege (1) a primary violation by the controlled person and (2) control of the primary violator by the targeted defendant.” *In re Lihua Int’l, Inc. Sec. Litig.*, No. 14-CV-5037 (RA), 2016 WL 1312104, at *17 (S.D.N.Y. Mar. 31, 2016).¹⁰ “[T]he SEC has defined ‘control’ generally to mean ‘the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person whether through the ownership of voting securities, by contract, or otherwise’” and “[t]he Second Circuit has adopted the SEC’s definition.” *Poptech, L.P. v. Stewardship Credit Arbitrage Fund, LLC*, 792 F. Supp. 2d 328, 336 (D. Conn. 2011) (quoting 17 C.F.R. § 240.12b-2). Control over the “primary violator” or controlled person need not require “stock ownership. It may arise from other business relationships, interlocking directors, family relationships and a myriad of other factors.” *Harriman v. E. I. DuPont De Nemours & Co.*, 372 F. Supp. 101, 105 (D. Del. 1974).

A control person “defendant must not only have actual control over the primary violator, but have actual control over the transaction in question” that constitutes the underlying securities fraud. *In re Alstom SA*, 406 F. Supp. 2d 433, 487 (S.D.N.Y. 2005) (quotation and emphasis omitted). However, in at least several circuits, “plaintiffs need not allege that the controlling

¹⁰ Courts are split on whether plaintiffs seeking to establish control person liability must also show that the alleged control person “culpably participated” in the underlying fraud. *In re Harman Int’l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 111-12 (D.C. Cir. 2015), *cert. denied sub nom. Harman Int’l Indus., Inc. v. Arkansas Pub. Employees Ret. Sys.*, 136 S. Ct. 1167 (2016); *compare, e.g., In re Philip Servs. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 486 (S.D.N.Y. 2004) (noting that some Second Circuit district courts have rejected culpable participation requirement and held that the requirement does not equate with scienter), *with Lapin v. Goldman Sachs Grp., Inc.*, 506 F. Supp. 2d 221, 248 (S.D.N.Y. 2006) (plaintiffs must show “some level of culpable participation at least approximating recklessness” by the control defendant). In any case, the State need not prove that Quiros culpably participated because “no culpability is required to be pled or proven.” Unif. Sec. Act § 501 cmt. 6. Even if some showing were required, the State has nonetheless adequately alleged Quiros’ culpable participation in the PPMs’ omissions and misrepresentations since Quiros “approved” and was “responsible” for the misleading PPMs, Am. Compl. ¶¶ 8, 82, and Quiros “knew” or was “extremely reckless in not knowing” the true facts “that should have been included in the PPMs,” *id.* ¶ 102.

person actually participated in the underlying primary violation to state [a] claim for control person liability.” *In re Dynegy, Inc. Sec. Litig.*, 339 F. Supp. 2d 804, 828 (S.D. Tex. 2004).¹¹

For example, when the underlying securities fraud takes the form of misleading communications to investors, a plaintiff’s allegations of control “must be related to the actual transactions at issue in the primary violation claims,” but the control person need not have “actually sent the communications himself, or approved the specific communications at issue” because “a firm may try to bifurcate the process of reporting information to investors in order to insulate particular people within the firm from future legal liability.” *Poptech*, 792 F. Supp. 2d at 336, 339.

Here, the State has alleged that the seven limited partnership Defendants were the “issuer[s] of securities sold to” the investors in their seven respective EB-5 Projects. *See Am. Compl.* ¶¶ 14-15, 17, 19, 21, 23, 25. The State has further alleged that the PPMs issued by all seven of these limited partnership Defendants contained material misrepresentations and omissions with respect to the misuse and misappropriation of investor funds by Quiros, Stenger, and other Defendants. *See id.* ¶¶ 104-07, 111-12, 115-16, 121-22, 126-27, 132-33, 138-40, 144-45; *see also id.*, Counts ¶¶ 3, 6, 9, 12, 15, 18, 21.

In addition, “[t]he AnC Bio PPM also contains material misrepresentations regarding the status of United States Food and Drug Administration (‘FDA’) approval for the biomedical products to be produced at the AnC Bio facility (‘AnC Bio Products’),” *id.* ¶ 148, as well as “contains material misstatements in its revenue projections because the projections were

¹¹ *See also Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 881 (7th Cir. 1992) (“We have looked to whether the alleged control-person actually participated in, that is, exercised control over, the operations of the person in general and, then, to whether the alleged control-person possessed the power or ability to control the specific transaction or activity upon which the primary violation was predicated, *whether or not that power was exercised.*” (emphasis added)).

baseless,” *id.* ¶ 149. Therefore, the State has adequately pled primary violations of Section 5501(2) of the VUSA by the limited partnership Defendants that issued the PPMs to sell the limited partnership interest that constitute securities.

The State has further alleged that Stenger is President (or an LLC member in the case of Phase VII) of all the general partner Defendants that formally direct and manage the activities of the limited partnership Defendants. *See id.* ¶ 11. The State also alleges that “Stenger . . . took direction from Quiros,” *id.* ¶ 6, from at least January 2008 when Quiros assumed functional control over Jay Peak, *see id.* ¶ 58, because Stenger is “President and Chief Executive Officer of Jay Peak,” *id.* ¶ 11, whereas “Quiros is the Chairman of the Board of Jay Peak,” and effectively its owner through Quiros’ company Q Resorts, *id.* ¶¶ 10-12. Jay Peak is also “the project sponsor for Phases I through VI . . . and Quiros is a member of the project sponsor and general partner entities for Phase VII.” *Id.* ¶ 10.

Therefore, “Quiros exercises control over the seven limited partnership Defendants,” *id.*, either directly (as in the case of Phase VII)¹² or indirectly through Stenger, by virtue of Quiros’ business relationships and influence. *See id.* ¶ 27 (“Quiros and Stenger controlled and used the seven limited partnerships, the six general partner entities, and other related corporate entities in carrying out the fraudulent scheme.”). Accordingly, the State has properly alleged that Quiros generally controlled the business operations of the primary violators, that is, the limited partnership Defendants that were caused to issue the misleading PPMs.

¹² Indeed, Quiros is directly liable as a “maker” of the misstatements and omissions in the Phase VII PPM under *Janus Capital Group, Inc.*, 564 U.S. at 142 (“maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it”). There can be more than one person with authority and therefore multiple makers of a statement. *See City of Pontiac Gen. Emps.’ Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012). For Phase VII, Quiros was a member of the general partner that acted for the limited partnership and he, along with Stenger, controlled both entities. He also reviewed and approved the Phase VII PPM and thus had authority for it. *See Am. Compl.* ¶¶ 10, 26, 82.

Moreover, Quiros had “actual control” over the specific transactions in question, namely, the preparation and issuance of the PPM for Phases III through VII that mislead investors concerning how their investment funds would be used. Specifically, Quiros approved the sections of the PPMs for Phases III through VI detailing how Jay Peak would spend investor funds for each EB-5 Project. *Id.* ¶ 82. Both Stenger and Quiros, as sole members and owners of AnC Bio General Partner, reviewed and approved the contents of the Phase VII PPM. *Id.*¹³ As a result, “Quiros, for all of the EB-5 Projects except for Phase I, w[as] responsible for all representations to investors.” *Id.* ¶ 8.¹⁴

The State’s allegations that Quiros generally controlled the limited partnership Defendants that issued the misleading PPMs and specifically approved the misleading PPMs are clearly sufficient to state a claim for control person liability. *See Poptech*, 792 F. Supp. 2d at 340 (in denying motion of individual defendant to dismiss control person claim, noting that complaint alleged that individual defendant “was at least nominally the President of [a corporate co-defendant]” and “alleges that at least initially, [that corporate co-defendant] played a role in approving investor communications sent by [another] and the other entities,” and concluding that “[a]ssuming they are true, those allegations are enough to establish that [the individual defendant] had the ability to exert control over the communications at issue here”).¹⁵ Therefore,

¹³ Because Quiros assumed functional control of Jay Peak in January 2008, *id.* ¶ 57, and Phase II became “fully subscribed” by investors on or about January 28, 2011, *id.* ¶ 55, “Quiros controlled Jay Peak during much of the time that the Phase II offering was open and most of the investor monies were collected.” *Id.* ¶ 119. Further, after the misappropriation of the Phase II investor funds in June 2008, Defendants, including Quiros, “did not correct the [PPM] they gave to approximately 136 future Phase II investors to show that \$9.5 million of [Phase II] investor funds had been improperly used to purchase Jay Peak Resort.” *Id.* ¶ 73. Thus, Quiros acquired “actual control” over the content of this PPM by January 2008, but did nothing to correct its misleading content.

¹⁴ In an additional indication of Quiros’ personal involvement in the solicitation of investors and “actual control” over this process, “in recent years, Quiros has attended meetings with investors and answered their questions.” *Id.* ¶ 85.

¹⁵ *See also In re Galena Biopharma, Inc. Sec. Litig.*, 117 F. Supp. 3d 1145, 1200 (D. Or. 2015) (“Allegations of day-to-day oversight of a company’s operations and involvement in the statements at issue have been found sufficient to presume control over the transactions giving rise to alleged securities violations by that company”)

the State has alleged sufficient facts to impose control person liability against Quiros under Section 5501(2) of the VUSA for making misrepresentations and omissions in connection with securities sales, as pled in Counts 2 through 7.¹⁶

d. Quiros' Misrepresentations, Omissions, and Deceptive Conduct Were All Made "In Connection With" Securities Sales

The "in connection with" requirement of Section 5501 of the VUSA has a well-established definition in securities law. As described above in Section II(a), the requirement is identical to Section 501 of the Uniform Securities Act, which in turn, was modeled on federal securities fraud law. "Under Supreme Court case law, fraudulent activity meets the "in connection with" requirement of § 10(b) whenever it 'touches' or 'coincides' with a securities transaction." *SEC v. Pirate Investor LLC*, 580 F.3d 233, 244 (4th Cir. 2009) (quoting, respectively, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006), and *Bankers Life & Cas. Co.*, 404 U.S. at 12-13). "The 'in connection with' requirement is construed broadly and flexibly to effectuate the remedial purposes of the federal securities laws." *SEC v. Terry's Tips, Inc.*, 409 F. Supp. 2d 526, 533 (D. Vt. 2006); see also *United States v. Nouri*, 711 F.3d 129, 143 (2d Cir. 2013) ("The Supreme Court has repeatedly held that Rule 10b-5's

(collecting cases); *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 741-42 (S.D.N.Y. 2015) ("Plaintiffs have adequately alleged the Individual Exchange Act Defendants' culpable participation—each of the Defendants was responsible for reviewing BioScrip's SEC filings . . . and thus, according to the allegations, knew or should have known that the primary violator, over whom they had control, was engaging in fraudulent conduct" (quotation and alteration marks omitted)); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 413 (S.D.N.Y. 2010) (where investment fund managers were alleged to have "influenced and controlled, directly or indirectly, the decision-making of the Funds, including the content and dissemination of the various statements that were false and misleading" complaint stated a claim for control person liability) (alteration marks omitted).

¹⁶ In addition to being liable as a control person, Quiros is also liable as a "primary violator" of the VUSA, including Section 5501(2), because he "had knowledge of the fraud and assisted in its perpetration." See *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1471 (2d Cir. 1996) (individual defendant liable even though he did not make the misrepresentations or omissions because he had knowledge of the fraud and "participated in the fraudulent scheme"). The Amended Complaint is replete with alleged facts showing Quiros' knowledge of and participation in the fraud (including his own admissions to the SEC about commingling and misuse of investor funds by paying margin loans or transferring funds between projects). Am. Compl. ¶¶ 94, 96, 139.

requirement that a fraud be ‘in connection with’ the purchase or sale of a security is easily satisfied.”).

“Where the fraud alleged involves public dissemination in a document such as a press release, annual report, [or] investment prospectus” of statements or omissions alleged to be materially misleading, the “in connection with” requirement is met. *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir.1993); *see also Semerenko v. Cendant Corp.*, 223 F.3d 165, 176 (3d Cir. 2000) (“[W]here the fraud alleged involves the public dissemination of information in a medium upon which an investor would presumably rely, the ‘in connection with’ element may be established by proof of the materiality of the misrepresentation and the means of its dissemination.”).

In this case, with regard to Quiros’ liability under Section 5501(2) of the VUSA for misrepresentations and omissions contained in the Phases II through VII PPMs issued by the limited partnership Defendants, the allegations of the State’s Amended Complaint easily meet the “in connection with” requirement. The State has alleged that “[e]ach EB-5 Project PPM sets forth specific representations regarding the purposes for which investor funds will be used,” Am. Compl. ¶ 79, as well as “restrictions on the authority of the general partner.” *Id.* ¶ 103.

Such representations were reasonably calculated to influence the investing public because “[a] reasonable investor relies on the statements contained in a PPM as a basis for deciding whether to purchase securities.” *Id.* ¶ 81; *see also id.* ¶ 46. However, these representations used to sell securities were false or misleading (or were so incomplete as to mislead) because Quiros’ misappropriation and misuse of investor funds “materially differed” from the represented uses and restrictions, *see id.* ¶¶ 104-07, 111, 115, 121, 126, 132, 138, 144, and “[i]nvestors were not informed” of these deviations. *Id.* ¶ 104; *see also id.* ¶¶ 112, 116, 122, 127, 133, 140, 145. Such

actionable misrepresentations and omissions in a PPM or other securities offering document are made “in connection with” the purchase or sale, or the offer to purchase or sell securities. *See SEC v. Provident Royalties, LLC*, No. 3:09-CV-01238-L, 2013 WL 5314354, at *5 (N.D. Tex. Sept. 23, 2013) (finding “in connection with” requirement “satisfied” because “[t]he SEC presented undisputed evidence that Defendant made misrepresentations and omissions in securities materials, e.g. PPMs, to defraud the investors” and “[t]he PPMs were used to sell securities”); *see also S.E.C. v. Morriss*, No. 4:12-CV-80 CEJ, 2012 WL 6822346, at *9 (E.D. Mo. Sept. 21, 2012) (in denying motion to dismiss, holding that “in connection with” requirement adequately alleged because “[t]he SEC alleges that defendants made misstatements or omissions in the operating documents and offering agreements for the securities which were made available to investors,” and “[t]he misstatements thus were made in connection with the sale of securities”).

Quiros “initiated” Phases III through VII, which were “financed through project-specific securities offerings,” Am. Compl. ¶ 75, and specifically “approved” the misleading “sections of the PPMs . . . detailing how Jay Peak would spend investor funds for the respective EB-5 Project,” *id.* ¶ 82, such that Quiros “w[as] responsible for all representations to investors.” *Id.* ¶ 8. By alleging that Quiros used the offerings to sell securities, generate investors funds, and perpetuate his fraudulent scheme, the State’s Amended Complaint adequately pleads facts satisfying the “in connection with” requirement.¹⁷ *See Morriss*, 2012 WL 6822346, at *10 (“If the SEC can establish, as it alleges, that [the defendant] made material misrepresentations to investors in order to obtain additional investor funds for improper purposes, it will have satisfied

¹⁷ Liability also extends to Phase II because Quiros assumed control over the PPM when he took functional control of Jay Peak in January 2008, *id.* ¶ 57, but did nothing to correct its misleading content while it was being used to sell Phase II securities through January 2011. *Id.* ¶ 55; *see also id.* ¶¶ 73, 119.

the ‘in connection with’ requirement.”); *see also* *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 n.11 (2d Cir. 2011) (“[C]onduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in connection with the purchase and sale of securities.” (quoting *Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 330 (3d Cir. 1999))).

With regard to Quiros’ ‘fraudulent scheme’ and ‘deceptive acts’ liability under Sections 5501(1) and (3) of the VUSA, Quiros’ misappropriation and misuse of the Phases I through VII investor funds were also committed “in connection with” the purchase or sale, or the offer to purchase or sell securities. When securities fraud liability is premised upon a fraudulent scheme to misappropriate the proceeds of securities sales (as distinct from misrepresentations or omissions made to induce a securities sale), “[i]t is enough that the scheme to defraud and the sale of securities coincide.” *SEC v. Zandford*, 535 U.S. 813, 822 (2002). In *Zandford*, “the Supreme Court held that the [in connection with] requirement was satisfied where a broker who had investment authority over a client’s account sold the securities in the account and pocketed the sales proceeds.” *In re J.P. Jeanneret Assoc., Inc.*, 769 F. Supp. 2d 340, 361 (S.D.N.Y. 2011). “While the fraudulent conduct alleged [in *Zandford*]—misappropriation of the proceeds of securities sales—was not the direct result of a purchase or sale, the broker’s scheme to defraud ‘coincided’ sufficiently with the actual (and completely legitimate) sale of those securities to satisfy the ‘in connection with’ requirement.” *Id.* (quoting *Zanford*, 535 U.S. at 820). In *Zandford*, “[t]he securities sales and [broker defendant’s] practices were not independent events.” 535 U.S. at 820.

Likewise in this case, Quiros’ scheme to defraud EB-5 investors by misappropriating and misusing the proceeds of the Phases I through VII securities sales sufficiently “coincides” with these securities sales. These securities sales—even the Phase I offering which was not complete

before Quiros assumed functional control of Jay Peak in January 2008—were a necessary predicate to Quiros’ scheme because without these securities sales and their proceeds, the scheme would have lacked a purpose and a means to sustain itself. *See* Am. Compl. ¶ 6 (alleging that EB-5 Projects and their associated securities offerings were “an integral part of Defendants’ scheme to defraud investors” because the securities became “funding sources to cover the shortfalls of other projects or resort operating costs, and as sources of funds to misuse for personal benefit”).

Courts have held that when a fraudulent scheme is dependent upon securities sales to exist and function, then the scheme is employed “in connection with” these securities sales. *See Pirate Investor*, 580 F.3d at 245 (in evaluating whether the “in connection with” is satisfied, “[w]e first consider whether a securities transaction was necessary to the completion of the fraudulent scheme”); *Romano v. Kazacos*, 609 F.3d 512, 521-22 & n.5 (2d Cir. 2010) (holding that “[t]he ‘coincide’ requirement is broad in scope” and is satisfied “where plaintiff’s claims ‘necessarily allege,’ ‘necessarily involve,’ or ‘rest on’ the purchase or sale of securities” or “where plaintiff’s allegations ‘depend’ upon transactions in securities” quotations citations omitted)).¹⁸ Thus, Quiros’ misappropriation and misuse of Phase I through VII investor funds in violation of Section 5501(1) and (3) of the VUSA is “in connection with” securities transactions.¹⁹

¹⁸ *See also In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 472 (D.N.J. 2005) (“[T]he only way for this scheme to succeed was for investors to purchase securities (shares of the defendant mutual funds)”; *Alley v. Miramon*, 614 F.2d 1372, 1378 n. 11 (5th Cir. 1980) (“[T]he ‘in connection with’ test . . . is satisfied when the proscribed conduct and the sale are part of the same fraudulent scheme.”).

¹⁹ Quiros’ argument that the VUSA’s “in connection with” requirement is somehow defined by or limited to state common law fraud (Motion at 10-11) is incorrect. The VUSA states that “[f]raud,’ ‘deceit,’ and ‘defraud’ are not limited to common law deceit.” 9 V.S.A. § 5102(9). These are the operative terms in the State’s VUSA claims under Section 5501 in this case. *See* 9 V.S.A. § 5501(1) (“defraud”) and (3) (“fraud” and “deceit”). Further, his assertion that the State has to allege that Quiros “had no present intention of using the partnership funds as specified at the time the PPMs were issued” (Motion at 11) is misguided. Section 5501 does not require proof of intent or culpability for liability (*see supra* Section II(a) above), and in any event, even if required, Quiros’ intent to misuse

III. THE CONSUMER PROTECTION ACT APPLIES TO SECURITIES

Quiros argues that the VCPA claims should be dismissed because it does not apply to securities. However, Quiros' argument ignores the plain language of the VCPA and rests on analysis of dissimilar consumer protection statutes from jurisdictions outside Vermont. For the reasons stated below, it is clear that the Vermont Legislature intended for the VCPA to apply to securities and the State has therefore stated proper claims under the VCPA.

a. The VCPA is Remedial in Nature and Read Broadly

The VCPA prohibits "unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). Pursuant to 9 V.S.A. § 2458(a), the Attorney General may bring an action against "any person . . . using or . . . about to use any method, act, or practice declared by section 2453 of this title to be unlawful." The Act is remedial in nature and "the Legislature clearly intended the [VCPA] to have as broad a reach as possible in order to best protect consumers against unfair trade practices." *Elkins v. Microsoft Corp.*, 174 Vt. 328, 331, 817 A.2d 9, 13 (2002); *accord State v. Custom Pools*, 150 Vt. 533, 536, 556 A.2d 72, 74 (1988) ("The Act is clearly remedial in nature. Therefore, we must construe the statute liberally so as to furnish all the remedy and accomplish all the purposes intended.").

b. The Vermont Legislature Intended for the VCPA to Apply to Securities Based on the Plain Language of the Statute

In interpreting a Vermont statute, courts look to the plain language of the statute and absent indicia to the contrary, are bound to follow it. *E.g.*, *Dep't of Taxes v. Murphy*, 2005 VT 84, ¶ 5, 178 Vt. 269, 883 A.2d 779 ("When interpreting a statute, [the Court's] overriding goal is

the investor funds at the time of each Phase II through VII offering is easily inferred from his pattern of commingling, misappropriating, and misusing investor funds raised from each of the previous Phases. Moreover, as explained above on pages 17-20, by misappropriating, misusing and commingling the Phases I through VII investor funds to personally enrich himself while subsequently backfilling the funding gaps that this created, Quiros' conduct itself was inherently deceptive and conveyed an additional false appearance of fact to investors to sustain his fraudulent scheme, independent of the PPMs' misrepresentations and omissions.

to effectuate the Legislature's intent. In reaching this goal, [the Court will] first look at the statute's plain language. If the statute's plain language resolves the conflict without doing violence to the legislative scheme [the Court is] bound to follow it." (quotation omitted)); *Bisson v. Ward*, 160 Vt. 343, 348, 628 A.2d 1256, 1260 (1993) (explaining that in construing the VCPA, the Court's "primary objective . . . is to effectuate the intent of the Legislature" and therefore the Court will "presume the Legislature intended the plain meaning of the statutory language").

The plain language of the VCPA is exceedingly clear—by its express terms, the VCPA applies to securities.²⁰ The VCPA prohibits "unfair or deceptive acts or practices *in commerce*." 9 V.S.A. § 2453(a) (emphasis added). For conduct to occur "in commerce," it must "occur in the consumer marketplace" and "have a potential harmful effect on the consuming public." *Foti Fuels, Inc. v. Kurrle Corp.*, 2013 VT 111, ¶ 21, 195 Vt. 524, 90 A.3d 885. A "consumer" is a person who purchases or contracts for "goods or services" not for resale but for personal or household benefit. 9 V.S.A. § 2451a(a). "'Goods' or 'services'" is defined in the VCPA to "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." 9 V.S.A. § 2451a(b) (emphasis added). Thus, the Attorney General's authority to bring an action under 9 V.S.A. § 2458(a), to enforce against violations of 9 V.S.A. § 2453, extends to the sale or solicitation of "securities." 9 V.S.A. § 2451a(b).²¹

²⁰ The limited partnership interests at issue in this case are securities. See Am. Compl. ¶ 37 (citing 9 V.S.A. § 5102(28)(E)). Quiros has not contested this fact.

²¹ The VCPA also provides a private right of action for "[a]ny consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453." 9 V.S.A. § 2461(b). A private right of action would therefore include an action by a consumer who contracts for *securities*. Furthermore, the Vermont Supreme Court has stated that the public right of action is at least as broad as the private right. See *Knutsen v. Dion*, 2013 VT 106, ¶ 19, 195 Vt. 512, 90 A.3d 866 ("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.").

This straightforward analysis is performed routinely by Vermont courts. For example, Vermont courts have held, based on the plain language of “goods or services” in 9 V.S.A. § 2451a(b), that the VCPA applies to residential rental agreements, horses, and herbicides. *See Bisson*, 160 Vt. at 349 (plain meaning of “real estate” as part of “goods or services” in 9 V.S.A. § 2451a(b) indicates that the VCPA applies to real estate leases, including residential rental agreements); *Fancher v. Benson*, 154 Vt. 583, 586-87, 580 A.2d 51, 53 (1990) (horse is a “good” within VCPA definition of “goods or services”); *Mainline Tractor & Equip. Co. v. Nutrite Corp.*, 937 F. Supp. 1095, 1107 (D. Vt. 1996) (herbicides are consumer goods).

The cases cited by Quiros to support his claim that the VCPA does not apply to securities are inapposite. Not a single case cited by Quiros involves an unfair or deceptive acts or practices (“UDAP”) statute²² that, like the VCPA, expressly defines “goods or services” (or an equivalent term) to include “securities” or the like. For example, the first case cited by Quiros in his extended string cite (Motion at 15) held that California’s UDAP statute, which does not reference securities, does not extend to securities because “there is no such legislative history suggesting that the California legislature anticipated the expansive reading.” *Shearson Lehman Bros. Inc. v. Greenberg*, No. 93-55535, 1995 WL 392028, 60 F.3d 834, at *3 (9th Cir. July 3, 1995). The Ninth Circuit, however, further explained that jurisdictions finding their UDAP statutes to apply to securities “are distinguishable in that the legislative histories of several acts clearly demonstrate that the states intended their Baby FTC Acts to be applied [to securities].” *Id.* (citing *Corbin v. Pickrell*, 667 P.2d 1304 (Ariz. 1983) and *Denison v. Kelly* 759 F. Supp. 199 (M.D. Pa. 1991)).

²² Consumer protection statutes in other states go by various names (e.g. “Baby FTC Act”), but for simplicity’s sake, the State will refer to all state consumer protection statutes (excluding the VCPA) as “UDAP” statutes.

In another case cited by Quiros (Motion at 14), a federal court found that a legislative “proposal to add securities to the definition of merchandise [in the New Jersey UDAP statute] and its subsequent deletion suggests that the legislature affirmatively decided to exclude the sale of securities from the scope of the Act.” *In re Cantanella and E.F. Hutton & Co., Inc. Sec. Litig.*, 583 F. Supp. 1388, 1443 (E.D. Pa. 1984). In yet another case cited by Quiros (Motion at 14), the Fourth Circuit’s decision was based on the fact that North Carolina’s UDAP statute does not mention securities. *See Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 165 (4th Cir. 1985) (“Because the North Carolina Unfair Trade Practices Act does not refer to securities transactions and the North Carolina courts have not addressed this issue, we must ascertain what the North Carolina Supreme Court would decide if confronted with this question.”).

Quiros also cites to *Cabot Corp. v. Baddour*, 477 N.E.2d 399 (Mass. 1985) (Motion at 14), even though the case was superseded by statute. At the time the Massachusetts Supreme Court decided *Cabot Corp.*, the Massachusetts UDAP statute did not specifically mention securities. As a result, the statute “was construed as not applying to securities laws claims.” *Ansin v. River Oaks Furniture, Inc.*, 105 F.3d 745, 760 (1st Cir. 1997) (citing *Cabot Corp.*). In 1987, however, “the Massachusetts legislature amended the definitions section of the statute so that ‘trade’ and ‘commerce’ now include ‘the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of . . . any security.’” *Id.* (emphasis added) (quoting Mass. Gen. Laws ch. 93A, § 1(b) (1987)). Since that time, Massachusetts courts have held that the state’s UDAP statute applies to securities. *E.g., Reisman v. KPMG Peat Marwick LLP*, 965 F. Supp. 165, 174 (D. Mass. 1997).

Furthermore, courts in other states have held that their UDAP statutes apply to securities based on statutory language less robust than the language contained in the VCPA. For example,

a federal court in Pennsylvania held that Pennsylvania's UDAP statute applies to securities where "[t]rade and commerce are defined, in part, as the sale or distribution of any services," and "an unfair method of competition" is defined as "any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding." *Denison*, 759 F. Supp. at 202 (quotations omitted). After analyzing each of "the typical reasons for refusing to allow a securities claim under state consumer protection laws," the Court "look[ed] first to the language of the statute rather than engage in a somewhat loose analysis, independent of the statutory language" and determined that the relevant sections of the Pennsylvania UDAP law "plainly and unambiguously cover the alleged conduct of the defendants in connection with the security transactions at issue." *Id.* at 203.

Additionally, a federal court in Illinois held that Illinois' UDAP statute applies to securities because the statute defines "merchandise" to include "intangibles." *Onesti v. Thomson McKinnon Sec., Inc.*, 619 F. Supp. 1262, 1267 (N.D. Ill. 1985). The Court determined that the "assertion that securities are not merchandise is unpersuasive in light of" an appellate court decision "defining securities as 'intangible' goods." *Id.* Minnesota and Arizona courts have also held that their respective UDAP statutes apply to securities. *See Blue Cross & Blue Shield of Minn. v. Wells Fargo Bank, N.A.*, No. CIV 11-25291, 2012 WL 1343147, at *5-7 (D. Minn. Apr. 18, 2012) (declining to dismiss UDAP claims relating to securities fraud because investors were consumers and securities were "merchandise" within the definition of Minnesota's statute); *Pickrell*, 667 P.2d at 1307 (holding that securities violations may serve as the basis for UDAP claims where the legislature provided in the UDAP statute that its provisions "are in addition to all other causes of action, remedies and penalties available" (quotation omitted)).²³

²³ Quiros misconstrues the holding in *Pickrell* to mean that a savings clause was necessary for the Arizona UDAP statute to apply to securities. In fact, the savings clause was one of several factors considered by the Arizona

Quiros' reliance on the interpretative guideline provision in 9 V.S.A. § 2453(b) to support his claim that the VCPA does not apply to securities is also misplaced. That section of the VCPA provides that "it is the intent of the Legislature that in construing" the meaning of unfair or deceptive acts or practices in commerce, "the courts of this State will be *guided* by the construction of *similar terms* contained in Section 5(a)(1) of the Federal Trade Commission Act as from time to time amended by the Federal Trade Commission and the courts of the United States." 9 V.S.A. § 2453(b) (emphasis added). Quiros incorrectly reads this section as requiring Vermont courts to be strictly bound by Section 5(a)(1) of the FTC Act. Specifically, Quiros argues that because courts have held that the FTC Act does not apply to securities, this Court must reach the same conclusion with respect to the VCPA. Motion at 15 ("[T]he VCPA must be interpreted in the same manner."). Quiros' argument fails, however, because unlike the VCPA, the FTC Act does not contain a term similar to 9 V.S.A. § 2451a(b) defining "goods" or "services" to include securities.

Thus, under the plain language of the VCPA, the Act applies to securities—and nothing in the Act, 9 V.S.A. § 2453(b) included, overrides the statute's plain language.

c. The VUSA Does Not Preclude Claims Brought Under the VCPA

Quiros argues that the VUSA provides the sole statutory remedy for claims of fraud and deception involving securities, and that the Vermont Legislature did not intend to subject individuals to potentially overlapping enforcement by two different statutes and state officials. Motion at 16-17. Once again, Quiros ignores the express plain language of the statute—this time the VUSA, which contains a savings clause that directly rebuts Quiros' contention. The VUSA

Supreme Court; it was not a necessary precondition to holding that the statute applies to securities. *Id.* at 1307-08. Nonetheless, as discussed *infra*, the VUSA has an express savings clause of other remedies, and as described above, the plain language of the VCPA extends the Act to "securities."

savings clause specifically states that “[t]he rights and remedies provided by this chapter *are in addition to any other rights or remedies that may exist.*” 9 V.S.A. § 5509(m) (emphasis added).

The savings clause reflects the Legislature’s clear intent that the VUSA is not meant to be the exclusive remedy for wrongful conduct involving securities, but rather is in addition to other rights and remedies.

In construing nearly identical wording to 9 V.S.A. § 5509(m), based on the Uniform Securities Act, the Supreme Court of South Carolina found that “this provision indicates a clear intent on the part of the Legislature to provide that the civil remedies set forth in the [South Carolina Uniform Securities] Act are in addition to all other causes of action or remedies at law.” *Bradley v. Hullander*, 222 S.E.2d 283, 287 (S.C. 1976) (holding that a claim brought under South Carolina’s securities act could be joined with a common law fraud claim); *see also Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, Inc.*, 463 S.E.2d 600, 604 (S.C. 1995) (explaining that “other remedies at law and equity which are not predicated on the Act—such as common law fraud, for example—remain available, and they may be joined with a Securities Act cause of action”); *see also Denison*, 759 F. Supp. at 204 (“It is . . . significant that . . . the Securities Act nowhere indicates that it is intended as the exclusive statutory remedy for securities violations. In fact, . . . it specifically preserves other remedies.”); *id.* at 204-05 (holding that “there is no irreconcilable conflict,” that “both laws can operate at the same time,” that the argument that simultaneous causes of action “would create overlapping areas of authority . . . is speculative,” and that a narrow construction of the UDAP statute would “evade the plain meaning of the [statute] to guard against this potential problem”).

When the Vermont Legislature enacted the VUSA in 2005, which included 9 V.S.A. § 5509(m), the section of the VCPA defining “[g]oods’ or ‘services’” to include “securities” had

been in effect for over 30 years. *See* 2005 Vt. Acts & Resolves No. 11 (enacting the VUSA); 1973 Vt. Acts & Resolves No. 221 (adding the definition of “[g]oods’ or ‘services’” to the VCPA). Quiros nonetheless asks this Court to find that the Vermont Legislature, despite an explicit statement that the rights and remedies provided by the VUSA did not preclude other rights or remedies that may exist, actually intended that the rights and remedies provided by the VUSA bar rights or remedies that may exist under the VCPA. Such a reading directly contravenes the plain language of 9 V.S.A. § 5509(m) and is not supported by any legislative history.

Further, the Vermont Supreme Court has upheld application of the VCPA, alongside other statutes, to govern substantially similar underlying conduct—precisely what Quiros claims the Legislature did not intend with the VCPA. *See, e.g., State v. Therrien*, 161 Vt. 26, 27, 633 A.2d 272, 273 (1993) (allowing State to sue an individual, based on the substantially similar underlying conduct, for violations of Act 250 land use permit and for unfair or deceptive acts or practices in violation of VCPA); *Bisson*, 160 Vt. at 349-50 (permitting claims under both the Residential Rental Agreement Act and VCPA arising from violations of the state building and health codes).

Finally, Quiros argues that the VUSA precludes claims under the VCPA because the private remedy section of the VCPA provides for treble damages. In support of his argument, Quiros quotes from a Fifth Circuit case (Motion at 16), but omits a key part of what the Court said. The quote cited by Quiros reads in its entirety: “Had the Louisiana legislature intended the availability of treble damages in securities fraud cases, it would *either* have provided for such a remedy in its Blue Sky Law, *or somehow indicated that the [UDAP statute] was broad enough to cover securities violations.*” *Stephenson v. Paine Webber Jackson & Curtis, Inc.*, 839 F.2d

1095, 1101 (5th Cir. 1988) (emphasis added to the part of the quote which was omitted by Quiros). In the case of the VUSA and the VCPA, the Vermont Legislature more than indicated—it explicitly stated—that the VCPA covers securities violations.

Therefore, the State’s VCPA claims should be sustained.

IV. THE STATE’S CLAIMS RELATED TO PHASE I ARE TIMELY AND ANY STATUTE OF LIMITATIONS CHALLENGE MUST AWAIT FACT DEVELOPMENT

Quiros’ final argument that the State’s claims relating to the Phase I Limited Partnership (Counts 1 and 8) are time-barred is without merit because Quiros ignores the well-established discovery rule in Vermont, which applies to the statute of limitations for the State’s claims under both the VUSA and VCPA. Under the discovery rule, the determination of timeliness as to the Phase I Counts depends on when the State first discovered or should have discovered its claims—a factual determination that cannot be made on the motion to dismiss. Therefore, Quiros’ motion to dismiss must be denied.

The State agrees with Quiros that 12 V.S.A. § 511 provides the applicable statute of limitations for both the VUSA and VCPA claims. *See* Motion at 17-18.²⁴ What Quiros overlooks is that the discovery rule applies to Section 511 and defines when the cause of action accrues. In *Kaplan v. Morgan Stanley & Co., Inc.*, 2009 VT 78, 186 Vt. 605, 987 A.2d 258, cited by Quiros (Motion at 17), the Vermont Supreme Court found that 12 V.S.A. § 511 provides the statute of limitations for a VCPA claim and specifically held that the discovery rule applies:

A cause of action is generally said to accrue upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. Thus, the statute of limitations begins to run when the plaintiff has

²⁴ Quiros’ refers to “9 V.S.A. §5516(j)(2)” [sic] as a possible statute of limitations provision for the VUSA claims, but also correctly cites to the six year limitations period provided by 12 V.S.A. § 511. Motion at 18 n.9. By its terms, 9 V.S.A. § 5509(j)(2) provides the statute of limitations for private rights of action in securities, not public actions. *See* 9 V.S.A. § 5509(j)(2).

notice of information that would put a reasonable person on inquiry, and the plaintiff is ultimately chargeable with notice of all the facts that could have been obtained by the exercise of reasonable diligence in prosecuting the inquiry.

Id. at ¶ 7 (quotation and alteration marks omitted); *see also Galfetti v. Berg, Carmolli & Kent Real Estate Corp.*, 171 Vt. 523, 524, 756 A.2d 1229, 1231 (2000) (mem.) (applying 12 V.S.A. § 511 and discovery rule to consumer fraud claim). The same analysis applies to the VUSA claims. *See Univ. of Vermont v. W.R. Grace & Co.*, 152 Vt. 287, 290, 565 A.2d 1354, 1357 (1989) (“We . . . hold specifically that the discovery rule should be read into § 511.”); *see also Estate of Alden v. Dee*, 2011 VT 64, ¶ 20, 190 Vt. 401, 35 A.3d 950 (applying discovery rule to claim subject to 12 V.S.A. § 511).²⁵

“Determination of the date of accrual under the discovery rule is a factual issue that generally should be decided by the [trier of fact].” *Pike v. Chuck’s Willoughby Pub, Inc.*, 2006 VT 54, ¶ 18, 180 Vt. 25, 904 A.2d 1133; *see also Lillicrap v. Martin*, 156 Vt. 165, 172, 591 A.2d 41, 44-45 (1989) (issue of when injury was discovered or reasonably should have been discovered is for trier of fact). Such is the case here. Quiros’ sole relevant assertion underlying his motion is that “the Phase I L.P. securities transactions were consummated outside of the limitations period.” Motion at 18. That fact does not determine when the State discovered or should have discovered its VCPA or VUSA claims relating to Phase I. The discovery rule inquiry (and thus any limitations issue) cannot be decided on a motion to dismiss, but only after factual development in the case.²⁶

²⁵ Although not cited by Quiros, it is worth noting that *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), does not provide the operative law for Vermont’s statute of limitations under the VUSA. That case held, based on federal law, that the discovery rule does not apply to SEC enforcement actions for civil penalties. As noted above, however, the Vermont Supreme Court has been clear that the discovery rule applies to 12 V.S.A. § 511 and provides the “general principles governing accrual of actions under that section.” *Kaplan*, 2009 VT 78, at ¶ 7. In fact, the *Kaplan* Court directly relied upon its earlier decision in *Agency of Natural Res. v. Towns*, 168 Vt. 449, 724 A.2d 1022 (1998)—a case that involved a state administrative enforcement regime with civil penalties—for how the discovery rule works.

²⁶ The same is true of other fact-driven doctrines such as fraudulent concealment, which can affect the running of a statute of limitations. *See* 12 V.S.A. § 555. Such inquiry in the present case also awaits factual development.

The State's claims relating to Phase I are timely, but any testing of that proposition for must await factual development in the case. Quiros' motion to dismiss should therefore be denied.

CONCLUSION

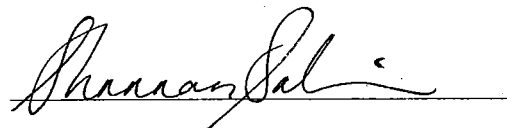
For these reasons, the State respectfully requests that this Court deny Quiros' motion to dismiss.

DATED at Montpelier, Vermont this 3rd day of August 2016.

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