STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO. 217-4-16 Wncv

STATE OF VERMONT,

THROUGH MICHAEL S. PIECIAK, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VERMONT DEPARTMENT OF FINANCIAL REGULATION,

and

ATTORNEY GENERAL WILLIAM H. SORRELL,

Plaintiffs,

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 SUR-REPLY TO DEFENDANT ARIEL QUIROS' REPLY IN SUPPORT OF MOTION TO DISMISS

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The State of Vermont files this sur-reply to address arguments raised for the first time by Defendant Ariel Quiros in his Reply in Support of Motion to Dismiss ("Reply"). The State responds as follows:

I. The State has adequately pled scheme liability "in connection with" securities.

After engaging, as alleged, in a multi-year fraudulent scheme, Defendant Ariel Quiros attempts to evade liability by claiming that the whole does not equal the sum of its parts. According to Quiros, there is *no* connection between the commitments made in private placement memoranda ("PPMs"), the investments made in reliance of those PPMs, and Quiros' misuse of those same investment funds. Quiros claims that the issuance of a security is a discrete action, disconnected from any later actions that occur. Not so. Under the Vermont Uniform Securities Act ("VUSA"), the "in connection with" requirement of fraudulent scheme liability means only that the scheme is connected to—"not independent" from—the securities offering. *SEC v. Zandford*, 535 U.S. 813, 820 (2002); *see also id.* at 819 (holding that "in connection with" must be construed "flexibly to effectuate its remedial purposes" (quotation omitted)).

Here, Quiros used the securities offerings as part of his fraudulent scheme to raise funds that he commingled, misused, and misappropriated for his own benefit. The misrepresentations and omissions were part of the ongoing scheme, which included his taking of the Phase I and II investor funds and continued with each subsequent project offering. This suffices to show that the scheme was in connection with the securities offerings.

Under Quiros' theory, seemingly no Ponzi scheme could ever violate securities law because the misuse of investor funds would never be in connection with the initial raising of those funds. That is not the correct analysis.

a. The specificity pleading requirements of Rule 9(b) are met here.

The Vermont Supreme Court has set an "exceedingly low threshold" for surviving a motion to dismiss. *Prive v. Vermont Asbestos Grp.*, 2010 VT 2, ¶ 14, 187 Vt. 280, 992 A.2d 1035 (quotation omitted). Quiros attempts to use Rule 9(b) to flip that standard on its head, but he overstates what Rule 9(b) requires regarding specificity. While Quiros cites to two federal district court decisions (Reply at 4), he fails to mention the Vermont Supreme Court's holding that Rule 9(b) "requires only that all of the elements be specifically pled, not that fraud be alleged by name." *Cheever v. Albro*, 138 Vt. 566, 570, 421 A.2d 1287, 1289 (1980).

The State's Amended Complaint undoubtedly meets that test. Quiros in fact concedes that "[t]he Complaint does broadly allege that Defendants have violated § 5501, and each VUSA Count dutifully recites the language of that provision, including its 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. Reply at 3-4 (alteration in original) (quoting Am. Compl. Count I, ¶ 3). And the Amended Complaint specifically details the ways in which Quiros engaged in a fraudulent scheme. In other words, "all of the elements" have been "specifically pled." *Cheever*, 138 Vt. at 570, 421 A.2d at 1289. Rule 9(b) requires no more.

After all, a "primary objective[] of Rule 9(b) is to provide the defendant with sufficient information to enable him or her to effectively prepare a response." *Silva v. Stevens*, 156 Vt. 94, 106, 589 A.2d 852, 859 (1991). The State's Amended Complaint does just that. In fact, although the *Cheever* Court held that fraud need not be "alleged by name," 138 Vt. at 570, 421 A.2d at 1289, the State repeatedly uses the phrases "fraud," "fraudulent," "deceptive," "scheme," and the like throughout the Amended Complaint. Am. Compl. ¶¶ 1-3, 6, 8-9, 27, 86-87, 94, 102. The Amended Complaint also lays out, in detail, the dates and amounts of investor funds that

Quiros misappropriated and how this fraudulent conduct benefitted Quiros. As just one example, the Amended Complaint notes that "[a]t most, Quiros and Stenger . . . were entitled to take approximately $6.3 million of investor funds" for supervision and land purchases related to Phase IV, but in fact "took at least $9 million of investor funds," and then lists the exact amounts and days that those transfers took place. Am. Compl. ¶ 125; *see also, e.g.*, *id.* ¶¶ 68-71, 74, 131, 137, 153-55, 157. This is "sufficient to put [Quiros] on notice" of the State's claims. *Cheever*, 138 Vt. at 570, 421 A.2d at 1289.

Although Quiros argues that the State has failed to "specifically allege the nature and function" of the fraudulent scheme (Reply at 4), that is: (1) not required under Vermont law (as explained above); and (2) incorrect. The Amended Complaint explains precisely what fraudulent actions Quiros took, and repeatedly notes that the function of all of these actions was to financially benefit Quiros. For instance, millions of dollars of investor money was:

- used "for personal benefit" (Am. Compl. ¶¶ 3, 6);
- used to "back a personal line of credit" and was used "to pay his personal income taxes" (*id.* ¶ 4);
- misappropriated by Quiros "for his personal enrichment" (*id.* ¶ 7);
- used "to purchase Jay Peak Resort for his own personal benefit" (*id.* ¶ 70);
- used "for the personal benefit of Quiros" without disclosure of that fact to investors (*id.* ¶ 104(c));
- used "to assist in the purchase of a condominium at the Setai Fifth Avenue Hotel and Residences located in New York City" (*id.* ¶¶ 125, 131);
- used to back Quiros' "personal line of credit," which was then used "to pay Quiros' personal income taxes" (*id.* ¶ 153");

- used to buy a New York City luxury condominium at Trump Place New York "for his personal benefit" (*id.* ¶ 154);
- used "to purchase the Burke Mountain Resort for his personal benefit," with Quiros also "improperly enrich[ing] himself at the expense of investors by selling a small portion of the Burke Resort land to investors at a significant per-acre markup" (*id.* ¶ 155);
- sent in amounts that "far exceed[ed] the value of payments made to contracted suppliers" to accounts "retained directly by Quiros" (*id.* ¶ 156);
- sent to a company directly controlled by Quiros (Jay Construction Management or "JCM") on the basis of "false . . . invoices" that "Quiros generated" (*id.* ¶ 158); and
- taken by Quiros as "fees far in excess of the maximum amount permitted" (*id.* ¶ 159).

The Amended Complaint contains many other specific allegations, explaining in detail the fraudulent scheme that occurred here. Quiros is not aided by his citation to *United States v. Finnerty*, 533 F.3d 143 (2d Cir. 2008). *See* Reply at 4. In that case, "[t]he government ha[d] identified *no way* in which [the defendant] communicated anything to his customers, let alone anything false." *Finnerty*, 533 F.3d at 148-49 (emphasis added). Here, by contrast, the State has specifically alleged that Defendants: "solicited . . . investments from investors, and claimed that their funds would finance and build certain investment projects"; provided "limited partnership interests (the 'Securities') offered in seven private placement memoranda ('PPMs'), one for each of the seven EB-5 Projects"; and engaged in additional "marketing efforts." Am. Compl. ¶ 2. The State has further alleged that "in recent years, Quiros has attended meetings with investors and answered their questions." *Id.* ¶ 85. The PPMs and other marketing efforts and meetings with investors were direct—and fraudulent—communications with investors.

At this stage of the proceedings, where the State has not yet had an opportunity to engage in discovery and where Defendants have concealed fraudulent activity, the Amended Complaint is more than adequate in its level of specificity. *See Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998) ("[T]he particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim, and that is most likely to be the case where, as here, the plaintiff alleges a fraud against one or more third parties.").

b. Quiros' actions went beyond misrepresentations and omissions.

Quiros unconvincingly attempts to defeat scheme liability by claiming that the State has alleged only misrepresentations and omissions. Quiros claims that this case is like *SEC v. Kelly*, 817 F. Supp. 2d 340 (S.D.N.Y. 2011), where the court found no fraudulent scheme (Reply at 8-9), but that analogy does not hold. *Kelly* involved transactions that were "deceptive *only* because of [the defendant's] subsequent public misrepresentations." 817 F. Supp. 2d at 344 (emphasis added). The conduct "*became* deceptive only through [the defendant's] misstatements in its public filings." *Id.* (emphasis in original). Here, by contrast, Quiros' misuses of investor funds—for instance, taking fees that far exceeded what was allowed, and using funds for personal purchases like luxury condominiums—were deceptive the moment they occurred because, among other things, he was not authorized to use the funds in those ways.

And there is no doubt that the creation of a shell corporation (JCM), and the generation of false invoices from that corporation, were fraudulent, deceptive acts the moment they occurred. The use of "sham transactions" is an "inherent[ly]" deceptive scheme and constitutes "deceptive conduct distinct from . . . misstatements and omissions." *SEC v. Farmer*, No. 4:14-cv-2345, 2015 WL 5838867, at *15 (S.D. Tex. Oct. 7, 2015); *see also, e.g., In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 161 (S.D.N.Y. 2012) (holding that scheme liability applied

because the "creation of" a company to facilitate a scheme, and the "funneling of [money] away from" investor funds "were deceptive acts committed in addition to any misleading statements and omissions").

Quiros entirely fails to distinguish directly applicable cases cited by the State, like *SEC v. China N.E. Petroleum Holdings, Ltd.*, 27 F. Supp. 3d 379 (S.D.N.Y. 2014). *See* Reply at 7-8. According to Quiros, *China N.E.* applied scheme liability only because the case involved "misrepresentations and omissions." Reply at 8. While it is true that *China N.E.* involved misrepresentations and omissions—as this case does as well—the holding in *China N.E.* was that scheme liability applied because the SEC "pled the existence of a *larger scheme*, one that went beyond mere misrepresentations to investors, whereby *defendants enriched themselves . . . at shareholders' expense*." 27 F. Supp. 3d at 392 (emphasis added). That is precisely the case here. The State has pled that the PPMs made material misrepresentations and omissions, and that Quiros took numerous actions "beyond mere misrepresentations to investors" that misused investor funds to enrich himself at shareholders' expense. *See, e.g.*, Am. Compl. ¶¶ 4, 68-71, 74, 86, 108, 125, 131, 137, 153-55, 157, 158, 159. Scheme liability attaches because these later "deceptive acts . . . were distinct from [the] alleged misrepresentations to the investors." *Cotter v. Gwyn*, No. 15-4823, 2016 WL 4479510, at *8 (E.D. La. Aug. 25, 2016).

c. Quiros' actions create scheme liability "in connection with" securities.

While Quiros attempts to divide up his fraudulent scheme into discrete, supposedly disconnected actions, he ignores the fact that he commingled and misused funds in an overarching fraudulent scheme *from all seven of the projects*. Am. Compl. ¶¶ 1, 3, 5-7, 87, 94, 108, 111, 115, 121, 126, 132, 138, 139, 144, 156. The "in connection with" requirement provides a "flexible approach" that imposes liability without "temporal limitations" when there is

"a string of events that were all intertwined." *Romano v. Kazacos*, 609 F.3d 512, 524 (2d Cir. 2010) (internal quotation marks omitted)[1]; *see also, e.g.*, *Davis v. Davis*, 526 F.2d 1286, 1290 (5th Cir. 1976) ("Even though the alleged scheme did not arise until after the contracts to sell had been entered, we agree with the District Court that it is still 'in connection with the sale.'"). Thus, even the Phase I securities sales are "in connection with" the fraudulent scheme, as are, certainly, the later projects for which PPMs were issued during the same exact time that Quiros was executing his scheme by taking and misusing investor funds.

Because the scheme involved the misuse of funds from all seven projects, it is also irrelevant that, according to Quiros, "five out of seven [Jay Peak projects] were constructed to completion." Reply at 7. First, this concedes that the last two projects were not completed—in fact, as the State has alleged, the Stateside project has a more than $25 million budget shortfall (Am. Compl. ¶ 143), and the AnC Bio project "a hole of at least $43 million" (*id.* ¶ 160). Second, the State disputes whether the first five projects were properly "completed." For instance, for Phases IV and V, the Amended Complaint alleges that the Defendants did not make the sponsor contributions to the projects as promised in the PPMs. Am. Comp. ¶¶ 5, 7, 129, 135. And all of the projects were paid for, in part, with improperly commingled and misused funds. Third, even as to the first five projects, every dollar that was misused (for instance, by purchasing luxury condominiums for Quiros) directly decreased the value of each investor's share of the project. *See, e.g.*, *China N.E.*, 27 F. Supp. 3d at 391 (holding that "the fact that the Company continued to make legitimate expenditures at the same time" it made illegitimate

[1] Although *Romano* involved a claim under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), the court noted that SLUSA follows the Securities Exchange Act cases in interpreting the phrase "in connection with": "the Supreme Court . . . [has] looked to its prior interpretations of [Securities Exchange Act] § 10(b) and Rule 10b-5 because the 'in connection with' language is the same as in SLUSA." *Id.* at 521; *see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78-89 (2006) (holding that the phrase "in connection with" must be interpreted the same way in both types of securities cases).

expenditures did not absolve it of liability). Fourth, because Quiros misused funds—from all seven projects—the investors from all seven projects are at risk of losing the immigration benefits that led them to make these investments in the first place. Am. Compl. ¶ 86; *see also* Anne Galloway, *State: Immigration Service 'Non-Responsive' to Defrauded Jay Peak Investors' Plight* (July 7, 2016), http://vtdigger.org/2016/07/07/state-immigration-service-non-responsive-to-defrauded-investors-plight/. In short, Quiros committed a fraudulent scheme that defrauded, and materially harmed, the investors from all seven development phases.

Quiros also ignores other allegations that demonstrate that his actions were not discrete and divisible, but rather were part of an overall fraudulent scheme. For instance, during the later phases of the Jay Peak area development, Quiros was simultaneously issuing new PPMs while he was misusing investor funds from earlier projects. He has admitted under oath to commingling funds from various projects (Am. Compl. ¶ 94), and the State has adequately and specifically pled the misuse of over $200 million of investor funds to backfill past projects and—perhaps more troublingly—to personally benefit Quiros, such as the millions of dollars he used to purchase two luxury condominiums in New York City.

The State has further alleged that Quiros set up a shell corporation, JCM, as a "construction manager," though it had "no employees in Vermont nor a physical Vermont address." Am. Compl. ¶ 108. Quiros was the "principal, sole shareholder, and owner," and "solely controlled JCM's bank accounts." *Id.* The State has further alleged that "[a]t all relevant times, JCM was the alter ego of Quiros," and was "a conduit for misuse of investor funds." *Id.*

Quiros also attempts to minimize what he concedes is a specific allegation of deceptive conduct: "the State's allegation Defendant Quiros generated false invoices for Jay Construction Management, Inc., in connection with the AnC Bio Limited Partnership." Reply at 6 n.2 (citing

Am. Compl. ¶ 158). According to Quiros, because this occurred during the last phase, it cannot "transform[] all of the preceding investments into a fraudulent scheme." *Id.* But Quiros ignores that the scheme was already underway many years earlier as, for instance, Quiros misused funds from the first two phases of the Jay Peak development, thus (as in a Ponzi scheme) creating a hole that could only be filled through later investments.

The State has met all of the pleading requirements for scheme liability.

II. The State has adequately pled control person liability.

Quiros also claims—incorrectly—that "control person" liability is unavailable in an enforcement suit. Reply at 11-12. Under Quiros' theory, Quiros cannot be held responsible for the actions of corporations that he directly controls, even sham corporations that exist for no purpose other than to further a fraudulent scheme. That is not the law in Vermont.

While Quiros cites a federal district court case from Minnesota for the theory that control person liability does not exist under common law (*id.*), that same case notes that traditional veil-piercing principles do apply if, for instance, a "corporation is so organized and controlled as to become the mere agent or instrumentality of another." *Berglund v. Cynosure, Inc.*, 502 F. Supp. 2d 949, 954 (D. Minn. 2007) (quotation omitted). More importantly, the Vermont Supreme Court has long held that individuals cannot manipulate the corporate form to evade liability. *Winey v. Cutler*, 165 Vt. 566, 567, 678 A.2d 1261, 1262 (1996). Whenever "the corporate form has been used to perpetuate a fraud"—as is the case here—individuals can be held directly liable for actions taken in the name of a corporation. *Amway, Inc. v. Brooks*, 173 Vt. 259, 262, 790 A.2d 438, 441 (2001). As the State noted in its Opposition to Quiros' Motion to Dismiss ("Opposition"), the VUSA 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). Further, the VUSA explicitly states that it applies to actions taken "directly *or indirectly*." 9 V.S.A. § 5501 (emphasis added). And under the VUSA, "'[f]raud,' 'deceit,' and 'defraud' are not limited to common law deceit." 9 V.S.A. § 5102(9).

The State adequately pled control person liability here. The State alleged that "Quiros exercises control over the seven limited partnership Defendants." Am. Compl. ¶ 10; *see also, e.g.*, Am. Comp. ¶¶ 27, 76, 89-91, 106, 108, 119, 121, 126, 132, 138, 144, 156. With regard to JCM, the State has further alleged that "[a]t all relevant times, JCM was the alter ego of Quiros." *Id.* ¶ 108. In addition, the State has alleged a number of specific representations, transactions, and other acts Quiros performed that demonstrated that "Quiros masterminded the longstanding fraudulent scheme." *Id.* ¶ 8.

III. Section 2453 of the Vermont Consumer Protection Act applies to securities.

a. The plain language of the VCPA extends the Act to securities.

Quiros' argument that the Vermont Consumer Protection Act's ("VCPA") definition of "goods or services" has no bearing on Attorney General enforcement actions, but rather functions merely as a "standing" requirement for private suits, is wrong. To the contrary, the term "goods or services" is used throughout the VCPA, in sections applicable to Attorney General actions brought under Section 2453 and private actions alike. *See, e.g.*, 9 V.S.A. § 2461c(a) ("No person, with the intent to harm competition, shall price goods or services in a manner that tends to create or maintain a monopoly or otherwise harms competition. A violation of this subsection is deemed to be an unfair method of competition in commerce and a violation of section 2453 of this title.").

Most importantly, as the State explained in its Opposition, the VCPA expressly includes securities within the public right of action by the Attorney General. The Vermont Supreme

Court has held that for conduct to occur "in commerce" under Section 2453 (a requirement for a public enforcement action), 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. Transactions that "occur in the consumer marketplace," the Court said, "involve products, *goods or services* purchased or sold for general consumption." *Id.* ¶ 25 (emphasis added). The VCPA specifically defines "'goods' or 'services'" to include "securities," and a "consumer" is someone who contracts for "goods or services." It is hardly an "unjustifiable jump in logic, unsupported by any statutory test" (Reply at 17) to find that the Legislature would intend the same definition for the same terms ("consumer" and "'goods' or 'services'") used directly or found by the Vermont Supreme Court in different parts of the same statute. This interpretation is consistent with the well-established rule of statutory construction "that a word used throughout an act or statutes in pari materia 'bear[s] the same meaning throughout [the act], unless it is obvious that another meaning was intended.'" *In re Burlington Airport Permit*, 2014 VT 72, ¶ 21, 197 Vt. 203, 103 A.3d 153 (alteration in original) (quoting *State v. Welch*, 135 Vt. 316, 321, 375 A.2d 351, 354 (1977)).[2]

Quiros is left with calling the statutory definition "an isolated reference" (Reply at 16). His argument that the Legislature somehow intended different and unspecified definitions of "consumer" and "'goods' or 'services'" between public and private rights of action is unavailing. Quiros' sole support for this argument is a Vermont Supreme Court case, predating a critical

[2] In *State v. Int'l Collection Serv., Inc.*, 156 Vt. 540, 594 A.2d 426 (1991), cited by Quiros, the Court held that the Attorney General is authorized under Section 2453 to bring an action on behalf of businesses even though businesses are not authorized to sue under Section 2461. 156 Vt. at 541-44. "Although certain parts of the Act apply only to consumers," the Court was "unable to conclude that the entire Act is so limited." *Id.* at 543. *International Collection Services*, decided before the Court in *Foti Fuels* interpreted the meaning of "in commerce," simply suggests that the requirement under Section 2453 that conduct "occur in the consumer marketplace" is broader than the "consumer" requirement under Section 2461. In no way does that holding suggest that "in commerce" is narrower than the private action "consumer" requirement, as Quiros implies.

statutory amendment, holding that the business of insurance, while "clearly within commerce," is not a good or service as defined by 9 V.S.A. § 2451a(b). *Wilder v. Aetna Life & Cas. Ins. Co.*, 140 Vt. 16, 18, 433 A.2d 309, 310 (1981). The Court explained that "the unfair or deceptive acts or practices portion of the act deal solely with consumer transactions in which there is an actual sale of goods or services involving a buyer, a seller, and the goods or services." *Id.* at 19, 433 A.2d at 310 (citations omitted) (internal quotation marks omitted). As Quiros noted in his Reply, the Vermont Legislature added "securities" to the definition of "'goods' or 'services'" "in a 1985 act." Reply at 19; *see* 1985 Vt. Acts & Resolves No. 34. This was four years *after* the *Wilder* decision, leaving no doubt that the VCPA covers securities transactions. Thus, the *Wilder* holding has no bearing on the issue of whether the current statute applies to securities.

b. Applying the VCPA to securities transactions is consistent with Section 2453(b).

Quiros has repeatedly misconstrued Section 2453(b) of the VCPA by omitting a key portion of the statute. In its entirety, Section 2453(b) provides that "[i]t is the intent of the Legislature that in construing" the meaning of unfair or deceptive acts of 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' argument about Section 2453(b) fails because, unlike the VCPA, the Federal Trade Commission Act ("FTC Act") does not contain a term similar to 9 V.S.A. § 2451a(b) defining "'goods' or 'services'" to include securities.[3]

[3] Quiros also misstates Massachusetts' consumer protection law, which is substantially similar to the VCPA. As the State explained in its Opposition, courts have held that Massachusetts' law applies to securities despite a provision similar to 9 V.S.A. § 2453(b) instructing courts to be guided by the FTC Act. *See* Mass. Gen. Laws. ch. 93A, § 1(b) (1987). Quiros argues that the cases holding that Massachusetts' law applies to securities are somehow distinguishable because "the [Massachusetts] state legislature expressly amended the prohibited acts statute to apply

IV. The VUSA's savings clause applies to enforcement actions.

Finally, Quiros erroneously contends that the savings clause contained in the VUSA is limited to private securities actions. Section 5509(m) of the VUSA 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). Thus, Section 5509(m) applies to every right and remedy provided by Chapter 150 of Title 9, which includes the rights and remedies afforded to the State in 9 V.S.A. § 5603, under which this action has been brought.

V. The discovery rule applies to the Phase I claims.

Quiros asserts for the first time in his Reply that the Court should divert from well-established Vermont law on the statute of limitations and refuse to apply the discovery rule to the State's Phase I securities claims. Quiros' new argument is incorrect and his reply makes important concessions.

First, Quiros' new assertion about the discovery rule is limited solely to the State's VUSA claims. Reply at 26-29. He does not make this argument or even mention the State's Consumer Protection claims. And with good reason. As noted in the State's Opposition, the Vermont Supreme Court has decided this issue directly. *See Kaplan v. Morgan Stanley & Co., Inc.*, 2009 VT 78, ¶ 7, 186 Vt. 605, 987 A.2d 258 (applying discovery rule to 12 V.S.A. § 511 for VCPA claim); *Galfelli v. Berg, Carmolli & Kent Real Estate Corp.*, 171 Vt. 523, 524, 756 A.2d 1229, 1231 (2000) (same). The Court should therefore deny the motion to dismiss on the VCPA claims.

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to securities." Reply at 21. However, that is precisely what the Vermont Legislature has done here, despite the fact that Quiros attempts to downplay the Legislature's addition of "securities" to the definition of "'goods' or 'services'" in 9 V.S.A. § 2451a(b) when Quiros asserts that "securities" was added "without fanfare"—as if that makes the statute less enforceable. Reply at 19.

Second, Quiros concedes that Section 511 is the applicable statute of limitations for the VUSA claims and that "the discovery rule generally applies . . . under 12 V.S.A. § 511." Reply at 27. Quiros' sole argument in his Reply is that Vermont Courts should ignore well-established Vermont law and adopt instead the federal statute of limitations decision in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). That argument is unpersuasive.

The Vermont Supreme Court has determined flatly that the discovery rule applies to Section 511. *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."); *Vermont Elec. Co-op., Inc. v. Mass. Muni. Wholesale Elec. Co.*, 165 Vt. 629, 630, 687 A.2d 1256, 1257 (1996) ("The discovery rule . . . applies to actions under 12 V.S.A. § 511."). *Gabelli*, which is not binding on Vermont courts, does not account for the Vermont Supreme Court's longstanding adoption and use of the discovery rule for Section 511 cases under state law.

Further, the Vermont Supreme Court affirmed use of the discovery rule in a civil enforcement context, interpreting the legislative discovery provision for civil environmental actions with "well settled" general principles for discovery of claims. *Agency of Natural Res. v. Towns*, 168 Vt. 449, 452, 724 A.2d 1022, 1024 (1998). The Court has never held that the discovery rule is inapplicable because the claims involved a public right of action as opposed to a private right of action. The Supreme Court's decision in *Towns* also belies the "practical impediments" (Reply at 28-29) that Quiros complains of in applying the discovery rule to a governmental agency in a civil enforcement action. The *Towns* Court never mentioned such a concern in its discussion of the general principles of discovery of claims.

To the contrary, our Supreme Court has made it clear that the discovery rule applies to Section 511, which Quiros concedes applies here.

CONCLUSION

For these reasons and those noted in the State's Opposition, the Court should deny the motion to dismiss.

DATED at Montpelier, Vermont this 16th day of September 2016.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

Scot L. Kline
Kyle H. Landis-Marinello
Shannon C. Salembier
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
scot.kline@vermont.gov
kyle.landis-marinello@vermont.gov
shannon.salembier@vermont.gov
(802) 828-3171