STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 338-10-20 Wncv

VERMONT JOURNALISM TRUST,
Plaintiff,

v.

VERMONT AGENCY OF COMMERCE AND COMMUNITY DEVELOPMENT and LINDSAY KURRLE, SECRETARY OF THE AGENCY OF COMMERCE AND COMMUNITY DEVELOPMENT,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW

NOW COME Defendants Vermont Agency of Commerce and Community Development ("ACCD") and Lindsay Kurrle, ACCD Secretary, and, pursuant to V.R.C.P. 56, move for summary judgment in their favor on all claims asserted against them by Plaintiff Vermont Journalism Trust, Ltd.'s ("VJT" or "Plaintiff") on the basis that there is no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law.

In support hereof, Defendants offer: (1) the following incorporated Memorandum of Law; (2) their contemporaneously-filed Statement of Undisputed Material Facts ("Defs SUMF"); (3) the March 16, 2021 Declaration of William E. Griffin; and (4) Defendants' Exhibits 1-3.

MEMORANDUM OF LAW

In this Public Records Act case, Plaintiff VJT seeks to compel the production of approximately one thousand emails written or received by former ACCD Secretary Lawrence Miller between 2011 and 2014 concerning various aspects of ACCD's involvement with the Jay Peak EB-5 Projects. ACCD properly denied production of these emails because they are broadly

relevant, that is, factually related or pertinent, to the subject matter of a putative class action brought by Jay Peak EB-5 Project investors, known as the *Sutton* litigation, pending in Lamoille Superior Court for discovery and other pre-trial proceedings.

The clear relevance of Mr. Miller's emails to the *Sutton* litigation, and the correctness of ACCD's decision in denying their production to VJT, is confirmed, in part, by VJT's own Complaint. VJT predicts, based on its prior reporting and documents already in its possession, that disclosure of these particular emails of Mr. Miller will reveal additional "details about the State's inadequate oversight of the EB-5 program," Compl. at p.3, just as asserted and theorized by the *Sutton* plaintiffs in their action.

However, VJT insists that it need not wait for the *Sutton* litigation to terminate or even for the Lamoille Superior Court to determine that the Miller emails, already demanded by the *Sutton* plaintiffs in discovery, are indeed discoverable. Rather than wait for the Lamoille Superior Court to make its determinations, VJT argues that it is entitled to the Miller emails right now so it can attempt to prove "in the court of public opinion," Compl. ¶ 48, the very same allegations and theories of liability asserted in the pending *Sutton* litigation.

VJT has no such entitlement under the Public Records Act or Vermont Supreme Court precedent. In addition, VJT's effort to circumvent the Lamoille Superior Court and try the *Sutton* case in the media, by obtaining emails that may not even be discoverable, let alone admissible, illustrates why the Vermont Legislature enacted the Public Records Act's "relevant to litigation" exemption. The public interest in government accountability must be balanced with the need to preserve the power of courts, like the Lamoille Superior Court, to control discovery in litigation pending before them and to avoid unfairly disadvantaging public agencies, like ACCD, who are parties to lawsuits like *Sutton*. Striking that balance in this case requires a

denial of VJT's public records request at this time and entry of summary judgment for Defendants ACCD and Kurrle.

I. Factual and Procedural Background

A. ACCD's Denial of Plaintiff's Request for the Miller Emails Due to their Relevance to the *Sutton* Litigation

This action arises out of the August 20, 2020 request by Plaintiff VJT to ACCD pursuant to the Vermont Public Records Act, 1 V.S.A. § 315, *et seq.* ("PRA") for the 2011-2014 email correspondence and any other written communications of then-ACCD Secretary Lawrence Miller (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 Miller's communications with Stenger, MacLean, or Hulme (collectively, "the Miller Emails"). Defs SUMF ¶ 1. On August 25, 2020, ACCD denied Plaintiff's public records request for the Miller Emails, citing the PRA's "relevant to litigation" provision, which exempts from public inspection and copying any "[r]ecords which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation." *Id.* ¶ 2 (quoting 1 V.S.A. § 317(c)(14)).

ACCD's August 25, 2020 denial explained that the Miller Emails are exempt from public inspection and copying under 1 V.S.A. § 317(c)(14) because they "are relevant to pending litigation concerning ACCD and its administration of the State's EB-5 program which are the subject of the plaintiffs' claims in *Sutton v. Vermont Regional Center, et al.*, Supreme Court Docket No. 2018-158." *Id.* ¶ 3. On September 29, 2020, ACCD likewise denied Plaintiff's administrative appeal of ACCD's August 25, 2020 denial. *Id.* ¶ 4. ACCD's appeal denial noted that Plaintiff's request for the Miller Emails sought "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." *Id.* ¶ 5.

B. The Claims and Allegations of the *Sutton* Litigation

The *Sutton* litigation is currently captioned as *Sutton, et al. v. State of Vermont Agency of Commerce and Community Development, James Candido, and Brent Raymond*, Docket No. 100-5-17 Lecv and is pending in the Vermont Superior Court, Civil Division, Lamoille Unit for discovery and other pre-trial proceedings following the case's remand by the Vermont Supreme Court in accordance with its opinion in *Sutton, et al. v. Vermont Regional Center, et al.*, 2019 VT 71A, --Vt. --, 238 A.3d 608 (Vt. July 31, 2020). *Id.* ¶ 6. A true and correct copy of the current and operative version of the *Sutton* Complaint, the Fifth Amended Class Action Complaint dated September 3, 2020, is attached as Exhibit I to Plaintiff VJT's Complaint. *Id.* ¶ 7.

The *Sutton* plaintiffs, who are all foreign national investors in the Jay Peak EB-5 projects, allege that the employment-based fifth preference visa, or EB-5, program, which is run by the United States Customs and Immigration Services ("USCIS"), is intended to stimulate the U.S. economy and create jobs through capital investment from foreign investors. Through this program, foreign investors and their spouses and children can become eligible for green cards, *i.e.*, permanent U.S. resident status, if they make the required investment in a commercial enterprise project in the United States associated with a regional center approved by USCIS. *Id.* ¶ 8. The *Sutton* plaintiffs allege that USCIS designated ACCD as a regional center in 1997, and ACCD began operating the Vermont Regional Center ("VRC"). According to the *Sutton* plaintiffs, ACCD held itself out as a regional center that took a more active role than other

regional centers in administration, oversight, auditing, and consultation with respect to its associated projects. *Id.* ¶ 9.

In 2006, the *Sutton* plaintiffs allege, ACCD partnered or associated with a series of projects led and developed by Ariel Quiros and William Stenger. The phased series of eight proposed projects included building a hotel, indoor water park, ice rink, golf club house, medical center, and other facilities in Jay, Vermont; a biomedical research facility in Newport, called the ANC Bio Vermont project; and a hotel, conference center, aquatic center, tennis center, and mountain bike facility in Burke, Vermont (collectively, "the Jay Peak EB-5 Projects"). *Id.* ¶ 10. The *Sutton* plaintiffs allege that ACCD officials and employees represented to prospective investors, including them, that the added protections of State approval and oversight made the Jay Peak EB-5 Projects a particularly sound investment. *Id.* ¶ 11.

However, the *Sutton* plaintiffs allege, unbeknownst to the investors, but known to ACCD officials and employees, no such State oversight by ACCD ever existed. *Id.* ¶ 12. The *Sutton* plaintiffs further allege that ACCD and the Jay Peak EB-5 Projects worked with a consulting firm, Rapid USA Visas, which was owned by Douglas Hulme, that helped solicit potential investors. In early 2012, Hulme is alleged to have raised concerns with ACCD that the Jay Peak EB-5 Projects were illegally misappropriating funds. *Id.* ¶ 13. In February 2012, *Sutton* plaintiffs allege, Rapid USA Visas allegedly ended its business dealings with the Jay Peak EB-5 Projects and announced it had lost confidence in the finances and representations of the Jay Peak EB-5 Projects and ACCD. The *Sutton* plaintiffs allege that, in response and retaliation, ACCD effectively prevented Rapid USA Visas from doing further work in Vermont. *Id.* ¶ 14.

Sutton plaintiffs also allege that ACCD employee and then-VRC executive director James Candido conducted an "audit-visit" in 2012 to the Jay Peak EB-5 Projects and

commissioned an inspection report on the Jay Peak EB-5 Projects from John Roth, an immigration attorney associated with the Projects, in a purported effort to rebut and dismiss the concerns raised by Rapid USA Visas and Hulme that the Jay Peak EB-5 Projects were illegally misappropriating funds. *Id.* ¶ 15. Candido and Roth's report allegedly found "no issues" with the Projects' financials and "particularly careful oversight" by ACCD. *Id.* ¶ 16. Based on his own audit visit and Roth's report, Candido allegedly reassured prospective and existing investors that Rapid USA Visas' concerns were unfounded and motivated by a separate "business dispute," that he had investigated the Jay Peak EB-5 Projects, and that it was safe to invest in the Projects, which *Sutton* plaintiffs allege was an intentional misrepresentation. *Id.* ¶ 17.

The *Sutton* plaintiffs also allege that, in 2014, about twenty investors made unheeded complaints to Brent Raymond, an ACCD employee and then-VRC executive director, alleging that the Jay Peak EB-5 Projects were misappropriating investor funds. They specifically alleged that the Jay Peak EB-5 Projects had conducted fraudulent sales of Hotel Jay penthouse suites, converted their Hotel Jay equity interests into unsecured promissory notes, and had not made available any financials showing the source and use of investor funds. *Id.* ¶ 18. In early 2015, *Sutton* plaintiffs allege, Raymond and ACCD approved the Jay Peak EB-5 Projects to solicit investors for additional projects. *Sutton* plaintiffs allege that one of those projects, the ANC Bio Vermont project, was a total fraud on investors. *Id.* ¶ 19.

The *Sutton* plaintiffs also allege that "the private leverage" that drove ACCD's purported "complicity with the fraud at the Jay Peak Projects" was illustrated when "a top aide to the Governor's office, Alexandra MacLean, departed state service and acquired a senior management position with the Jay Peak Projects." *Id.* ¶ 20. The *Sutton* Plaintiffs further allege that then-Governor Shumlin was involved in "[s]etting up Alexandra MacLean's lucrative

transition" to working for the Jay Peak EB-5 Projects and once stayed in Ariel Quiros' "Manhattan apartment – paid for by Jay Peak Investor funds." *Id.* ¶ 21.[1]

In assuming the truth of these and other unproven allegations, as it was required to in reviewing a decision under V.R.C.P. 12(b)(6), the Vermont Supreme Court concluded that the *Sutton* plaintiffs had stated claims for negligence, breach of contract and breach of the covenant of good faith and fair dealing against the State, as well as for gross negligence by Brent Raymond and James Candido. The Supreme Court remanded the case to the Lamoille Superior Court for further proceedings. *Id.* ¶ 23. The Vermont Supreme Court affirmed the Superior Court's dismissal of the *Sutton* plaintiffs' remaining claims, including those against former ACCD Secretary Lawrence Miller on grounds of his absolute immunity and for failure to state any claim. *Id.* ¶ 24.

II. Argument

The Vermont Public Records Act establishes a temporary but broad restriction on the disclosure of public records relevant to litigation in which the State is a party. Here, ACCD properly withheld the Miller Emails from inspection and copying by Plaintiff VJT because the documents are factually related or pertinent to the *Sutton* litigation. Specifically, the Miller Emails all have some bearing on the *Sutton* plaintiffs' allegations about ACCD's oversight of the Jay Peak EB-5 Projects and/or ACCD's notice or knowledge concerning the solicitation and use of Jay Peak EB-5 investor funds, which is the collective subject matter of all the claims and

[1] In April 2016, the U.S. Securities and Exchange Commission filed a lawsuit alleging securities fraud, wire fraud, and mail fraud against the Jay Peak EB-5 Projects developers, Ariel Quiros and William Stenger. The Vermont Department of Financial Regulation also filed suit against Quiros and Stenger, alleging similar claims. Defs SUMF ¶ 22.

allegations in the *Sutton* litigation. Accordingly, and on the undisputed material facts, Defendants are entitled to judgment on VJT's claims as a matter of law.

A. Summary Judgment Standard

"Summary judgment is appropriate if the material facts are undisputed and any party is entitled to judgment as a matter of law." *Progressive Cas. Ins. Co. v. MMG Ins. Co.,* 2014 VT 70, ¶ 10, 197 Vt. 253, 258, 103 A.3d 899, 902 (2014). For the moving party to prevail, "first, no genuine issue of material fact must exist between the parties, and second, there must be a valid legal theory that entitles the moving party to judgment as a matter of law." *Price v. Leland*, 149 Vt. 518, 521, 546 A.2d 793, 796 (1988). "The issue is material only if it might affect the outcome." *N. Sec. Ins. Co. v. Rossitto,* 171 Vt. 580, 581, 762 A.2d 861, 863 (2000).

"A defendant who moves for summary judgment satisfies his legal burden when he presents 'at least one legally sufficient defense that would bar plaintiff's claim.'" *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266, 438 A.2d 373, 375 (1981) (quoting 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2734, at 647 (1973)). "[T]o defend against a summary judgment motion, a plaintiff cannot rely on conclusory allegations or mere conjecture." *Mello v. Cohen*, 168 Vt. 639, 641, 724 A.2d 471, 474 (1998). Rather, "the party opposing summary judgment must point to specific facts in the record that support the assertion that there is a genuine issue of material fact." *Turnley v. Town of Vernon*, 2012 VT 69, ¶ 7 n.3, 192 Vt. 238, 242 n.3, 58 A.3d 215, 217 n.3.

B. The 'Relevant to Litigation' Exemption is a Temporary Restriction Intended to Preserve Court Control Over Discovery and Protect Public Agency Litigants

"Despite the broad policy of facilitating public access to government records," the Vermont Public Records Act "specifically carves out an exception," *Shlansky v. City of Burlington*, 2010 VT 90, ¶ 8, 188 Vt. 470, 475, 13 A.3d 1075, 1079, that "exempt[s] from public inspection and copying . . . [r]ecords which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation." 1 V.S.A. § 317(c)(14). "As evidenced by the plain language of § 317(c)(14), the Legislature's goal in passing it was to place a temporary restriction on the release of otherwise publicly accessible documents during the pendency of litigation in which the requested documents have relevance." *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 15, 177 Vt. 287, 293, 865 A.2d 350, 356.

Application of Section 317(c)(14) "does not cause any undue hardship" or "conflict with the strong public interest in open access to government documents" because "access to these documents is simply delayed until the termination of litigation," *id.*, 2004 VT 102, ¶ 23, or "until they have been 'ruled discoverable,' 1 V.S.A. § 317(c)(14)," whichever happens first. *Shlansky*, 2010 VT 90, ¶ 8 n.1. Conversely, because "a disputed item may be relevant but not discoverable for many reasons," permitting a litigant or non-party to obtain documents relevant to litigation before they are ruled discoverable would sanction "an end run around the Vermont Rules of Civil Procedure" as well as "eviscerate the inherent power of courts to control discovery in litigation pending before them." *Wesco*, 2004 VT 102, ¶¶ 12, 16; *see also Shlansky*, 2010 VT 90, ¶ 9 (Section 317(c)(14) "is intended to allow the court presiding over the litigation to retain

control over issues regarding the production of documents relevant to the case and to avoid disadvantaging public agencies as parties to a lawsuit.").

Under Section 317(c)(14), documents relevant to litigation, unless ruled discoverable at a litigant's request, must "necessarily be withheld from everyone for the pendency of the litigation," including press organizations, since "to do otherwise would make the litigation exception meaningless. Anyone else could simply obtain the withheld materials and then pass them along to" a public agency's litigation adversaries. *Shlansky*, 2010 VT 90, ¶ 13; *see also id.*, ¶ 12 ("[T]he litigation exception, if it is to have any meaning, cannot apply solely to an individual litigant.").

C. The 'Relevant to Litigation' Exemption Broadly Applies to all Documents Related or Pertinent to Litigation

"[R]elevance for purposes of the Public Records Act cannot be equated to evidentiary relevance . . . because that construction would require agencies responding to Public Records Act requests to determine whether the material in question was 'relevant' within the meaning of V.R.E. 401, determinations typically, and best, made by trial judges with extensive familiarity with the issues in the litigation." *Wesco*, 2004 VT 102, ¶ 16. Rather, the Vermont Supreme Court "appl[ies] the plain, ordinary meaning of 'relevant' in construing § 317(c)(14)," *id.*, which is defined as: "'[r]elated to the matter at hand; pertinent.'" *Id.*, 2004 VT 102, ¶ 16 (quoting American Heritage Dictionary 1044 (2d ed. 1982)).

Thus, Section 317(c)(14) "exempt[s] from disclosure through a public records request documents that are relevant—related or pertinent—to, and not merely discoverable in, pending

or ongoing litigation." *Id.*, 2004 VT 102, ¶ 17. This definition exempts "the broadest category of documents from disclosure." *Id.*, 2004 VT 102, ¶ 15.[2]

D. ACCD Properly Withheld the Miller Emails as Related or Pertinent to the *Sutton* Litigation

The Miller Emails are factually related or pertinent to the *Sutton* litigation for at least three principal reasons: (1) in its Complaint, Plaintiff VJT repeatedly asserts that the Miller Emails will "shed light" on the very same claims and allegations made by the *Sutton* plaintiffs; (2) with their written discovery requests, the *Sutton* plaintiffs seek production of the same Miller Emails sought by VJT, thereby confirming their asserted relevance to the *Sutton* litigation; and (3) review of the Miller Emails by ACCD's *Sutton* litigation counsel, described below, has concluded that the Miller Emails are generally pertinent to the *Sutton* claims and allegations.

1. VJT Concedes the Relevance of the Miller Emails to Claims and Allegations in the *Sutton* Litigation

Plaintiff VJT expects that disclosure of the Miller Emails in this PRA action will, by the emails' very nature, substantiate and prove "in the court of public opinion," the same allegations and theories of liability asserted by the *Sutton* plaintiffs in Lamoille Superior Court. Defs SUMF ¶ 25. VJT's expectation that the Miller Emails will confirm the *Sutton* plaintiffs' narrative is based on its interpretation of "documents and communications" already obtained by VJT, as well as its years-long "vigorous coverage of the EB-5 scandal." Compl. at p. 4. VJT's reporting,

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[2] This "related or pertinent" definition of "relevant" for purposes of the PRA's Section 317(c)(14) is therefore even broader than the already "exceedingly broad" scope of evidentiary relevance. *See Centrella v. Ritz-Craft Corp. of Pa., Inc.*, No. 2:14-CV-111-JMC, 2017 WL 3720757, at *1 (D. Vt. June 28, 2017) (noting that evidentiary "definition of relevant evidence is exceedingly broad, including any evidence that 'has the slightest bit of probative worth'" (citation omitted)); *see also State v. Derouchie*, 153 Vt. 29, 34, 568 A.2d 416, 418 (1989) ("We have a very broad rule of relevance.").

extensively footnoted in its Complaint, has credulously repeated and endorsed the *Sutton* plaintiffs' various assertions to a degree that is somewhat unexpected from an ostensibly objective news-gathering organization "dedicated to producing rigorous journalism." Compl. ¶ 1.

As understood by VJT, the *Sutton* plaintiffs essentially allege that ACCD, its employees and officials undertook to "maintain adequate oversight of the [Jay Peak EB-5] project[s]," but that they "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." *Id.* ¶ 26. Plaintiff effectively concedes the relevance of the Miller Emails to the *Sutton* litigation by claiming that disclosure of the Miller Emails will "uncover details about the State's inadequate oversight of the EB-5 program," predicts that the Miller Emails "will shed light on the full extent of the State's knowledge and lack of oversight over the EB-5 program," and will reveal "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." *Id.* ¶ 27. Just like the *Sutton* plaintiffs, Plaintiff VJT seeks through disclosure of the Miller Emails to demonstrate the State's "lack of oversight and mishandling of the EB-5 program" and reveal "how much the State knew about the EB-5 fraud scheme prior to taking action." *Id.* ¶ 28.

Plaintiff VJT also understands that the *Sutton* plaintiffs allege that ACCD, its employees and officials "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." *Id.* ¶ 29. Mirroring these allegations and theories of the *Sutton* plaintiffs, VJT wishes (and expects) to use the Miller Emails to substantiate its view that ACCD "was charged with overseeing the Jay Peak projects" but "provided little oversight to the program and ignored many warning signs,"

such as allegedly when Douglas Hulme, "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, but Miller decided against requiring an independent audit after Stenger asserted that it would be expensive," or when "Alex MacLean, a former aide to Governor Peter Shumlin" purportedly "told another whistleblower to 'lay off' his questions." *Id.* ¶ 30.

No different than the *Sutton* plaintiffs, VJT expects that the requested Miller Emails will indicate "why the State allowed the [Jay Peak EB-5] project[s] to continue and promoted the project[s] after investors, Hulme, and Raymond directly brought concerns to the State," as well "whether the State was aware of AnC Bio's public issues and the lack of FDA approval." *Id.* ¶ 31. Thus, VJT's bare assertion that "[t]he Miller emails are not relevant to any ongoing litigation," Compl. ¶ 72, is patently contradicted by its own allegations and admissions.

2. The *Sutton* Plaintiffs Seek the Miller Emails in their Discovery, Underscoring the Relevance of the Miller Emails to the *Sutton* Litigation

By seeking discovery of the Miller Emails in the *Sutton* action, the *Sutton* plaintiffs apparently view the Miller Emails as having specific evidentiary relevance to the claims, allegations and defenses that action. Defs SUMF ¶ 32. In their discovery requests, *Sutton* plaintiffs seek from ACCD a comprehensive production of "All Correspondence between the VRC Team" and "Jay Peak" or "Rapid Visas," as well as with any investor, USCIS, the U.S. Securities and Exchange Commission, and any other employee or agency of the State of Vermont "Concerning the Jay Peak Projects" or "Concerning litigation and/or arbitration with Rapid Visas" created or authored between November 2006 and April 2016. *Id.* ¶ 33.[3]

[3] The *Sutton* 2d RFPs define the "VRC Team" to refer, among others, to former ACCD Secretary Lawrence Miller. The *Sutton* 2d RFPs define "Jay Peak" to refer to, among others, Alex Maclean, Ariel Quiros, and William Stenger and "Jay Peak Projects" to encompass "all series

In light of these broadly phrased requests to produce, the *Sutton* plaintiffs evidently seek the entirety of the Miller Emails requested by Plaintiff VJT in this action, that is, the 2011-2014 email correspondence and any other written communications of then-ACCD Secretary Lawrence Miller (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 Miller's communications with Stenger, MacLean, or Hulme. *Id.* ¶ 37. In addition, the *Sutton* plaintiffs have separately requested from Lawrence Miller, via subpoena *duces tecum*, to produce several categories of documents that collectively comprise the Miller Emails sought by Plaintiff VJT in this action. *Id.* ¶ 38. By requesting production of the Miller Emails from ACCD and Lawrence Miller in discovery, the *Sutton* plaintiffs necessarily contend that these documents are discoverable and, by implication, have evidentiary relevance to the *Sutton* litigation. *Id.* ¶ 39; *see also* V.R.C.P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . .").

3. Review of the Miller Emails Confirms their Relevance to the *Sutton* Litigation

ACCD's counsel in the *Sutton* litigation, Special Assistant Attorney General William E. Griffin, oversaw the search of ACCD's archived email to identify the approximately 1,089 emails that comprise the Miller Emails. Defs SUMF ¶ 40. To confirm that the Miller Emails -- all requested in discovery by the *Sutton* plaintiffs -- are indeed relevant to the *Sutton* litigation for

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and/or phases of EB-5-financed development projects in Jay, Newport or Burke, Vermont . . . ." The *Sutton* 2d RFPs define "Rapid Visas" to refer, among others, to "Kenneth Douglas Hulme." Defs SUMF ¶¶ 34-36.

purposes of 1 V.S.A. § 317(c)(14), SAAG Griffin conducted a sample review of 200 of these emails, that is, approximately 20 percent of the 1,089 total. *Id.* ¶ 42.

SAAG Griffin concluded that the reviewed Miller Emails were factually related or pertinent to *Sutton* because they all have some bearing on the *Sutton* plaintiffs' allegations about ACCD's oversight of the Jay Peak EB-5 Projects and/or ACCD's notice or knowledge concerning the solicitation and use of Jay Peak EB-5 investor funds, which is the collective subject matter of all the claims and allegations in the *Sutton* litigation. *Id.* ¶¶ 43-44. Accordingly, examination of the Miller Emails, any of which are available for the Court's *in camera* review, corroborates what both Plaintiff VJT and the *Sutton* plaintiffs have already indicated – these documents are relevant to the *Sutton* litigation. Thus, the Miller Emails are temporarily exempt from public inspection and copying, per 1 V.S.A. § 317(c)(14), until the conclusion of the *Sutton* litigation, or until ruled discoverable by the Lamoille Superior Court.

CONCLUSION

For the forgoing reasons, Defendants Vermont Agency of Commerce and Community Development and Lindsay Kurrle respectfully request that the Court grant summary judgment in their favor on all claims asserted against them by Plaintiff Vermont Journalism Trust, Ltd.

DATED at Burlington, Vermont this 16th day of March 2021.

STATE OF VERMONT

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day March 2021, I served DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW in the above-captioned matter using the Vermont Courts Odyssey Electronic Filing System and via email to the following:

Lia Ernst
ACLU Foundation of Vermont
lernst@aclvt.org

DATED at Burlington, Vermont this 16th day of March 2021.

STATE OF VERMONT

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