

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. _ - _ - _ Wnev

VERMONT JOURNALISM TRUST,)
)
Plaintiff,)
)
v.)
)
VERMONT AGENCY OF COMMERCE AND)
COMMUNITY DEVELOPMENT, and)
LINDSAY KURLLE, SECRETARY OF THE)
AGENCY OF COMMERCE AND)
COMMUNITY DEVELOPMENT,)
)
Defendants.)

COMPLAINT

The EB-5 Immigrant Investor Visa Program is a federal program designed to create jobs and stimulate foreign capital investment in low-income regions while providing a path to citizenship for foreign investors. The operators of Jay Peak, a ski resort in the Northeast Kingdom, purportedly planned to use this program to fuel major expansions and facility updates. While Jay Peak owner Ariel Quiros and CEO Bill Stenger promised to bring money and jobs to the Northeast Kingdom, they instead engaged in an eight-year Ponzi-like securities fraud.¹ The two also fraudulently peddled the AnC Bio program, which was supposed to be a state-of-the-art laboratory capable of stem cell research

¹ Complaint for Injunctive and Other Relief, *SEC v. Quiros*, No. 16-21301, at ¶¶ 1-2 (S.D. Fla. Apr. 12, 2016) (a true and correct copy is attached as Exhibit A).

and manufacturing artificial organs.² In reality, the two never even obtained FDA approval for this project.³ The result was a “fraudulent scheme” involving the misuse of more than \$200 million and Jay Peak’s eventual bankruptcy.⁴ Instead of creating jobs and economic development in one of Vermont’s poorest areas, Quiros funneled the program’s money into personal tax payments, margin loans, and a luxury condominium—all unrelated to the EB-5 program.⁵ While around 800 foreign investors each contributed \$500,000 and a \$50,000 administrative fee, Quiros and Stenger’s fraud endangered both their investments and path to citizenship.⁶ The U.S. Securities and Exchange Commission (“SEC”) ultimately filed an enforcement action in federal court against the two.⁷ A federal grand jury later indicted both Quiros and Stenger for their crimes.⁸ This summer Quiros pleaded guilty to conspiring in the scheme to defraud immigrant investors seeking green cards.⁹

The Vermont Agency of Commerce and Community Development (“ACCD”) operated the Vermont EB-5 Regional Center that was charged with overseeing the Jay Peak projects. Nonetheless, the State provided little oversight to the program and ignored many warning signs. In fact, the State had been warned on numerous occasions about Jay Peak’s dubious financial practices yet took no action until after the SEC stepped in.¹⁰ For example, the owner of the EB-5 consulting firm Rapid USA Visas raised concerns about Jay Peak’s finances to Commerce Secretary Lawrence Miller in 2012,

² *Id.* at ¶ 116.

³ *Id.* at ¶ 6.

⁴ *See id.* at ¶¶ 2-3.

⁵ *Id.* at ¶ 4.

⁶ *Id.* at ¶¶ 8, 53.

⁷ *See generally id.*

⁸ *United States v. Quiros*, No. 5:19-cr-76, Doc. No. 1 (D. Vt. May 21, 2019) (a true and correct copy is attached as Exhibit B).

⁹ Press Release, Department of Justice, *Quiros Pleads Guilty to Fraud Charges Related to the Jay Peak EB-5 AnC Vermont Project in Northeast Vermont* (Aug. 14, 2020), <https://www.justice.gov/usao-vt/pr/ariel-quiros-pleads-guilty-fraud-charges-related-jay-peak-eb-5-anc-vermont-project#:~:text=August%2014%2C%202020-,Ariel%20Quiros%20Pleads%20Guilty%20to%20Fraud%20Charges%20Related%20to%20The,before%20Chief%20Judge%20Geoffrey%20W.>

¹⁰ *See, e.g.,* Anne Galloway, *Documents Suggest State Ignored Warnings About Jay Peak in 2012*, VT Digger (July 25, 2016), <https://vtdigger.org/2016/07/25/documents-suggest-state-ignored-warnings-about-jay-peak-in-2012/>.

but Miller decided against requiring an independent audit after Stenger asserted that it would be expensive.¹¹ Furthermore, Alex MacLean, a former aide to Governor Peter Shumlin, told another whistleblower to “lay off” his questions.¹² Due to Vermont’s failure to provide “adequate and proper oversight, monitoring, and management of its projects[.]” the federal government ultimately terminated Vermont’s EB-5 program.¹³

Yet to this day, many questions remain unanswered about Vermont’s involvement with the Jay Peak funding. To uncover details about the State’s inadequate oversight of the EB-5 program, the Vermont Journalism Trust, operator of VTDigger.org (“VTDigger”), made a request in accordance with the Access to Public Records Law (“PRA”)¹⁴ to the ACCD for Miller’s emails between January 1, 2011 and December 31, 2014 (i) pertaining to AnC Bio, Rapid USA Visas, the Hotel Jay and the Jay Peak Penthouse Suites L.P. projects, Bill Stenger, Alex MacLean, or Rapid USA Visas owner Douglas Hulme; and (ii) documenting his communications with Stenger, MacLean, or Hulme (collectively, “the Miller emails”). These documents will shed light on the full extent of the State’s knowledge and lack of oversight over the EB-5 program. Specifically, VTDigger anticipates these documents will shed light on why the State continued to endorse the solicitation of investors for Quiros and Stenger’s EB-5 projects in spite of the increasingly apparent discrepancies.

Since 2012—well before the SEC sued Quiros and Stenger—VTDigger was suspicious of Quiros and Stenger’s massive, seemingly unrealistic, promises for economic growth. Providing near-

¹¹ Anne Galloway, *Documents Suggest State Ignored Warnings About Jay Peak in 2012*, VTDigger (July 25, 2016), <https://vtdigger.org/2016/07/25/documents-suggest-state-ignored-warnings-about-jay-peak-in-2012/>; Anne Galloway, *EB-5 Chief Was Repeatedly Shut Down in Efforts to Audit Jay Peak*, VTDigger (Sept. 20, 2018), <https://vtdigger.org/2018/09/20/eb-5-chief-repeatedly-shut-efforts-audit-jay-peak/> (true and accurate copies of all VTDigger articles cited herein are attached in chronological order as Exhibit C).

¹² Anne Galloway, *EB-5 Chief Was Repeatedly Shut Down in Efforts to Audit Jay Peak*, VTDigger (Sept. 20, 2018), <https://vtdigger.org/2018/09/20/eb-5-chief-repeatedly-shut-efforts-audit-jay-peak/>.

¹³ Letter from USCIS to Michael Sullivan Pieciak & Joan Goldstein, dated July 3, 2018 (a true and correct copy is attached as Exhibit D).

¹⁴ 1 V.S.A. §§ 315–20.

exclusive news coverage of the EB-5 scandal, VTDigger obtained documents and communications detailing the fraud and broke stories on its progression. VTDigger's coverage has been publicly credited for helping uncover Jay Peak's financial improprieties and for launching the SEC's investigation and enforcement action.¹⁵ VTDigger has received nationwide recognition for its coverage of the EB-5 scandal.¹⁶

VTDigger seeks to continue this vigorous coverage of the EB-5 scandal with the records request before the Court today. The State denied access to these records under the PRA's litigation exemption, 1 V.S.A. § 317(c)(14). In doing so, the State uses the litigation exemption contrary to the PRA's letter and spirit and seeks to avoid public accountability for years to come.

Parties

1. Vermont Journalism Trust LTD is a nationally recognized nonprofit charitable foundation dedicated to producing rigorous journalism that explains complex issues, holding the government accountable to the public, and engaging Vermonters in the democratic process. It is incorporated in Montpelier, Vermont. It operates VTDigger.org, one of Vermont's major news sources.

2. The ACCD is an agency within the executive branch of State Government as defined by 1 V.S.A. § 317(a)(2).

3. Lindsay Kurrle is the duly appointed Secretary of the ACCD, at whose directions all decisions regarding public records are made.

¹⁵ ASBPE Staff, *The ASBPE Foundation Announces Plans to Award VTDigger and Its Editor with the 2018 Journalism That Matters Award*, American Society of Business Publication Editors (Mar. 1, 2018), <http://www.asbpe.org/blog/2018/03/01/the-asbpe-foundation-announces-plans-to-award-vtdigger-and-its-editor-with-the-2018-journalism-that-matters-award/>.

¹⁶ See, e.g., *id.* ("This is the kind of consequential reporting that business publications aspire to[.]") (internal quotation marks omitted); Tim Griggs, *VTDigger: A Rising Star in Nonprofit News*, Harvard Kennedy School: Shorenstein Center on Media, Politics and Public Policy (May 21, 2018, 8:45 AM), <https://shorensteincenter.org/vtdigger-case-study/> (describing VTDigger as "a new model for success in the nonprofit news movement" and outlining its involvement in the breaking the EB-5 scandal).

Jurisdiction and Venue

4. The Court’s jurisdiction over this matter arises from 1 V.S.A. § 319. Venue in Washington County Superior Court is established by statute. *Id.*

Factual Allegations

A Short History of the EB-5 Scandal in Vermont

5. The United States Congress created the federal EB-5 program in 1990. The U.S. program then required, in part, that foreign nationals agree to invest \$500,000 in a company in an underdeveloped rural area that would expand employment in that area. In exchange, the investors receive permanent legal resident visas (“green cards”), which allow them to stay and live indefinitely in the United States.

6. The EB-5 program is operated by the United States Citizen and Immigration Services (“USCIS”).

7. In 1997, the ACCD was designated as an EB-5 regional center to participate in the federal program.¹⁷

What Could Have Been: The Plan for the Vermont EB-5 Program

8. From its outset in Vermont, one of the EB-5 program’s goals was to bring jobs and economic development to the Northeast Kingdom—one of Vermont’s poorest regions.¹⁸

9. Jay Peak, a ski resort located in the Northeast Kingdom, was one of the first companies to take advantage of the program.

10. At the time, Ariel Quiros owned Jay Peak and Bill Stenger was the president and CEO.

¹⁷ Letter from Michael L. Aytes, Assistant Commissioner for Adjudications, to Howard Dean, Governor of Vermont, dated June 26, 1997 (a true and correct copy is attached as Exhibit E).

¹⁸ Supplemental attachment to letter from Howard Dean, Governor of Vermont, to Michael Aytes, Assistant Commissioner for Adjudications ¶ 7 (June 17, 1997) (a true and correct copy is attached as Exhibit F).

11. Starting in 2006, Quiros and Stegner raised more than \$250 million from 500 investors through the EB-5 program for the Jay Peak expansion.¹⁹ That money was supposed to fund a major expansion of the resort, including hotels, a water park, an ice rink, condo complexes, and a golf club.²⁰

12. This expansion was part of a larger scheme that included a project at Burke Mountain and the construction of AnC Bio Vermont: a state-of-the-art stem cell laboratory.²¹ The project partnered with a Korean company, AnC Bio (“AnC Bio Korea”).

What Actually Was: The Vermont EB-5 Fraud

13. The AnC Bio project raised approximately \$85 million.²² The facility was supposed to be capable of conducting stem cell research and developing, manufacturing, and distributing artificial organs.²³ Instead, the AnC Bio project was “rampant with fraud” with “baseless” revenue projections.²⁴ Quiros and Stenger never even sought FDA approval for these products.²⁵

14. Instead of using the EB-5 program to generate investment and jobs in the Northeast Kingdom, Quiros and Stenger “pilfered tens of millions of dollars of investor funds[.]”²⁶

15. Quiros used millions of those funds to purchase a luxury condominium, to pay off personal marginal loans and his own income taxes, and as collateral for personal credit lines.²⁷

16. As a result of Quiros and Stenger’s fraud, the SEC filed a 52-count action against the two in 2016, seeking, *inter alia*, an injunction, disgorgement, asset freezing, and civil penalties.²⁸

¹⁹ Anne Galloway, *Special Report: AnC Bio Vermont Troubles Began in South Korea*, VTDigger (Dec. 27, 2016), <https://vtdigger.org/2016/12/27/anc-bio-vermont-troubles-began-south-korea/>.

²⁰ *Id.*

²¹ *Id.*

²² Exhibit B at ¶ 26.

²³ Exhibit A at ¶ 116.

²⁴ *Id.* at ¶ 117.

²⁵ *Id.* at ¶¶ 118-122.

²⁶ *Id.* at ¶ 130.

²⁷ *Id.*

²⁸ *See generally id.*

17. The SEC described Quiros and Stenger’s scheme as “nearly a complete fraud” that “baselessly projected hundreds of millions of dollars in revenue[.]”²⁹

18. Quiros settled with the SEC for nearly \$84 million. Stenger settled for \$75,000.³⁰

19. A federal grand jury also indicted Quiros and Stenger, among others.

20. Quiros was indicted on twelve counts including, *inter alia*, wire fraud and money laundering.³¹ He ultimately pleaded guilty to three felony charges.³² Stenger was indicted on ten counts including, *inter alia*, wire fraud and making false statements.³³

21. The charges against Stenger are still pending, and VTDigger has continued to follow these cases as the public seeks accountability for this fraud.

The Warning Signs: Vermont’s Failure to Oversee the EB-5 Program

22. As a result of Vermont’s complete failure to provide “oversight, monitoring, and management of” the EB-5 projects, the USCIS terminated Vermont’s EB-5 program.³⁴

23. Vermont appealed this determination to USCIS’s Administrative Appeals Office, which rejected the appeal because the State sponsored projects that “allowed Mr. Quiros and Mr. Stenger to engage in ‘an ongoing, massive eight-year fraudulent scheme,’” and the State engaged in an “insufficient level of oversight.”³⁵ According to the Administrative Appeals Office, the State’s failure

²⁹ *Id.* at ¶ 6.

³⁰ Pl.’s Unopposed Mot. for Entry of Final Judgments Against Quiros and Stenger 2, *SEC v. Quiros*, No. 16-CV-21301, Doc. No. 447 (S.D. Fla. Feb. 2, 2018) (a true and correct copy is attached as Exhibit G).

³¹ See Exhibit B.

³² Press Release, Department of Justice, *Quiros Pleads Guilty to Fraud Charges Related to the Jay Peak EB-5 AnC Vermont Project in Northeast Vermont* (Aug. 14, 2020), <https://www.justice.gov/usao-vt/pr/ariel-quiros-pleads-guilty-fraud-charges-related-jay-peak-eb-5-anc-vermont-project#:~:text=August%2014%2C%202020-,Ariel%20Quiros%20Pleads%20Guilty%20to%20Fraud%20Charges%20Related%20to%20The,before%20Chief%20Judge%20Geoffrey%20W>.

³³ See Exhibit B.

³⁴ Exhibit D.

³⁵ *Matter of V-A-O-C-A-C-D-R-C-*, ID# 1982072, at 1, 6–9 (AAO Sept. 25, 2019) (a true and correct copy is attached as Exhibit H).

to communicate evidence of the fraud to the federal government until after the SEC initiated its own enforcement action caused the USCIS to erroneously approve Jay Peak filings.³⁶

24. There is ample evidence to support the Administrative Appeals Office's finding that the State failed to communicate evidence of Quiros and Stenger's fraud.

25. Douglas Hulme, who owned the EB-5 consulting firm Rapid USA Visas, warned Vermont officials in 2012 about Jay Peak's business practices. The state failed to act on his warnings until three years later.³⁷

26. State officials retaliated against Hulme by telling him he could no longer use the Vermont state logo on his website and threatening to notify the Vermont Attorney General that he allegedly marketed an EB-5 program that the State had not yet approved.³⁸

27. Jay Peak, on the other hand, continued to use the Vermont state logo and also marketed an office building in Newport without approval for months without the State's objection.³⁹

28. After Hulme sent a letter in February 2012 to 100 EB-5 immigration attorneys indicating that he no longer had faith in Jay Peak's financials, EB-5 Regional Center Director James Candido conducted a daylong audit of Jay Peak and declared that there were "no issues" with the project.⁴⁰ According to the plaintiffs in a civil suit against Candido, he "spent 'an extravagant weekend'" at the resort prior to declaring that the project's finances were in order.⁴¹

³⁶ *Id.* at 8–9.

³⁷ Anne Galloway, *Documents Suggest State Ignored Warnings About Jay Peak in 2012*, VTDigger (July 25, 2016), <https://vtdigger.org/2016/07/25/documents-suggest-state-ignored-warnings-about-jay-peak-in-2012/>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Anne Galloway, *UPDATED: Jay Peak Investor Sues State*, VTDigger (Jun. 14, 2017), <https://vtdigger.org/2017/06/14/jay-peak-investor-sues-vermont-eb-5-regional-center/>.

⁴¹ *Sutton v. Vt. Reg'l Ctr.*, 2019 VT 71A, ¶ 11.

29. Candido was supposed to review Jay Peak activities at least four times a year. In fact, Governor Shumlin touted the State's auditing of the projects in a 2013 promotional video.⁴² The State later admitted this auditing never took place.⁴³

30. EB-5 Regional Center Director Brent Raymond also testified under oath that he requested that the State perform a forensic audit into Jay Peak in 2012, but state officials repeatedly rebuffed him.⁴⁴

31. Alex MacLean, a former aide to Governor Shumlin who was hired to oversee investor recruitment and relations for the Jay Peak EB-5 project,⁴⁵ instructed Raymond to stop asking questions about AnC Bio Vermont and to "[l]ay off."⁴⁶

32. Raymond also repeatedly asked his superior, then-Commerce Secretary Lawrence Miller, to require audits for the project.⁴⁷ Miller refused the request after Stenger asserted that a private audit would be very expensive. Miller also rebuffed Hulme's concerns about Jay Peak.⁴⁸

33. Raymond also raised concerns about AnC Bio Korea's financial dealings. When he could not get answers, he suspended the AnC Bio projects in Vermont and began a probe into the company. Nonetheless, Governor Shumlin still pushed for the projects to have partial approval in 2015 so more investors could be solicited.⁴⁹

⁴² Anne Galloway, *EB-5 Chief Was Repeatedly Shut Down in Efforts to Audit Jay Peak*, VTDigger (Sept. 20, 2018), <https://vtdigger.org/2018/09/20/eb-5-chief-repeatedly-shut-efforts-audit-jay-peak>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Anne Galloway, *Stenger Hires MacLean to Oversee Investor Recruitment and Relations for Northeast Kingdom EB-5 Projects*, VTDigger (Jan. 7, 2013), <https://vtdigger.org/2013/01/07/stenger-hires-maclean-to-oversee-investor-recruitment-and-relations-for-northeast-kingdom-eb-5-projects/>.

⁴⁶ Anne Galloway, *EB-5 Chief Was Repeatedly Shut Down in Efforts to Audit Jay Peak*, VTDigger (Sept. 20, 2018), <https://vtdigger.org/2018/09/20/eb-5-chief-repeatedly-shut-efforts-audit-jay-peak/>.

⁴⁷ *Id.*

⁴⁸ *Id.*; Anne Galloway, *Documents Suggest State Ignored Warnings About Jay Peak in 2012*, VTDigger (July 25, 2016), <https://vtdigger.org/2016/07/25/documents-suggest-state-ignored-warnings-about-jay-peak-in-2012/>.

⁴⁹ Anne Galloway, *Special Report: AnC Bio Vermont Troubles Began in South Korea*, VTDigger (Dec. 27, 2016), <https://vtdigger.org/2016/12/27/anc-bio-vermont-troubles-began-south-korea/>.

34. Investors also complained to Raymond in 2014 that Quiros and Stenger were committing fraud and turning their investments into unsecured loans.⁵⁰

35. In spite of these warning signs, the State was still allowing Quiros and Stenger to solicit more investors for additional projects shortly before the SEC filed its enforcement action in 2016.⁵¹ Only after the SEC filed its enforcement action did the State bring its own enforcement action to provide restitution to the defrauded investors and disgorge Quiros's and Stenger's gains.⁵²

36. Quiros and Stenger reached monetary settlements to resolve the State and the SEC enforcement actions.⁵³ The Vermont Supreme Court later rejected investors' attempt to intervene in the state enforcement action.⁵⁴

VTDigger Raising Concerns and Breaking the Story of the EB-5 Scandal

37. Anne Galloway, VTDigger's founder and editor, became suspicious of the Jay Peak project shortly after attending and publishing a story on a press conference that Quiros, Stenger, Governor Shumlin, and Senator Leahy held. Quiros and Stenger promised massive investments and expansions, which she thought were "too good to be true," given the size of the workforce in the remote region.⁵⁵

38. In 2013, Galloway's suspicions and VTDigger's focus on Jay Peak increased as a journalism fellow investigated a different resort project approved by the Vermont EB-5 Regional

⁵⁰ Anne Galloway & Hilary Niles, *VTDigger Exclusive: Jay Peak Loses Trust of First EB-5 Investors*, VTDigger (July 27, 2014), <https://vtdigger.org/2014/07/27/vtdigger-exclusive-jay-peak-loses-trust-first-eb-5-investors/>.

⁵¹ *Sutton*, 2019 VT 71A, ¶ 17.

⁵² *State v. Quiros*, 2019 VT 68, ¶ 7.

⁵³ See Exhibit G; *State v. Quiros*, 2019 VT 68, ¶ 12.

⁵⁴ *State v. Quiros*, 2019 VT 68, ¶ 17.

⁵⁵ Anne Galloway, *Jay Peak Partners Pitch \$500 Million Investment in Three Northeast Kingdom Towns*, VTDigger (Sept. 28, 2012), <https://vtdigger.org/2012/09/28/jay-peak-partners-expand-their-500-million/>; Jessica Huseman, *The Breakthrough: How a Small News Outlet Broke Down the State Hero*, PROPUBLICA (Aug. 11, 2017), <https://www.propublica.org/podcast/the-breakthrough-how-a-small-news-outlet-brought-down-the-state-hero>.

Center. Galloway noted that, while the state investigated and cancelled one project due to misrepresentations and the lack of progress, the Jay Peak projects did not receive any state scrutiny.⁵⁶

39. As the state publicly supported the expansion projects and promoted them internationally, VTDigger's journalists sought out sources to reveal the project's underlying issues.⁵⁷

40. In 2014, after receiving a tip from a source, VTDigger reached out to investors and conveyed the investors' concerns to the public via reporting based on exclusive interviews.⁵⁸ The interviews reveal that the investors "believed that the state would carefully monitor the finances of the project" to ensure that they received the promised returns on their investments, but the State did not require Jay Peak to file quarterly reports and the developers converted investors' shares into unsecured loans.⁵⁹

41. Additionally, VTDigger discovered that investors had already brought these concerns to the ACCD earlier in 2014 and were met with more empty promises.⁶⁰

⁵⁶ See, e.g., Nat Rudarakanchana, *VTDigger Exclusive: State Pulls Plug On EB-5 Project*, VTDigger (Apr. 3, 2013), <https://vtdigger.org/2013/04/03/state-pulls-plug-on-eb-5-project/>; Hilary Niles, *DreamLife Hopes for Second Shot at Canceled EB-5 Project*, VTDigger (Jul. 3, 2013), <https://vtdigger.org/2013/07/03/dreamlife-hopes-for-second-shot-at-canceled-eb-5-project/>.

⁵⁷ Senator Patrick Leahy, *Jay Peak's Bill Stenger Testifies Before Leahy-Chaired Panel in Washington*, Patrick Leahy: U.S. Senator Patrick Leahy of Vermont (Dec. 12, 2011), <https://www.leahy.senate.gov/press/jay-peaks-bill-stenger-testifies-before-leahy-chaired-panel-in-washington> (announcing that Senator Leahy invited Stenger, recognized as the 2011 Vermont Chamber of Commerce Citizen of the Year, to testify about the success of the EB-5 program before the U.S. Senate); Hilary Niles, *Shumlin and Stenger Return from EB-5 Promo Trip to Asia*, VTDigger (Oct. 1, 2013), <https://vtdigger.org/2013/10/01/shumlin-stenger-return-eb-5-promo-trip-asia/> (reporting that Governor Shumlin and Stenger promoted the Jay Peak projects in Asia to solicit foreign investments).

⁵⁸ See Anne Galloway, *Who Are the Tram Haus Investors?*, VTDigger (Oct. 22, 2014), <https://vtdigger.org/2014/10/22/tram-haus-investors/>; Anne Galloway, *A Sense of Betrayal: EB-5 Investors Go Public*, VTDigger (Oct. 22, 2014), <https://vtdigger.org/2014/10/22/sense-betrayal-eb-5-investors-go-public/>; Anne Galloway, *VTDigger Exclusive: EB-5 Investors Question State Watchdog's Independence*, VTDigger (Oct. 5, 2014), <https://vtdigger.org/2014/10/05/documents-show-state-jay-peak-coordinated-promotional-materials-media-response/>.

⁵⁹ See Anne Galloway, *Who Are the Tram Haus Investors?*, VTDigger (Oct. 22, 2014), <https://vtdigger.org/2014/10/22/tram-haus-investors/>.

⁶⁰ Anne Galloway, *A Sense of Betrayal: EB-5 Investors Go Public*, VTDigger (Oct. 22, 2014), <https://vtdigger.org/2014/10/22/sense-betrayal-eb-5-investors-go-public/>; Anne Galloway, *VTDigger Exclusive: EB-5 Investors Question State Watchdog's Independence*, VTDigger (Oct. 5, 2014), <https://vtdigger.org/2014/10/05/documents-show-state-jay-peak-coordinated-promotional-materials-media-response/>.

42. For example, in May of 2014, Raymond promised to aid investors in obtaining financial documents; however, VTDigger obtained communications wherein Raymond never requested that Stenger provide investors with this information.⁶¹ Instead, Raymond offered to help Stenger “repair this reputational damage”—referring to VTDigger’s dedicated coverage of investor complaints.⁶²

43. In 2016, Galloway traveled to South Korea to continue VTDigger’s independent investigation into the AnC Bio project. Galloway worked with a local journalist to verify that the AnC Bio Korea facility was just an empty building with no workers or products.⁶³ Additionally, AnC Bio never sought FDA approval for touted biomedical devices that would have been key to the success of the AnC Bio project in Vermont, including one that in initial testing had a high fatality rate.⁶⁴

44. VTDigger’s investigation in South Korea also uncovered public financial issues with the AnC Bio project in Korea that Vermont state officials had overlooked.⁶⁵ VTDigger’s exclusive reports revealed that AnC Bio Korea had not only been operating at a loss for years, but also that its CEO, a close business partner of Quiros, had been charged in 2013 with stock manipulation, corruption, and embezzlement in relation to the project.⁶⁶

⁶¹ Anne Galloway, *A Sense of Betrayal: EB-5 Investors Go Public*, VTDigger (Oct. 22, 2014), <https://vtdigger.org/2014/10/22/sense-betrayal-eb-5-investors-go-public/>; Anne Galloway, *VTDigger Exclusive: EB-5 Investors Question State Watchdog’s Independence*, VTDigger (Oct. 5, 2014), <https://vtdigger.org/2014/10/05/documents-show-state-jay-peak-coordinated-promotional-materials-media-response/>.

⁶² Anne Galloway, *VTDigger Exclusive: EB-5 Investors Question State Watchdog’s Independence*, VTDigger (Oct. 5, 2014), <https://vtdigger.org/2014/10/05/documents-show-state-jay-peak-coordinated-promotional-materials-media-response/>.

⁶³ See Anne Galloway, *Special Report: AnC Bio Vermont Troubles Began in South Korea*, VTDigger (Dec. 27, 2016), <https://vtdigger.org/2016/12/27/anc-bio-vermont-troubles-began-south-korea/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Anne Galloway, *VTDigger Exclusive: State Raises Questions about AnC Bio Finances*, VTDigger (Mar. 30, 2015), <https://vtdigger.org/2015/03/30/vtdigger-exclusive-state-raises-questions-about-anc-bio-finances/>; Anne Galloway, *Special Report: AnC Bio Vermont Troubles Began in South Korea*, VTDigger (Dec. 27, 2016), <https://vtdigger.org/2016/12/27/anc-bio-vermont-troubles-began-south-korea/>.

45. Despite AnC Bio’s alarming issues, Governor Shumlin continued to appear in promotional videos and “laud[] [Quiros’s Korean business partner’s] work in the biomedical industry.”⁶⁷

EB-5 Shareholders File Sutton Lawsuit Against the ACCD and High-Level Employees

46. After the Jay Peak fraud was exposed, investors filed suit in Vermont Superior Court against the Agency of Commerce and Community Development and various state employees. The investors—who had lost millions and either did not receive or faced uncertainty over the status of their green cards—alleged that the ACCD and certain employees were active partners in the Jay Peak fraud and liable to the shareholders for, *inter alia*, negligence, negligent misrepresentation, and breach of the contracts and of good faith and fair dealing.⁶⁸

47. One such investor, Mohammed Adil, had grown up poor in India and participated in the Vermont EB-5 program so that his daughters could attend college in the United States.⁶⁹ His daughters faced potential deportation because of Quiros and Stenger’s fraud.

48. The Vermont Supreme Court dismissed the claims against certain state officials, including Lawrence Miller, due to sovereign and qualified immunity—not a lack of wrongdoing.⁷⁰ Thus, the only way to hold these officials accountable is through the court of public opinion.

49. The Court then remanded the remaining claims in the *Sutton* litigation against the ACCD, James Candido and Brent Raymond for further proceedings. The suit, which is entirely focused on the State’s duty to the shareholders, alleges that the State Defendants worked together to create offering documents and made other sales efforts that purported that the State would maintain

⁶⁷ Anne Galloway, *Special Report: AnC Bio Vermont Troubles Began in South Korea*, VT Digger (Dec. 27, 2016), <https://vtdigger.org/2016/12/27/anc-bio-vermont-troubles-began-south-korea/>.

⁶⁸ See *Sutton*, 2019 VT 71A, ¶ 1 & n.1.

⁶⁹ Anne Galloway, *Immigrant Investors, Officials Scramble to Head off Deportation*, VT Digger (May 22, 2016), <https://vtdigger.org/2016/05/22/immigrant-investors-officials-scramble-to-head-off-deportation/>.

⁷⁰ *Sutton*, 2019 VT 71A, ¶¶ 48-50. The court allowed a gross negligence claim to go forward against James Candido and Brent Raymond. *Id.* at ¶¶ 52-57.

adequate oversight of the project.⁷¹ The Defendants traveled with Jay Peak officials to trade shows and investor programs, sat at the same table at lunch, appeared in promotional materials, and took other actions that assured investors of the State's cooperation, the Complaint alleges.⁷² But later, the Complaint alleges, the Defendants were negligent in their oversight and failed to observe easily discoverable fraud, such as the AnC Bio facility which did not even have U.S. Food and Drug Administration approval.⁷³ Drawing entirely from public documents, the Complaint also alleges that the Defendants took steps to silence a whistleblower who tried to bring the fraud to their attention, spurned investors' requests for scrutiny, and gave Jay Peak a clean bill of financial health.⁷⁴ The case is still in the discovery phase.

The State Rebuffs VTDigger's Requests

50. Throughout its investigation, VTDigger made multiple public record requests to uncover what state officials knew or should have known about the EB-5 fraud scheme. VTDigger made five requests to the ACCD in 2013, with only two requests being fulfilled in whole.⁷⁵ The State rejected additional requests in 2015 for state communications and records regarding the Jay Peak project.⁷⁶ VTDigger continued to pursue the records until the ACCD finally produced thirty pages of documents—though the State heavily redacted the documents.⁷⁷

⁷¹ See Proposed Fifth Am. Complaint, *Sutton v. Vt. Reg'l Ctr., et al.*, No. 100-5-17, at ¶¶ 73-95 (Vt. Sup. Ct. Sept. 3, 2020) (Supplement to Plaintiffs' Composite Exhibits omitted) (a true and correct copy is attached as Exhibit I).

⁷² *Id.* at ¶¶ 58-63, 71-75.

⁷³ See, e.g., *id.* at ¶¶ 238-50.

⁷⁴ *Id.* at ¶¶ 96-142, 158-223.

⁷⁵ *Statewide Public Record Requests Database*, Vermont Agency of Administration, <https://aoa.vermont.gov/statewide-public-record-requests> (last visited May 26, 2020).

⁷⁶ Anne Galloway, *State EB-5 Records Missing*, VTDigger (Aug. 27, 2019), <https://vtdigger.org/2019/08/27/state-eb-5-records-missing/>.

⁷⁷ *Id.*

51. In hopes of revealing the State’s motivations for its actions in the EB-5 project and promoting public accountability, VTDigger made another request to the ACCD and the Department of Financial Regulation (“DFR”) for “I-924 and I-924A [Form]s” for each year the state was enrolled in the EB-5 program, as well as related communications with state officials.⁷⁸ The ACCD and the DFR denied VTDigger’s access to these documents under the PRA’s litigation exemption, under 1 V.S.A. § 317(c)(14), citing the SEC and state civil suits.⁷⁹

52. VTDigger ultimately filed suit to gain access to these documents, and its efforts revealed that the State could not locate certain communications between Hulme and Candido.⁸⁰ VTDigger became aware of these missing communications through another source.

53. Still missing pieces to the story, VTDigger narrowed its focus to another set of documents: the Miller emails at issue in this case.

54. On August 20, 2020, Galloway emailed a PRA request to the ACCD seeking Miller’s emails between January 1, 2011 and December 31, 2014 (i) pertaining to AnC Bio, Rapid USA Visas, the Hotel Jay and the Jay Peak Penthouse Suites L.P. projects, Bill Stenger, Alex MacLean or Rapid USA Visas owner Douglas Hulme; and (ii) documenting his communications with Stenger, MacLean, or Hulme.⁸¹

55. On August 25, 2020, ACCD General Counsel John Kessler denied the request based on the PRA’s litigation exemption, 1 V.S.A. § 317(c)(14), citing *Sutton v. Vermont Regional Center, et al.*, Supreme Court Docket No. 2018-158 and stating, “As this case is still open, the records you request are exempt from public disclosure under 1 VSA 317(c)(14), provided that they shall otherwise be

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See, e.g., Paul Heintz, *A VTDigger Legal Fight Reveals that Key EB-5 Docs are Missing*, Seven Days (Sept. 11, 2019), <https://www.sevendaysvt.com/vermont/a-vtdigger-legal-fight-reveals-that-key-eb-5-docs-are-missing/Content?oid=28446570>.

⁸¹ A true and correct copy of the request is attached as Exhibit J.

available as allowed under the Public Records Act upon termination of the litigation, or earlier if ruled discoverable by a court.”⁸²

56. On September 15, 2020, Ms. Galloway appealed the decision to Secretary Lindsay Kurrle.⁸³

57. On September 29, 2020, Mr. Kessler denied Ms. Galloway’s appeal “as seeking records exempt from public disclosure under 1 VSA 317(c)(14) related to the pending *Sutton* litigation to which the State remains a party and is still actively defending. The specific people and subject matter described in your request involves state and private people who worked on various aspects of Jay Peak EB-5 projects that relate to the operation of the Vermont EB-5 Regional Center.”⁸⁴

58. After the State denied VTDigger access to these documents at every turn, VTDigger again must turn to litigation to pursue the Miller emails and continue its duty to keep the people aware of their government’s actions.

Key Unanswered Questions

59. With the requested documents, VTDigger seeks to provide the people of Vermont with the information necessary to hold accountable the state officials responsible for the lack of oversight and mishandling of the EB-5 program.

60. The documents may reveal how much the State knew about the EB-5 fraud scheme prior to taking action.

61. The documents may also shed light on why the State allowed the project to continue and promoted the project after investors, Hulme, and Raymond directly brought concerns to the State.

⁸² A true and correct copy of the denial is attached as Exhibit K.

⁸³ A true and correct copy of the appeal is attached as Exhibit L.

⁸⁴ A true and correct copy of the denial of the appeal is attached as Exhibit M.

62. Further, the documents may reveal whether the State was aware of AnC Bio’s public issues and the lack of FDA approval.⁸⁵

Public Records Act

63. Article Six of the Vermont Constitution provides that, because power is “originally inherent in and co[n]sequently derived from the people,” all government officials are “at all times, in a legal way, accountable to them.”⁸⁶ The Vermont Public Records Act was created to allow the public to exercise its right to oversee and hold government officials accountable.⁸⁷ The purpose of the Act, stated in 1 V.S.A. § 315, is as follows:

It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Consistent with these principles, the General Assembly hereby declares that certain public records shall be made available to any person as hereinafter provided. To that end, the provisions of this subchapter shall be liberally construed to implement this policy, and the burden of proof shall be on the public agency to sustain its action.⁸⁸

64. The Vermont Supreme Court has repeatedly stated that the PRA must be construed liberally in favor of disclosure.⁸⁹ Exceptions to disclosure must be construed “strictly against the custodians of the records and any doubts should be resolved in favor of disclosure.”⁹⁰ The agency bears the burden of justifying withholding the requested records.⁹¹ One such exception allows public officials to withhold records that are relevant to litigation to which the public agency is a party of

⁸⁵ Anne Galloway, *Special Report: AnC Bio Vermont Troubles Began in South Korea*, VTDigger (Dec. 27, 2016), <https://vtdigger.org/2016/12/27/anc-bio-vermont-troubles-began-south-korea/>.

⁸⁶ Vt. Const. ch. I, art. 6.

⁸⁷ 1 V.S.A. § 315(a).

⁸⁸ *Id.*

⁸⁹ See, e.g., *Price v. Town of Fairlee*, 2011 VT 48, ¶ 13.

⁹⁰ *Id.* (citation and internal quotation marks omitted).

⁹¹ *Id.*

record.⁹² A broad interpretation of this exemption severely harms the public’s right to review and criticize government officials by cutting off “valuable information not only to the parties to the litigation, but to all Vermonters[.]”⁹³

Claims

Count I. Violation of Vermont Public Records Law, 1 V.S.A. §§ 315–320

65. This section incorporates all the information set forth above.

66. The State has public records in its possession—specifically, the Miller emails—that it could make accessible to the public by inspection or copying.

67. VTDigger has requested that the State provide access to these records.

68. In response, the State has asserted a litigation exemption under 1 V.S.A. § 317(c)(14) to prevent disclosure of all of these documents.

69. The only active litigation involving the State as a party in an EB-5 related matter is *Sutton v. Vermont Reg’l Ctr.*, No. 218-158 (Vt).

70. That action was filed on May 30, 2017, and the Vermont Supreme Court recently remanded the case on October 4, 2019 for further proceedings.⁹⁴

71. As applied in this case, the litigation exemption could deprive the public of documents of great public interest for years to come.

72. The Miller emails are not relevant to any ongoing litigation, within the meaning of relevant under 1 VSA § 317(c)(14).

⁹² 1 V.S.A. § 317(c)(14).

⁹³ *Sblansky v. City of Burlington*, 2010 VT 90, ¶ 12.

⁹⁴ *Sutton v. Vt. Reg’l Ctr.*, 2019 VT 71, ¶ 78, amended and superseded by 2019 VT 71A.

73. To the extent that the Miller emails could be relevant to litigation, the emails are unlikely to be privileged or otherwise exempt from discovery.

74. The purpose of 1 V.S.A. § 317(c)(14) is to prevent parties from doing an “end-run” around the discovery process by using public records requests.

75. VTDigger is not a party to any litigation, and thus is not seeking to do an “end-run” around the discovery process.

76. The likelihood of the *Sutton* case resolving in the near future is unlikely.

77. If upheld, the exemption would prevent public review and scrutiny of these documents—and the State’s oversight of the EB-5 program—for many months or years to come.

78. VTDigger’s sole purpose for seeking the documents is to fulfill the PRA’s purpose by reporting information contained within the documents and making it available to the public.

79. The public has a right to such documents under the PRA.

80. Withholding these documents does not serve any purpose under 1 V.S.A. § 317(c), and it directly violates the PRA’s purpose and policy under 1 V.S.A. § 315.

81. Since the exemption’s purposes and terms are not served, and there are compelling reasons requiring release, the PRA favors a release.

82. By refusing to release the Miller emails, the State unlawfully denies the public access. This denial removes the State and its employees from public accountability.

83. By denying the public access to these documents, the State has violated 1 V.S.A. §§ 315–19.

84. This case’s documents and facts do not support such a broad application of the litigation exemption, as to deprive the public access to the Miller emails.

85. VTDigger has exhausted its administrative remedies prior to filing the present lawsuit.

86. VTDigger, as a requesting party, is entitled to relief under 1 V.S.A. § 319, including the release of the documents sought and attorney's fees.

87. VTDigger is entitled to judgement in its favor.

Remedies

Wherefore, Plaintiff Vermont Journalism Trust respectfully requests:

A. That the Court order Secretary Kurrle and the ACCD to provide promptly copies or access to all records responsive to VTDigger's request;

B. That the Court order Secretary Kurrle and the ACCD to pay all costs and attorney's fees Vermont Journalism Trust incurred in pursuing this action;

C. That the Court provide whatever other legal or equitable relief it deems appropriate.

Dated at Montpelier, Vermont this 29th day of October, 2020.

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