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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18209

In the Matter of Hui Feng and Law Offices of Feng & Associates, P.C., Respondents.	DIVISION OF ENFORCEMENT'S MOTION FOR ENTRY OF DEFAULT AND SANCTIONS

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Pursuant to the Notice to Parties and Order Setting New Procedural Schedule, AP Rulings Rel. No. 5315 (Dec. 7, 2017), the Division of Enforcement ("Division") submits this motion for default and sanctions.

I. INTRODUCTION

This is a follow-on administrative proceeding based on entry of a permanent injunction against Respondents Hui Feng and his law firm, Law Offices of Feng & Associates ("Law Offices") (collectively, "Respondents"). Respondents were properly served with the Order Instituting Proceedings ("OIP") in this matter by October 7, 2017 and November 3, 2017, respectively. Neither filed an answer, and the Respondents are thus in default. The Division of Enforcement moves, pursuant to Rules 155(a)(2) and 220(f) of the Securities and Exchange Commission ("SEC")'s Rules of Practice, for a finding that Respondents are in default and for the imposition of remedial sanctions. The Division specifically requests that Respondents be permanently barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

II. BACKGROUND

A. Underlying Action

Respondent Hui Feng is a New York-based immigration lawyer, and is the primary attorney at his law firm, Respondent Law Offices of Feng & Associates. The SEC filed a federal district court action against Respondents on December 7, 2015. The action arose out of the EB-5 immigrant investors program, a federal program which awards permanent residency status to foreign investors who invest at least $500,000 in domestic job-creating projects approved by the United States Citizenship and Immigration Service ("USCIS"). The SEC alleged that Respondents had acted as unregistered brokers in soliciting approximately 150 foreign investors, over a period of years, in return for millions of dollars in commissions from the regional centers that administered the EB-5 offerings that were at issue in the case. The SEC also alleged that Respondents defrauded

their immigration law clients by failing to disclose to the clients that Respondents were receiving commissions from the regional centers whose investments they recommended, which constituted a clear conflict of interest and a violation of fiduciary duties. The SEC further alleged that Respondent defrauded the EB-5 regional centers whose securities they promoted by falsely claiming that the commissions the regional centers were paying were going to unrelated overseas entities when, in fact, they were going to Respondents. *See* OIP ¶ 3 (summarizing allegations in the district court complaint); *see also* Searles Decl., Ex. 1 (Complaint).

On June 29, 2017, the district court granted the SEC's motion for summary judgment on all claims, concluding that the undisputed evidence established that Respondents had acted as unregistered brokers and had had defrauded both their law firm clients and the regional centers. *See* Searles Decl., Exs. 2 & 3 (ECF Dkt. No. 96 (Order Granting Summary Judgment) and Dkt. No. 101 (Amended Order, correcting amount of prejudgment interest)). On August 10, 2017, the Court entered final judgment against Respondents on the SEC's claims under Section 17(a) of the Securities Act of 1933 ("Securities Act"); Section 10(b) of the Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder; and Section 15(a)(1) of the Exchange Act, and permanently enjoined the Respondents from further violations of those provisions. *See* Searles Decl., Ex. 4, ¶¶ 1-6 (Dkt. No. 102 (Final Judgment)). The Court further ordered Respondents, jointly and severally, to pay $1,398,517.09 in disgorgement and prejudgment interest, and imposed a penalty of $160,000 against Feng and $800,000 against the Law Offices. *Id.* ¶ 7.

B. The Institution of this Proceeding, the Service of the OIP and Respondents' Failure to Answer

On September 25, 2017, the Commission instituted this matter pursuant to Section 15(b) of the Exchange Act. The Order Instituting Proceeding ("OIP") was served on Respondent Law Offices by mail on October 2, 2017 in accordance with Rule 141(a)(2)(i)-(ii) of the Commission's Rules of Practice, and was served on Respondent Feng on November 3, 2017 by a process server who left a copy of the OIP at his office with a person in charge in accordance with Rules 141(a)(2)(i) and 150(c)(1). *See* Division of Enforcement's Statement Regarding Service

of the Order Instituting Proceedings (Nov. 1, 2017); Division of Enforcement's Further Statement Regarding Service (Nov. 3, 2017). In orders dated November 2, 2017 and November 8, 2017, the administrative law judge in this matter, the Honorable Cameron Elliot, ruled that the Division had established that the service on each respondent had been properly effected and that each Respondent had twenty days from the time of service to answer. Order Regarding Service, AP Rulings Rel. No. 5215 (Nov. 2, 2017) (finding that Respondent Law Offices had been served by October 2, 2017); Order Finding Service, AP Rulings Rel. No. 5222 (Nov. 8, 2017) (finding that Respondent Feng had been served on November 3, 2017). No answer was filed by either Respondent. Searles Decl. ¶ 4.

C. Order to Show Cause

On November 29, 2017, Judge Elliot issued an order requiring Respondents to show cause for why they should not be found in default and setting a procedural schedule. *See* Order to Show Cause and Setting Motion Deadline, AP Rulings Rel. No. 5244 (Nov. 29, 2017). The order reiterated that Respondents had been properly served and noted that no answer had been filed. *Id.* The order further noted that "Feng has been aware of this proceeding since at least October 18 – when he emailed [Judge Elliot's] office – yet he failed to attend a prehearing conference on October 30." *Id.* On November 30, 2017, after the Commission had ratified the appointment of Judge Elliot and directed him to reconsider the record, including all substantive and procedural actions, Judge Elliot vacated the prior schedule and provided that each party would be permitted to submit by January 5, 2018 any new evidence he or it deemed relevant to reexamination of the record, along with further briefing. *See* Notice to Parties and Order Setting New Procedural Schedule, AP Rulings Rel. No. 5315 (Dec. 7, 2017). The order further ordered Respondents to show cause for their failures to participate in the proceedings by January 5, 2018. *Id.* The order stated: "If Respondents do not show cause and no party asks for reconsideration of my prior actions by that date, I will ratify my prior actions and the Division shall file a motion

for default and sanctions by January 16, 2018." *Id.* Respondents submitted no evidence or briefing in response to that order.

III. ARGUMENT

A. The Respondents Are In Default and the Allegations of the OIP May Be Deemed To Be True

Because the Respondents have not responded to the OIP, they are in default. Rule 155(a) of the Commission's Rules of Practice states:

> A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against the party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails: . . .
>
> (2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding . . . .

Moreover, the OIP itself provides: "If Respondent fails to file the directed answer . . . . the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true . . . ." (OIP at p. 3).

Judge Elliot's prior findings that Respondents were properly served with the OIP, are on notice of the proceedings, and have failed to answer are amply supported by the record, and, after full reconsideration, should be ratified. *See* Division of Enforcement's Statement Regarding Service of the Order Instituting Proceedings (Nov. 1, 2017); Division of Enforcement's Further Statement Regarding Service (Nov. 3, 2017). Under Rule 155(a), the allegations of the OIP may thus be deemed to be true and the hearing officer may determine the proceedings against the party upon consideration of the record, including the order instituting proceedings.

B. The Findings in the Underlying Case Are Binding on Respondents

Moreover, where, as here, facts have been litigated and determined in an earlier judicial proceeding, those facts may not be revisited in a subsequent administrative proceeding. *See Peter J. Eichler, Jr.*, Initial Dec. Rel. No. 1032, 2016 WL 4035559 (July 8, 2016) ("It is well-established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by summary judgment, by consent, or after a trial") (collecting cases); *accord Robert Burton*, Initial Dec. Rel. No. 1014, 2016 WL 3030850 (May 27, 2016); *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 S.E.C. Docket 2708, 2713 & n.13, 2007 WL 2974200, *petition for review denied*, 285 F. App'x 761 (D.C. Cir. 2008); *In the Matter of Gunderson*, Exchange Act Release No. 61234, 2009 SEC LEXIS 4322 *15-16 (Dec. 23, 2009).

C. Imposition of a Permanent Bar Is Warranted

Based on the record here and in the underlying action, the Division respectfully requests that sanctions be imposed under Section 15(b)(6) of the Exchange Act. That section provides in relevant part:

> "With respect to any person who is associated, . . . or, at the time of the alleged misconduct, who was associated . . . with a broker or dealer, . . . the Commission, by order, shall censure, place limitations on the activities or functions of such a person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and an opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person – . . .

(i) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph . . . (D) . . . of paragraph (4) of [Section 15(b)]

***

(ii) is enjoined from any action, conduct or practice specified in subparagraph (C) of such paragraph (4)" of Section 15(b).

Thus, Section 15(b)(6) authorizes the Commission to impose an associational bar against a respondent if: (1) at the time of the alleged misconduct, he was associated with a broker; (2) he has *either* (a) committed any act, or is subject to an order or finding that he committed any act enumerated in Section 15(b)(4)(D), ***or*** (b) is enjoined from any action, conduct or practice specified in Section 15(b)(4)(C); and (3) a bar is in the public interest.

1. At the Time of the Misconduct, Each Respondent was Acting as An Unregistered Broker and Was Associated With an Unregistered Broker

Each of these factors is easily met here. First, the district court found that, at the time of the misconduct here, Respondents were acting as unregistered brokers. The Court based its finding on undisputed evidence establishing that:

> (1) Feng received transaction based income in the form of commissions or referral fees for referring his clients to the regional centers; (2) Defendants have provided services in connection with the EB-5 Program since 2010, Feng started trading securities in 2003, and operated a hedge fund from 2008 to 2014 for which he conducted securities transactions; (3) Defendants advertised for clients and were active finders of investors by promoting EB-5 projects on the internet and through Feng's website; (4) Defendants were involved in negotiations between regional centers and investors by interfacing directly with regional centers regarding his clients' EB-5 investments, asking regional centers numerous questions regarding the

projects, and negotiating with regional centers as to the amount of administrative fees and rebates on Defendants' clients' behalf; and (5) Defendants gave advice regarding investments by conducting research and performed due diligence regarding EB-5 investment projects and providing lists of EB-5 regional centers they recommended clients to invest in.

Based on that evidence, the Court concluded that Respondents had acted as unregistered brokers under the Act. Searles Decl. Ex. 2 (summary judgment order, Dkt. 96, p. 14-15). As previously discussed, Respondents are bound by the district court's finding here. Administrative proceedings for sanctions against unregistered broker dealers are properly instituted under Section 15(b)(6), and the Commission regularly issues against unregistered brokers pursuant to that section. *See, e.g., Hector J. Garcia*, Exch. Act Rel. No. 54116, (July 10, 2006); *James Joseph Conway*, Exch. Act Rel. No. 53722 (Apr. 25, 2006).

2. The District Court Found That Feng Willfully Violated the Antifraud Provisions Of the Securities Laws and Enjoined Him Against Future Violations

The second element under Section 15(b)(6) is also established by the record in the underlying action because Respondents are subject to a finding that they committed acts enumerated in Section 15(b)(4)(D) and are also enjoined from conduct specified in Section 15(b)(4)(C). The acts enumerated under Section 15(b)(4)(D) include willful violations of the Securities Act, the Exchange Act or any rules or regulations under such statutes. Here, the district court found that respondents willfully engaged in schemes to defraud both the Respondents' clients who were induced to invest in EB-5 securities and the regional centers who issued those securities. *See* Searles Decl., Ex. 2 (Order re: Motions for Summary Judgment, Dkt. No. 96, at p. 19 (finding that the undisputed evidence shows that Respondents "knowingly failed to disclose their receipt of commission to their clients" and thereby acted with scienter); p. 22 (undisputed evidence that Respondents "acted to create a 'false appearance of fact' to regional centers")). Further, Feng is enjoined from conduct specified in Section 15(b)(4)(C), which provision includes permanent and

temporary injunctions against "engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security." Here, the district court permanently enjoined Respondents from, "violating, directly or indirectly, Section 10(b) [of the Exchange Act] and Rule 10b-5 thereunder" "in connection with the purchase or sale of any security" and also enjoined respondents from violating Section 15(a) of the Exchange Act and Section 17(a) of the Securities Act.[1] *See* Searles Decl., Ex. 4 (Final Judgment, Dkt. No. 102, ¶¶ 1-6).

3. A Bar Is In The Public Interest

Finally, the record establishes that a bar is in the public interest. In determining whether an administrative sanction is in the public interest, the Commission considers a number of factors, including (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (3) the sincerity of the respondent's assurances against future violations; (4) recognition of wrongful conduct; and (5) the likelihood that the respondent's occupation will present future opportunities for violations. *See Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 81 (1981); *Lonny S. Bernath*, Initial Dec. Rel. No. 993 at 4, 2016 SEC LEXIS 1222 *10-11 (Apr. 4, 2016) (*Steadman* factors used to determine whether a bar is in the public interest). The Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violations, and the sanction's expected deterrent effect. *Lonny S. Bernath*, 2016 SEC LEXIS at *4, 11. "[N]o one factor is dispositive." *Michael C. Pattison, CPA*, No. 3-14323, 2012 WL 4320146, at *8 (Comm. Op. Sept. 20, 2012); *ZPR Investment Management, Inc.*, No. 3-15263,

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[1] Respondents have filed an appeal of the district court's judgment. The pendency of an appeal does not affect the proceeding here. As the Commission has stated, "it is well established that the existence of an appeal of the district court's decision does not affect the permanent injunction's status as a basis for administrative action." *Chris G. Gunderson,* Exchange Act Rel. No. 61234, p. 8 (Dec. 23, 2009) (brackets in original omitted). "Unless and until it is vacated, the permanent injunction entered against the respondent is a valid basis for administrative action." *Id.* (brackets in original omitted).

2015 WL 6575683, at *27 (Comm. Op. Oct. 30, 2015) (inquiry into the public interest is "flexible").

As to whether a permanent bar is appropriate in a follow-on proceeding, precedents hold that, "[v]iolations involving the antifraud provisions of the federal securities laws are especially serious and merit the severest of sanctions." *Vinay Kumar Nevatia*, Initial Dec. Rel. No. 1021, 2016 WL 3162186, at *5 (June 7, 2016), citing *Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014); *accord Eichler*, 2016 WL 4035559, at *6 ("The Commission considers an antifraud injunction to be especially serious and to subject a respondent to the severest of sanctions ... Indeed, from 1995 to the present, there have been over thirty-five litigated follow-on proceedings based on antifraud injunctions in which the Commission issued opinions, and all of the respondents were barred ... ") (internal citations omitted). Moreover, "[t]he existence of an injunction can, in the first instance, indicate the appropriateness in the public interest of a suspension or bar from participation in the securities industry." *Michael V. Lipkin and Joshua Shainberg*, Init. Dec. Rel. No. 317, 88 SEC Docket 2346, 2006 WL 2422652, at *4 (Aug. 21, 2006), *notice of finality*, 88 S.E.C. Docket 2872, 2006 WL 2668516 (Sept. 15, 2006).

a. Respondents' violations were egregious, intentional and recurrent

As previously noted, in the underlying district court action, Respondents were found liable for intentional fraud, which findings alone prove that the violations were egregious. The district court found that the evidence was undisputed that Respondents' fraud was intentional, establishing a high degree of scienter. Further, while all violations of intentional fraud are egregious, Respondents' violations were particularly egregious, since Respondents defrauded their law firm clients, with whom they had an attorney-client relationship and to whom they owed the highest fiduciary duty. *See, e.g., Gibson v. SEC,* 561 F.3d 548, 555 (6th Cir. 2009) (fact that defendant owed a fiduciary duty to defrauded investors contributed to the egregiousness of the fraud); *Raymond J. Lucia Companies, Inc. v. SEC*, 832 F.3d 277, 295 (D.C.

Cir. 2016) (*en banc*) (affirming Commission's imposition of a permanent bar, in part, because the defendant "violated a fiduciary duty owed to his prospective clients and did so repeatedly"); *SEC v. Gunn*, Case No. 3:08-CV-1013-G, 2010 WL 3359465 *4 (N.D. Tex. Aug. 25, 2010) (fact that defendant's violation of the securities laws was also a breach of fiduciary duty is an aggravating factor that renders the violation particularly egregious).

Further, Respondents' fraud was not an isolated incident. Instead, they engaged in the scheme to defraud over a number of years and against multiple clients and regional centers. Respondents had approximately 150 EB-5 clients for whom I-526 petitions have been presented to USCIS. Searles Decl, Ex. 5 (Feng depo. at 119:12-15). The record shows that Respondents defrauded most (if not all) of these clients by inducing them to invest in EB-5 investments for which Respondents were receiving undisclosed commissions from regional centers in violation of his fiduciary duties. Feng admits that he procured investors for only those regional centers that had agreed to pay referral fees or commissions. *Id.* (Feng depo. at 85:1-2). Further, Feng and his nominees have received at least $1.268 million in commissions from regional centers, and had contracted to receive an additional $3.45 million upon the approval of pending I-526 petitions. *Id.* (Feng depo. 118:5-11); *see also* Searles Decl., Ex. 6 (Feng Decl. submitted in underlying action, Dkt. 76-1, Ex. 1) (spreadsheet showing that Respondents received "referral fees" from regional centers for virtually all of their clients).

In sum, the egregiousness and extent of Respondents' fraud clearly favor a permanent bar under *Steadman*.

b. The remaining *Steadman* factors also favor a permanent bar

Respondents have provided no assurances against future violations and lack any recognition of their wrongful conduct. Instead, Feng's response to the district court's order has been nothing short of contemptuous. In a series of emails sent to a broad mailing list (including SEC lawyers), Feng has publicly denounced the district court's decision, calling into question the competency of the Court and impugning the integrity of Division staff. In these emails, Feng

has, for example, called the Court's decision a "ludicrous opinion demonstrating a complete or purposeful misunderstanding of the current jurisprudence of the federal securities law within the 9th circuit" and "a complete mockery and sham on the American judicial system." He has claimed that the action brought against him constitutes "idiotic and treasonous enforcement activity" that is "abusive and oppressive" and in violation of the "spirit [on which] this country was founded on July 4 of 1776." Despite having lost the case, Feng claims that the Division's position was "wrong, unpatriotic and destructive to American interest" and that the lawsuit was "frivolous" and "a complete waste of taxpayers' money." *See* Searles Decl., Ex. 7 (Email dated 7/3/2017, p.1 and 3).

Feng has reiterated these basic themes in email after email. *See, e.g., id.* Ex. 8 (Email dated 7/18/2017 (referring to the lawsuit as "frivolous" and a "disgrace to this great nation" and enforcement staff as "clueless officials")); Ex. 9 (Email dated 7/28/2017 (again referring to both the SEC and the district court as "clueless"; stating that, in light of this case, "America has become a 3rd world country with a corrupt and arbitrary government agency and a judicial system that is equally bankrupt in terms of delivering fairness and justice"; accusing SEC staff of "fraud or crime against the US Congress or the American people" for pursuing this case; claiming that the SEC "both ignored the facts and manipulated the facts for its unspeakable agenda, and the lower federal court was foolish enough to go along with the SEC like an underling"); Ex. 10 (Email dated 10/18/2017 (stating that the "SEC officials have shamelessly manipulated the facts and misinterpreted the securities laws" and that the "district court has failed to be impartial in finding the facts"; referring to the SEC's pursuit of this case as "persecution" against him.); Second Email dated 10/18/2017 (stating that "until this case" he was unaware the SEC officials "will be so lack of integrity to manipulate the facts so that it can persecute citizens who contribute to the interest of the United States . . . and the federal district court will be so biased to help the SEC in its persecutions in ignorance of its Constitutional duty to be impartial . . . .")).

Feng has reiterated his contempt for the SEC staff and the Court in emails sent to the ALJ in this matter. *See, e.g.*, *id.*, Ex. 11 (Email dated 10/27/2017 (claiming "[t]he SEC officials manipulated the facts from the depositions"; that the SEC's position is "a ridiculous proposition and an insult to the conscience and intelligence of anyone who is not mentally insane"; further contending that this "is the modern day "emperor without clothes case and so far no one dares to pop this big bubble lie for fear of losing their jobs or promotions.")); Ex. 11 (Email dated 10/27/2017 (more of the same)); Ex. 12 (Email dated 12/17/2017 (ditto)).

These emails show that Feng has utterly failed to take responsibility for his actions. The "absence of recognition by [a respondent] of the wrongful nature of his conduct" favors a permanent bar. *Jonathan D. Havey, CPA*, Initial Dec. Rel. No. 959, 2016 SEC LEXIS 522, at *11 (Feb. 11, 2016) (granting permanent bar on motion for summary disposition in follow-on proceeding to criminal conviction); *Siming Yang*, Initial Dec. Rel. No. 788, 2015 SEC LEXIS 1735, at *10 (May 6, 2015) (noting, as part of grant of summary disposition and imposing of permanent bar in follow on proceeding to civil injunction, that, "[c]onsistent with a vigorous defense of the charges, [respondent] ha[d] not recognized the wrongful nature of his conduct"); *Delsa U. Thomas and The D. Christopher Capital Management Group, LLC*, Initial Dec. Rel. No. 205, 2014 SEC LEXIS 4181, at 24 (Nov. 4, 2014) (imposing permanent bar and revoking adviser's registration on summary disposition following civil fraud injunction, noting that "Respondents do not recognize the wrongful nature of their conduct. Instead, they deny any culpability, insist that none of their conduct was inappropriate, and accuse the Commission and the Commission's witnesses of bias or lying"); *Terrence O'Donnell*, Initial Dec. Rel. No. 334, 2007 SEC LEXIS 2148, at *14 (Sept. 20, 2007) (weighing in favor of bar respondent's "protest" that the securities laws were not sufficiently clear, finding this "evidence that [respondent] still seeks to minimize his misconduct"); *Steadman*, 603 F.2d at 1140.

The final *Steadman* factor considers "the likelihood that the respondent's occupation will present future opportunities for violations." Here, Feng's occupation as an immigration lawyer does just that. Indeed, in the emails quoted above, Feng essentially admits his intent to continue

his unlawful conduct unabated, despite the district court's order and the judgment against him. For example, in the email dated July 3, 2017, Feng defiantly pledged: "As I have stated last week, regardless what the SEC or the courts say about the EB-5 program, I will continue to provide my best service to my clients who are seeking to immigrate to the United States through EB-5 program. It is my first amendment right to conduct legal due diligence on EB-5 programs to protect the interest of my clients." Searles Decl., Ex. 7.

In short, all of the *Steadman* factors favor the imposition of the bar, which is strongly in the public's interest.

IV. CONCLUSION

For the foregoing reasons, the Division respectfully requests that Respondents be barred from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

January 16, 2018

Respectfully submitted,

/s/ Donald W. Searles

Donald W. Searles
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In the Matter of Hui Feng and Law Offices of Feng & Associates, P.C.
Administrative Proceeding File No. 3-18209
Service List

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the attached:

DIVISION OF ENFORCEMENT'S MOTION FOR ENTRY OF DEFAULT AND SANCTIONS

was filed with the Office of the Secretary of the Commission and served by email and UPS Overnight Mail on January 16, 2018, upon the following parties as follows:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549-1090
Facsimile: (703) 813-9793

(By Facsimile and UPS)
(Original and three copies)

Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E., Mail Stop 2557
Washington, DC 20549-2557
Email: alj@sec.gov

(By Email and UPS)

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Pro Se

(By Email and U.S. mail)

Dated: January 16, 2018

/s/ Donald W. Searles
Donald W. Searles

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18209

In the Matter of

Hui Feng and Law Offices of Feng & Associates, P.C.,

Respondents.

DECLARATION OF DONALD W. SEARLES IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR ENTRY OF DEFAULT AND SANCTIONS

I, Donald W. Searles, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am an attorney at law admitted to practice law in the State of California and in the Central District of California. I am employed as a Senior Trial Counsel for the Division of Enforcement ("Division") at the Los Angeles Regional Office of the U.S. Securities and Exchange Commission, 444 S. Flower Street, Suite 900, Los Angeles, California 90071, Telephone: (323) 965-3998, extension 54573. I have personal knowledge of each of the facts set forth in this Declaration and, if called as a witness, could and would competently testify thereto.

2. On September 25, 2017, the Division instituted this matter pursuant to Section 15(b) of the Exchange Act.

3. On October 2, 2017 and November 3, 2017, the Order Instituting Proceeding was served on Respondent Law Offices by mail and Respondent Feng by a process server, respectively.

4. As of this filing, no answer was filed by either Respondent.

5. Attached as **Exhibit 1** is a true and correct copy of the Complaint filed against Hui Feng and Law Offices of Feng & Associates, P.C., by the Securities and Exchange Commission in the United States District Court for the Central District of California, Case No. 2:15-cv-09420-CBM-SS ("District Court Action").

6. Attached as **Exhibit 2** is a true and correct copy of the June 29, 2017 Order re: Motions for Summary Judgment issued in the District Court Action (Dkt. No. 96).

7. Attached as **Exhibit 3** is a true and correct copy of the August 10, 2017 Amended Order re: Motions for Summary Judgment issued in the District Court Action (Dkt. No. 101).

8. Attached as **Exhibit 4** is a true and correct copy of the August 10, 2017 Final Judgment against Hui Feng and Law Offices of Feng & Associates, P.C., issued in the District Court Action (Dkt. No. 102).

9. Attached as **Exhibit 5** is a true and correct copy of excerpts from the deposition of Hui Feng taken on December 15, 2016.

10. Attached as **Exhibit 6** is a true and correct copy of the spreadsheet of "referral fees" received by Respondents.

11. Attached as **Exhibit 7** is a true and correct copy of Hui Feng's July 3, 2017 email re "Heading to the 9th circuit judicial review from the 4th of July."

12. Attached as **Exhibit 8** is a true and correct copy of Hui Feng's July 18, 2017 email re "Chairman Jay Clayton is cleaning the house."

13. Attached as **Exhibit 9** is a true and correct copy of Hui Feng's July 28, 2017 email re "We help our clients avoid risky EB-5 projects to achieve immigration success."

14. Attached as **Exhibit 10** is a true and correct copy of Hui Feng's October 18, 2017 email re "17-10-6 Notice of Appeal."

15. Attached as **Exhibit 11** is a true and correct copy of Hui Feng's October 27, 2017 email re "Re:3-18209 Hui Feng, et al."

16. Attached as **Exhibit 12** is a true and correct copy of Hui Feng's December 17, 2017 email re "SEC is determined to sell American immigration interest to overseas immigration agencies."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2018, in Los Angeles, California.

/s/ Donald W. Searles
Donald W. Searles

In the Matter of Hui Feng and Law Offices of Feng & Associates, P.C.
Administrative Proceeding File No. 3-18209
Service List

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the attached:

DECLARATION OF DONALD W. SEARLES IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR ENTRY OF DEFAULT AND SANCTIONS

was filed with the Office of the Secretary of the Commission and served by email and UPS Overnight Mail on January 16, 2018, upon the following parties as follows:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549-1090
Facsimile: (703) 813-9793

(By Facsimile and UPS)
(Original and three copies)

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Dated: January 16, 2018

/s/ Donald W. Searles
Donald W. Searles

EXHIBIT 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. HUI FENG and LAW OFFICES OF FENG & ASSOCIATES P.C., Defendants.	Case No. **COMPLAINT**

Plaintiff Securities and Exchange Commission (the "SEC") alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1) and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b), 77t(d)(1) and 77v(a), and Sections 21(d)(1), 21(d)(3)(A), 21(e) and 27(a) of the Securities and Exchange Act ("Exchange Act"), 15 U.S.C. §§ 78u(d)(1), 78u(d)(3)(A), 78u(e), and 78aa.

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2. Defendants have, directly or indirectly, made use of the means or instrumentalities of interstate commerce or of the mails, in connection with the transactions, acts, practices and courses of business alleged in this Complaint.

3. Venue is proper in this district pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15 U.S.C. § 78aa(a), because certain of the transactions, acts, practices and courses of conduct constituting violations of the federal securities laws occurred within this district. In addition, venue is proper in this district because Defendants have transacted business in this district, and the offer and sale of some of the securities, in which Defendants participated, occurred in this district.

SUMMARY

4. This case involves a scheme perpetrated by Hui Feng ("Feng"), an immigration attorney, and his law firm, Law Offices of Feng & Associates P.C. ("Feng & Assocs.") to receive undisclosed commissions for selling investments in offerings under the federal EB-5 Immigrant Investor Program to their legal clients. In so doing, Feng and his firm also acted as unregistered brokers.

5. The EB-5 Immigrant Investor Program was created to stimulate the U.S. economy with capital investment from foreign investors. Under the program, foreign investors can receive a permanent visa to live and work in the U.S. if they make a capital investment that satisfies certain conditions over a two-year period, including the creation of jobs. Under the program's regulations, the foreign investors must put "the required amount of capital at risk for the purpose of generating a return." The investments are typically administered by "regional centers" throughout the U.S. and made in limited partnerships managed by people other than the foreign investors (collectively, the "Promoters").

6. The Defendants offered and sold the Promoters' EB-5 investments to their legal clients while also secretly collecting commissions from the Promoters if their clients invested in the Promoters' offerings. The Defendants or their nominees

received at least $1,168,000 in commissions from at least five Promoters for referring dozens of clients to invest in EB-5 offerings. The Defendants are also contractually entitled to receive at least $3,100,000 in additional commissions from the Promoters for the referral of scores of additional clients once the United States Citizenship and Immigration Services ("USCIS") approves the clients' petitions for conditional residency. As attorneys, the Defendants had fiduciary, legal and ethical duties towards their clients to disclose their receipt of the commissions and the conflicts of interest such compensation created, but knowingly, recklessly and/or negligently failed to make the required disclosures in breach of those duties.

7. Feng and his law firm also defrauded certain of the Promoters whose offerings they marketed by using overseas nominees to receive the commissions, while falsely representing to the Promoters that those foreign-based persons were responsible for finding investors, rather than Feng. In reality, the commission recipients consisted of one of Feng's friends, Feng's relatives, and an entity Feng controlled, none of whom played any role in finding investors.

8. By engaging in this conduct, the Defendants have violated and are continuing to violate the antifraud provisions of Section 17(a) of the Securities Act, 15 U.S.C. § 77q; Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rules 10b-5(a), (b), and (c) thereunder, 17 C.F.R. §240.10b-5(a)-(c); and Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

THE DEFENDANTS

9. **Hui Feng** is a resident of Flushing, New York and has been licensed to practice law in New York since 1998. He has been providing immigration law services to his legal clients since approximately 2005. Feng has never been registered with the SEC in any capacity.

10. **Law Offices of Feng & Associates P.C.** is a New York professional corporation incorporated in October 2011. Feng & Assocs. maintains an office in Flushing, New York and, until approximately October 2014, also maintained an

office in Alhambra, California. Feng founded the firm and is the primary attorney at the firm. Feng & Assocs. has never been registered with the SEC in any capacity.

RELATED ENTITY

11. **Atlantic Business Consulting Limited ("ABCL")** is a Hong Kong entity that Feng formed in April 2014 for the purpose of receiving commissions from the Promoters. Until at least December 2014, Feng controlled ABCL and its bank account.

THE FRAUDULENT SCHEME

A. The EB-5 Immigrant Investor Program

12. Congress created the EB-5 Program in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. In 1992, Congress created the EB-5 Immigrant Investor Program, also known as the Regional Center Program.

13. The EB-5 Immigrant Investor Program sets aside EB-5 visas for participants who invest in commercial enterprises associated with regional centers approved by the USCIS based on proposals for promoting economic growth.

14. The EB-5 Immigrant Investor Program is designed to attract individuals from other countries who are willing to put their capital at risk in the United States with a hope of making a return on their investment.

15. Under the EB-5 Immigrant Investor Program, foreign investors who invest capital in a "commercial enterprise" in the United States may petition the USCIS (called an "I-526 Petition") and receive conditional permanent residency status for a two-year period. The USCIS defines a "commercial enterprise" as any for-profit activity formed for the ongoing conduct of lawful business.

16. To qualify for the program, the foreign investors must invest $1 million ($500,000 if in a rural area or area of high unemployment) and thereby create at least ten full-time jobs for United States workers.

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17. The EB-5 Immigrant Investor Program requires a showing that the foreign investor "has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk."

18. If the foreign investor satisfies these and other conditions within the two-year period, the foreign investor may apply to have the conditions removed from his or her visa and live and work in the United States permanently.

19. Many EB-5 investments are administered by entities called "regional centers." EB-5 regional centers are designated by the USCIS to administer the EB-5 investment projects based on proposals for promoting economic growth.

20. Regional center investment vehicles are typically offered as limited partnership interests or limited liability company units, which are managed by a person or entity other than the foreign investor, who acts as a general partner or managing member of the investment vehicle.

21. The EB-5 investments made by the Defendants' clients were all associated with regional centers. The regional centers, the investment vehicles, and the managers thereof are collectively referred to herein as the "Promoters."

B. Defendants' EB-5 Immigration Law Business

22. In 2010, the Defendants began promoting EB-5 investments to actual and potential immigration law clients, many of whom were located in China.

23. In 2012, Feng & Assocs. began using a Chinese language website that was hosted in the United States through 2013 to advertise the firm's EB-5 immigration services and promote certain EB-5 investments. Feng believed that his website was popular with clients and potential clients because they "feel they are getting something independent, something objective."

24. Feng wrote or reviewed and approved the website's content.

25. In April 2013, Feng opened four Feng & Assocs. offices in China that were generally staffed with one non-lawyer employee each. Feng directed those employees to actively promote Feng & Assocs. and its website, which was primarily

focused on the EB-5 investment program, in online chat rooms.

26. Through at least December 2014, the employees received compensation based on their success in having prospective clients retain Feng & Assocs. as their attorney.

27. Feng drafted and signed retainer agreements through which clients retained Feng & Assocs. The retainer agreements typically required the clients to pay a legal fee of between $10,000 and $15,000 for legal work associated with the clients' petitions under the EB-5 program. The retainer agreements touted Feng's purported objectivity in conscientiously studying, investigating and recommending only the most reliable EB-5 investment projects

28. The retainer agreements did not disclose the Defendants' receipt of commissions in connection with the clients' EB-5 investments.

29. Feng primarily communicated with his clients and the Promoters over the phone, via email, and through online chat platforms. Feng or his law office employees also met with some clients at the Feng & Assocs. office in New York. At the time they retained Feng & Assocs., some of the clients were also already residing in the United States on temporary visas.

C. EB-5 Investments Made By Defendants' Clients Were Securities

30. The Defendants recommended that their clients invest in EB-5 offerings associated with at least five different EB-5 Promoters. Some of the Promoters had multiple offerings that the Defendants referred their clients to.

31. The Promoters are headquartered in the United States and at least two of them operate in this judicial district (Irvine, California and El Segundo, California).

32. The offerings required the Defendants' foreign clients to invest a capital contribution of either $1 million or $500,000, and pay a separate administrative or management fee, which was used to pay other fees and expenses incurred by the Promoters, including the payment of commissions and finder's fees.

33. The Promoters pooled the foreign investors' capital contributions, but

not the administrative fees, for the purpose of making loans to fund United States-based construction projects.

34. At the end of the loan term, the foreign investors expected to receive a return of their capital contributions.

35. The investments by the Defendants' clients were passive investments, as they relied on others to develop the job-creating projects.

36. The Defendants' clients were not involved in the making or servicing of loans on EB-5 construction projects or in the operation or management of the construction projects themselves.

37. Rather, the clients relied on the Promoters for the success of the projects and obtaining a return on their investments.

38. The limited partnership and limited liability company operating agreements for the EB-5 investments vested management control in the hands of the Promoters.

39. Thus, the Defendants' clients were dependent on the efforts of others to realize their profits.

40. Generally, the Defendants circulated private placement memoranda and/or other offering documents to their clients for the offerings that the Defendants recommended their clients invest in.

41. These offering documents described the terms of the investment, and how the profits would be allocated to the investors.

42. The investments offered annual rates of return that generally ranged from approximately 0.5% to 0.8% of the capital contribution.

43. For example, one of the investments provided that net proceeds realized from the sale, repayment or distribution of realized profits from the limited partnership's investments (including any interest) would be allocated and distributed 99% to the limited partners and 1% to the general partner.

44. Some of the investments also allowed for investors to earn additional

returns if the Promoters extended the loan terms associated with the offerings.

45. Also, one EB-5 private placement memorandum that the Defendants circulated to their clients states that the investment of capital is intended to "generate revenue for the Partnership" and sets forth a formula pursuant to which annual interest is paid to the general partner and to the limited partners (that is, Feng's clients). The limited partnership agreement associated with this offering also provides that the partners — that is, Feng's clients — will "share in the risks, benefits, profits, and losses."

46. Depending on the stage of the construction project, Defendants' clients who invested in the EB-5 offerings would receive Schedule K-1s, which are federal tax documents for an investment in partnership interests, that would reflect the interest they had earned on their capital contributions.

47. The offering documents distributed to investors by the Defendants stated that the investments were being offered pursuant to exemptions from the registration requirements of the federal securities laws.

48. In addition, some of the offering documents associated with the clients' investments also expressly described the investments as "securities."

D. Defendants Acted as Unregistered Brokers

49. As early as 2010, Feng began recommending offerings associated with certain Promoters as investments, in exchange for commissions on successful sales. In approximately 2013, Feng began intensifying his efforts to sell EB-5 investments.

50. Feng began providing a list of recommended EB-5 offerings to his clients through the Feng & Assocs. website in an effort to obtain more EB-5 investor clients.

51. Feng facilitated his clients' investments in the EB-5 offerings by obtaining offering documents from the Promoters, printing out the signature pages of the documents, preparing instructions explaining what the clients should sign, and transmitting the signed offering documents to the Promoters.

52. Feng interfaced directly with the Promoters regarding his clients' EB-5 investments on their behalf.

53. In most instances, all of the communications and negotiations between the clients and the Promoters leading to the investment were channeled through Feng.

54. On several occasions, Feng or Feng & Assocs. also received EB-5 investment funds from clients that they transmitted to one of the Promoters.

55. Feng described himself to the Promoters as "marketing" or "promoting" the EB-5 investments.

56. On at least two occasions, Feng also requested allocations of spots in EB-5 offerings that he could sell to his clients. This required Feng to fill the allocated spots with investors by a certain date or give the spots up. Feng ultimately sold one of those offerings to seven of his clients.

57. Defendants or Feng's nominees received commissions from the Promoters for the sales of EB-5 investments. Those commissions ranged from $15,000 to $70,000 per transaction.

58. Defendants or their nominees received payments from at least five Promoters for referring their clients to those Promoters' EB-5 offerings.

59. In addition, if the USCIS approves other clients' pending I-526 Petitions, the Defendants are contractually entitled to receive additional payments from the Promoters for referring those clients to those Promoters' EB-5 offerings.

60. The Promoters wired the commissions out of United States-based bank accounts to accounts held by Feng or his nominees.

61. The commissions were governed by written referral fee agreements with the Promoters. The agreements were executed by Feng on behalf of Feng & Assocs. or by Feng's nominees, which made payment of the commissions contingent on (1) an investor making the required capital contribution and (2) the USCIS approving the investor's I-526 Petition.

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62. Feng is not, and has never been, registered with the SEC as a broker-dealer.

63. Feng & Assocs. is not, and has never been, registered with the SEC as a broker-dealer.

E. Defendants Defrauded their Clients

64. As attorneys, the Defendants owed fiduciary, legal and ethical duties to their clients to disclose their receipt of commissions from the EB-5 Promoters whose offerings they recommended.

65. Defendants failed to disclose to their clients that the Defendants were receiving commissions from the EB-5 Promoters, and failed to disclose their conflicts of interest for the purpose of maximizing their own monetary compensation.

66. The Defendants knew, or were reckless or negligent in not knowing, that their receipt of commissions was not disclosed to their foreign clients investing in the Promoters' EB-5 investments.

67. The Defendants' receipt of commissions from the Promoters was material to the investors' investment decisions.

68. That information, had it been disclosed, would have been significant information to investors, as it would have affected their assessment of Feng's claimed objectivity and due diligence in recommending certain Promoters over others.

69. That information would also have affected the investors' understanding and belief that Feng, as their legal representative and as a licensed attorney, was free of any undisclosed financial conflicts of interest in his dealings with his clients.

70. The commission payments to Feng, had they been disclosed, would also have affected the investors' understanding of the overall terms, conditions, risks and costs associated with their EB-5 investments, and would have been significant information to them in deciding whether to proceed with the EB-5 investments that Feng recommended.

71. Rather than disclose their receipt or right to receive commissions from

the Promoters, Defendants only told their clients about their receipt of commissions if the client specifically asked.

72. As a result, Defendants did not inform the vast majority of their clients that they received commissions from the Promoters.

73. The clients who did learn about the commissions requested that Defendants refund all or a portion of the commissions to them.

74. Feng knowingly, recklessly and/or negligently chose not to inform his clients about the commissions so that he could avoid having to negotiate with his clients to share or refund the commissions to them, which in many cases exceeded the legal fees he also charged them.

F. Defendants Also Defrauded the Promoters

75. The Defendants' practice of receiving commissions changed over time. Feng initially received wire transfer payments of referral fees starting in March 2011 directly into a United States-based bank account held in his name.

76. In or about May 2013, some of the Promoters informed Feng that they would not wire commissions to United States-based bank accounts as part of an apparent effort to avoid running afoul of the broker-dealer registration requirements contained in the federal securities laws.

77. As a result, Feng had relatives or friends act as "nominees" or "surrogates" to execute the referral fee agreements with the Promoters and to receive the commissions on his behalf or on behalf of Feng & Assocs. through overseas bank accounts.

78. In communications with some of the Promoters, Feng represented that the individuals he designated to sign the agreements or receive the commissions were "partners" or "agents" that he worked with in China.

79. The Defendants never disclosed to the Promoters that these "nominees" or "surrogates" were, in fact, Feng's relatives or friends.

80. Also, in communications with some Promoters, Feng represented that

these "nominees" or "surrogates" were the ones soliciting and referring investors to the Promoters, when, in fact, it was Feng or his employees.

81. These representations were materially false and misleading because certain of the Promoters would not have continued paying the Defendants to refer clients to the Promoters' EB-5 investments if the Promoters knew that the agreements were not signed by bona fide partners or agents that had referred the investors, but rather by Feng's relatives or friends. The Promoters would also not have continued paying the Defendants to refer clients if the Promoters knew that the commissions they were paying were being wired to bank accounts held by Feng's relatives or friends.

82. Defendants knew, or were reckless or negligent in not knowing, that these representations to the Promoters were materially false and misleading because those individuals were actually Feng's friends or relatives who played no substantive role in soliciting investors.

83. For example, in May 2013 Feng had his relative sign a referral fee agreement with one of the Promoters, which represented that his relative had access to sophisticated investors that the relative could introduce to parties interested in investing with the Promoter.

84. Similarly, in January and February 2014 Feng sent emails to another Promoter stating that "our partners" or "agents" in China would execute the referral fee agreements. Feng then had his relative who played no role in locating investors sign the referral fee agreement with this Promoter.

85. Feng's relatives who signed these agreements with the Promoters were not partners or agents who found investors. Instead, they were nominees that Feng used to secretly receive commissions on his behalf.

86. In addition to designating friends or relatives as nominees to receive referral fees, Feng formed ABCL, a Hong Kong entity, in April 2014 for the purpose of receiving referral fee payments through a Hong Kong bank account that he

controlled.

87. Feng had his relatives execute referral fee agreements with some of the Promoters, on behalf of ABCL, even though the relatives had no role with ABCL.

88. For example, in May 2014 Feng had a relative execute a referral fee agreement as a "principal" of ABCL even though that relative did not, in fact, have any such role.

89. In total, Feng and his nominees, including ABCL, have represented over 100 investors for EB-5 investments with at least five Promoters.

90. From at least March 2011 to April 2015, Defendants or their nominees, including ABCL, have received at least $1,168,000 in commissions from these five Promoters for their clients' investments in those Promoters' EB-5 offerings.

91. Those five Promoters have paid at least $662,000 in commissions to Defendants' nominees.

92. In addition, the Defendants directly, or through their nominees, are contractually entitled to receive at least $3,100,000 more in commission payments upon the approval of the pending I-526 Petitions.

FIRST CLAIM FOR RELIEF

Fraud in the Offer or Sale of Securities

Violations of Section 17(a) of the Securities Act

(against all Defendants)

93. The SEC realleges and incorporates by reference paragraphs 1 through 92 above.

94. Defendants, and each of them, by engaging in the conduct described above, directly or indirectly, in the offer or sale of securities by the use of means or instruments of transportation or communication in interstate commerce or by use of the mails:

(a) with scienter, employed devices, schemes, or artifices to defraud;

(b) obtained money or property by means of untrue statements of a

material fact or by omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

95. By engaging in the conduct described above, Defendants violated, and unless restrained and enjoined, will continue to violate, Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

SECOND CLAIM FOR RELIEF

Fraud in Connection with the Purchase or Sale of Securities

Violations of Section 10(b) of the Exchange Act and Rule 10b-5

(against all Defendants)

96. The SEC realleges and incorporates by reference paragraphs 1 through 92 above.

97. Defendants, by engaging in the conduct described above, directly or indirectly, in connection with the purchase or sale of a security, by the use of means or instrumentalities or interstate commerce, of the mails, or of the facilities of a national securities exchange, with scienter:

(a) employed devices, schemes, or artifices to defraud;

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

(c) engaged in acts, practices or courses of business which operated or would operate as a fraud or deceit upon other persons.

98. By engaging in the conduct described above, Defendants violated, and unless restrained and enjoined, will continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

THIRD CLAIM FOR RELIEF

Failure to Register as a Broker-Dealer

Violation of Section 15(a) of the Exchange Act

(against all Defendants)

99. The SEC realleges and incorporates by reference paragraphs 1 through 92 above.

100. Defendants by engaging in the conduct described above, made use of the mails or means or instrumentalities of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of securities, without being registered as brokers or dealers in accordance with Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

101. By engaging in the conduct described above, Defendants violated, and unless restrained and enjoined will continue to violate, Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

PRAYER FOR RELIEF

WHEREFORE, the SEC respectfully requests that the Court:

I.

Issue findings of fact and conclusions of law that Defendants committed the alleged violations.

II.

Issue orders, in a form consistent with Fed. R. Civ. P. 65(d), permanently enjoining Defendants and their agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from violating Section 17(a) of the Securities Act, 15 U.S.C. § 78q(a); Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5; and Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

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III.

Order Defendants to disgorge all ill-gotten gains from their illegal conduct, together with prejudgment interest thereon.

IV.

Order Defendants to pay civil penalties under Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3).

V.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

VI.

Grant such other and further relief as this Court may determine to be just and necessary.

Dated: December 7, 2015

Respectfully submitted,

/s/ Donald W. Searles

Donald W. Searles
Megan M. Bergstrom
Attorneys for Plaintiff
Securities and Exchange Commission

Complaints and Other Initiating Documents

2:15-cv-09420 Securities and Exchange Commission v. Feng et al

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Searles, Donald on 12/7/2015 at 8:03 AM PST and filed on 12/7/2015

Case Name: Securities and Exchange Commission v. Feng et al
Case Number: 2:15-cv-09420
Filer: Securities and Exchange Commission
Document Number: 1

Docket Text:
COMPLAINT No Fee Required - US Government, filed by Plaintiff Securities and Exchange Commission. (Attorney Donald W Searles added to party Securities and Exchange Commission(pty:pla))(Searles, Donald)

2:15-cv-09420 Notice has been electronically mailed to:

Donald W Searles searlesd@sec.gov, berryj@sec.gov, irwinma@sec.gov, LAROFiling@sec.gov

2:15-cv-09420 Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

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EXHIBIT 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. HUI FENG and LAW OFFICES OF FENG & ASSOCIATES P.C., Defendants.	Case No. 15-cv-09420-CBM(SSx) **ORDER RE: MOTIONS FOR SUMMARY JUDGMENT**

The matters before the Court are: (1) Plaintiff Securities and Exchange Commission's ("SEC's") Motion For Summary Judgment; and (2) Defendants Hui Feng's ("Feng's") and Law Offices of Feng & Associates P.C.'s ("Law Office's") (collectively, "Defendants'") Motion For Summary Judgment. (Dkt. Nos. 61, 66.)

I. BACKGROUND

The EB-5 Immigrant Investor Program was created by Congress in 1992 to stimulate the U.S. economy with capital investment from foreign investors. Foreign investors who invest $500,000 or $1,000,000 capital in a domestic commercial enterprise may petition the United States Citizenship and Immigration Services ("USCIS") (the "I-526 Petition") and receive conditional permanent

residency status. Many EB-5 investments are administered by entities called "regional centers."

This securities action arises from Defendants' (who are immigration attorneys) receipt of undisclosed commissions from regional centers in connection with Defendants' clients' EB-5 Immigrant Investor Program (the "EB-5 Program") investments. The SEC's Complaint assert the following three causes of action under the Securities Exchange Act ("the Act"): (1) Fraud in the Offer or Sale of Securities, 15 U.S.C. § 77q(a); (2) Fraud in Connection with the Purchase or Sale of Securities, 15 U.S.C. § 78j(b); and (3) Failure to Register as a Broker-Dealer, 15 U.S.C. § 78o(b).

The SEC's first cause of action for Fraud in the Offer or Sale of Securities alleges Defendants violated Section 17(a) of the Act, which provides:

> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> **(1)** to employ any device, scheme, or artifice to defraud, or
>
> **(2)** to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> **(3)** to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a).

The SEC's second cause of action for Fraud in Connection with the Purchase or Sale of Securities alleges Defendants violated Section 10(b) of the Act and Rule 10b-5. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so

> registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U.S.C. § 78j(b). One of the rules promulgated under the Act is Rule 10b-5, which provides: "It shall be unlawful for any person ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

The second and third causes of action for securities fraud allege: (1) Defendants failed to disclose to clients that Defendants received commissions from regional centers for referring Defendants' clients to invest in a regional center's EB-5 offerings; and (2) Defendants falsely represented to regional centers that foreign-based persons or a foreign-based entity were responsible for finding EB-5 investors, when in reality Defendant Feng's relatives or an entity controlled by Feng received commissions for referring clients.

The SEC's third cause of action for Failure to Register as a Broker-Dealer alleged Defendants violated Section 15 of the Act, which provides:

> (a) . . . It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section. . . .
>
> (b) . . . A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78o. The third cause of action alleges Defendants failed to register as

brokers under Section 15 in connection with their EB-5 activities.

II. STATEMENT OF LAW

On a motion for summary judgment, the Court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact. *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 609-10 (9th Cir. 2003); Fed. R. Civ. P. 56. Summary judgment against a party is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. *Id.* at 248.

The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Rather, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant's] favor." *Anderson*, 477 U.S. at 255. But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Id.* at 252. "Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citations omitted).

III. DISCUSSION

A. Evidentiary Objections

The Court rules on the parties' evidentiary objections as follows:

The SEC's Request for Evidentiary Rulings On Specified Objections (Dkt. No. 80): The SEC's objection No. 18 is SUSTAINED as to ABCL maintaining offices in China, and otherwise OVERRULED. The SEC's remaining objections are SUSTAINED.

Defendants' Request for Evidentiary Ruling on Specified Objections (Dkt. No. 75-3): Defendants' objections are OVERRULED.

Defendants' Request for Evidentiary Ruling on Specified Objections (Dkt. No. 81-3): Defendants' objections Nos. 3, 23, and 24 are SUSTAINED. Defendants' objection No. 28 is SUSTAINED as to Ekins Deposition page 41, line 22 through page 42 line 4, and OVERRULED as to Ekins Deposition page 41, lines 19 to 21. Defendants' remaining objections are OVERRULED.[1]

B. Defendants' Requests for Judicial Notice

Defendants request the Court take judicial notice of various administrative materials and news articles. (*See* Dkt. Nos. 67, 75-2, 81-1.) The Court may only take judicial notice of the existence of the documents, but not the truth of the contents therein. *See* Fed. R. Evid. 402; *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). The Court finds the existence of the documents for which Defendants seek judicial notice is not relevant, and therefore denies Defendants' requests for judicial notice.

C. Whether the EB-5 Investments Are "Securities" Under the Act

Defendants seek summary judgment as to all causes of action on the ground the EB-5 investments are not "securities" covered by the Act. Defendants also oppose the SEC's summary judgment motion on the same basis.

Section 3(a)(10) of the Act defines "security" to include, among other things, an "investment contract." 15 U.S.C. § 78c(a)(10) (emphasis added).[2]

[1] Consistent with the rulings on the objections, the Court did not consider evidence for which an objection was sustained.

[2] Specifically, "security" is defined under the Act as:

[A]ny note, stock, treasury stock, security future, security-based swap,

"Congress' purpose in enacting the securities laws was to regulate *investments,* in whatever form they are made and by whatever name they are called." *S.E.C. v. Edwards*, 540 U.S. 389, 393 (2004) (citation omitted) (emphasis in original). "To that end, it enacted a broad definition of 'security,' sufficient 'to encompass virtually any instrument that might be sold as an investment.'" *Id. See also Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990) ("In defining the scope of the market that it wished to regulate [via the federal securities laws], Congress painted with a broad brush."); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality."); *S.E.C. v. C.M. Joiner Leasing Corp.,* 320 U.S. 344, 351 (1943) ("Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a 'security.'").

In *S.E.C. v. W.J. Howey Co.*, the Supreme Court defined an "investment contract" as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts

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> bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, ***investment contract***, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78c(a)(10) (emphasis added). The term "investment contract" is not defined in the Act.

of the promoter or a third party." 328 U.S. 293, 298-99 (1946). The Ninth Circuit has held the definition of "investment contract" set forth in *Howey* created a three-part test requiring: "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." *Warfield v. Alaniz*, 569 F.3d 1015, 1020 (9th Cir. 2009) (citation omitted). The third prong of this test "involves two distinct concepts: whether a transaction involves any expectation of profit and whether expected profits are the product of the efforts of a person other than the investor." *Id.*

"[W]hile the subjective intent of the purchasers may have some bearing on the issue of whether they entered into investment contracts, [the Court] must focus [its] inquiry on what the purchasers were offered or promised." *Warfield*, 569 F.3d at 1021. Therefore, "[u]nder *Howey*, courts conduct an objective inquiry into the character of the instrument or transaction offered based on what the purchasers were 'led to expect.'" *Id.* (citing *Howey*, 328 U.S. at 298-99); *see also C.M. Joiner Leasing Corp.*, 320 U.S. at 352-53 ("The test [for determining whether an instrument is a security] ... is what character the instrument is given in commerce *by the terms of the offer*, the plan of distribution, and the economic inducements held out to the prospect.") (Emphasis added.); *Edwards*, 540 U.S. at 392 (payphone sale and buyback scheme involved investment contracts where promotional materials noted "potential for ongoing revenue generation").

The parties disagree as to whether the third prong of the *Howey* test is met.[3]

Regulations governing the EB-5 Program, which became effective in November 2011, provides: "To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk ***for the purpose of generating a return on the capital placed at***

[3] Defendants do not contend the first or second prongs of the *Howey* test is not satisfied here.

risk." 8 C.F.R. § 204.6 (emphasis added). Based on the evidence before the Court, there is no genuine issue of material fact that (1) the terms of the EB-5 investments note a potential for profit;[4] (2) many of the private placement memoranda for the EB-5 investments describe the offerings as "securities";[5] and (3) the regional centers' offerings were designed to meet the requirements set forthe in 8 C.F.R. § 204.6 that capital must be invested for the purpose of generating ae return.[6]

Defendants nevertheless argue the third prong re: expectation of profits is

[4] *See, e.g.*, Escalante Decl. Ex. 151 at p.1282 ("However, investment in the Partnership also offers investors an opportunity for a non-guaranteed annual return as described in the Offering Memorandum. With essential investment elements of risk and return incorporated in the Offering Memorandum, the Partnership complies with the terms of the program regulations."), Ex. 156 at p.1317 (same), Ex. 164 at p.1699 ("In the case of Lam Group's Pearl Street Project, the EB-5 investment is indeed generating a 1.5% return on the investment, however, the language did not specify that the 1.5% interest would be distributed to the individual investors; rather the return is maintained at the level of the new commercial enterprise. To remedy the ambiguity, the Regional Center has amended its offering documents to reflect that the EB-5 investors would individually be earning an interest payment."); Feng Decl. Ex. 2 (0.5% annual return on investment), Ex. 3 (4.25% annual interest income), Ex. 4 (up to 4% annual interest income), Ex. 82 at p.3 (6% annual return on investment); Ex. 7 (0.5% annual return on investment), Ex. 8 (0.5% annual return on investmente), Ex. 80 (up to 5% annual interest income), Ex. 81 (up to 4.5% annual interest income), Ex. 82 (5% annual interest income), Ex. 83 (6.25% annual interest rate of return).)

[5] *See* evidence cited in support of SEC Statement of Fact Nos. 21-22, 27-28, 30-32; *see also* Feng Decl. Ex. 2 at p.6 ("THE UNITS ARE RESTRICTED SECURITIES UNDER THE SECURITIES ACT."), Ex. 3 at p.i ("THE SECURITIES OFFERED HEREBY CANNOT BE OFFERED OR SOLD IN THE UNITED STATES OR TO "U.S. PERSONS" (AS SUCH TERM IS DEFINED IN REGULATIONS, PROMULGATED UNDER THE SECURITIES ACT) UNLESS THE SECURITIES ARE REGISTERED UNDER THE SECURITIES ACT, OR AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT IS AVAILABLE."), Ex. 4 at p.ie (same), Ex. 80 at p.i (same), Ex. 81 at p.i (same), Ex. 82 at p.i (same), Ex. 83 at p.i (same).) *See SEC v. United Ben. Life Ins. Co.*, 387 U.S. 202, 211 (1967) ("In the enforcement of an act such as this it is not inappropriate that promoters' offering be judged as being what they were represented to be."); *Warfield*, 569 F.3d at 1021 ("[C]ourts have frequently examined the promotional materials associated with an instrument or transaction in determining whether an investment contract is present.").

[6] *See* evidence cited in support of SEC Statement of Fact No. 50. *See also* Escalante Decl. Ex. 187 (filing with USCIS wherein Feng represented that "Investor's investment entitles her to a share of profits and cash flows generated by the business of CMB Group IV.").

not satisfied here because: (1) the EB-5 investments were motivated by Defendants' clients' desire for permanent resident status in the U.S.;[7] and (2) the terms of the EB-5 investments demonstrate Defendants' clients had no expectation of profits because EB-5 clients were required to pay mandatory administrative fees to regional centers[8] which cost more than the actual profit made by their EB-5 investments.[9]

First, the expectation of profits prong can be satisfied even where investments are made primarily for other reasons in addition to profit. Defendants argue the EB-5 investments were not solely made for profits, and therefore are not investment contracts, relying on dicta in *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975). In *Forman*, the Supreme Court noted in dicta:

> [T]he basic test for distinguishing the transaction [involving a security] from other commercial dealings is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment ([e.g.,] sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, ([e.g.,] dividends on the investment based on savings and loan association's profits). In

[7] It is undisputed representatives of regional centers acknowledge EB-5 investors hope to obtain green cards. (*See* evidence cited in support of Defendants' Statement of Fact No. 34.)

[8] Defendants submit offering documents for EB-5 investments between regional centers and Defendants' clients demonstrating clients were required to pay administrative fees ranging from $30,000 to $65,000. (*See* Feng Decl. Exs. 3, 4, 7, 8, 80, 81, 82, 83, 110.)

[9] Defendants also contend the SEC has "historically conceded that an EB-5 investment without an expectation of profit is not a security," and request that the Court take judicial notice of a January 18, 2002 No Action Letter issued by the SEC. (*See* Dkt. No. 67.) The Court can only take judicial notice of the existence of the SEC's no action letter, and not the truth of the contents of therein. (*See supra* at p.5 (denying Defendants' requests for judicial notice).) *See* Fed. R. Evid. 402; *Lee*, 250 F.3d at 690. Moreover, the SEC's no action letter is based on "the facts presented" before the SEC in an unrelated matter, and is not binding on this Court. *See Aventa Learning, Inc. v. K12 Inc.*, 2011 WL 13100748, at *4 (W.D. Wash. Mar. 28, 2011); *Holmes v. Bartlett*, 2004 WL 793190, at *3 (D. Or. Mar. 30, 2004), *report and recommendation adopted*, 2004 WL 1173138 (D. Or. May 21, 2004).

> such cases the investor is ***attracted solely by the prospects of a return*** on his investment. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased—to occupy the land or to develop it themselves. . . —the securities laws do not apply.

421 U.S. at 852-53 (emphasis added) (internal quotations and citations omitted). The Ninth Circuit and Second Circuit, however, have both held post-*Forman* that investments promoted primarily for tax benefits nevertheless satisfied the expectation of profits prong under the *Howey* test. *See S.E.C. v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 463-64 (9th Cir. 1985); *S.E.C. v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577 (2d Cir. 1982), *cert. denied*, 459 U.S. 1086 (1982). Therefore, evidence demonstrating Defendants' clients were also motivated to make EB-5 investments to obtain permanent residency in the United States does not preclude a determination that the EB-5 investments involved an expectation of profits and are therefore securities. *See S.E.C. v. Liu*, 2016 U.S. Dist. LEXIS 181536, at *9-12 (C.D. Cal. Aug. 17, 2016) (finding EB-5 investments were securities under the Act despite defendants' contention investors' did not have a "primary profit motive," reasoning although "nobody would dispute that EB-5 investors are motivated in significant part by obtaining lawful permanent residency in the United States[,] . . . the fact that the acquisition of EB-5 shares comes with unrelated benefits does not somehow convert the shares from securities into something else").

Second, Defendants cite to no authority in support of the proposition there can be no "expectation of profits" where clients are required to pay fees greater than their actual profits. The district court's opinion in *S.E.C. v. Liu* is persuasive on this point:

> The fact that [EB-5] investors paid a significant fee to invest . . .—a fee larger than the projected profits—does not alter this conclusion [that the instruments are securities under the Act]. Defendants have produced no legal authority for the proposition that the size of an investment fee can alter the nature of an investment contract itself. An [EB-5] investor who pays a fee to purchase securities has nonetheless purchased securities. ***The question here is not whether some combination of EB-5 shares and fees are profitable securities, but whether the shares themselves . . . qualify as investment***

> ***contracts. . . . Conflating fees paid to administer an offering with the proceeds of the offering itself makes little sense when determining whether the proceeds of the offering were expected to be profitable.***

2016 U.S. Dist. LEXIS 181536, at *12 (emphasis added). Moreover, the issue is not whether investors actually received a profit, but whether there was an expectation of profit based on the objective terms of the offerings. *See Warfield*, 569 F.3d at 1020. Therefore, evidence Defendants' clients were required to pay administrative fees for their EB-5 investments is irrelevant in determining whether there was an "expectation of profits" under the *Howey* test.

Here, although it is undisputed EB-5 investors are also motivated to make investments to obtain permanent residency in the United States, the EB-5 regulations require, and the terms of the EB-5 investments demonstrate capital contributions were made by Defendants' clients for the purpose of generating a return. Accordingly, the Court finds the EB-5 investments are investment contracts and therefore securities governed by federal securities laws and regulations.[10]

D. Whether Defendants Acted As "Brokers" Covered By the Act

Section 3(a)(4) of the Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." 15 U.S.C. § 78c(a)(4). The purpose of Section 15(a)'s broker registration requirement is to ensure that "securities are [only] sold by a salesman who understands and appreciates both the nature of the securities he sells and his responsibilities to the investor to whom he sells." *Roth v. S.E.C.*, 22 F.3d 1108, 1109 (D.C. Cir. 1994). *See also Edwards*, 549 U.S. at 393 ("Congress' purpose in enacting the securities laws was to regulate *investments,* in whatever form they are made and by whatever name they are called.").[11]

[10] *See S.E.C. v. Liu*, 2016 U.S. Dist. LEXIS 181536, at *9-12; *see also Edwards*, 540 U.S. at 392; *Warfield*, 569 F.3d at 1021; *S.E.C. v. U.S. Reservation Bank & Trust*, 289 F. App'x 228, 230-31 (9th Cir. 2008).

[11] Whether a security is exempt from registration and therefore not sold on an exchange facility is irrelevant to the issue of whether Defendants acted as brokers

(1) Exemptions from Broker Registration

Defendants argue they should be exempt from the Act's broker-registration requirements as a matter of public policy since attorneys already have heightened fiduciary duties owed to their clients. Defendants rely on 11 U.S.C. §80b-2(a)(11) of the Investment Advisers Act of 1940, which defines an "investment advisor" as "any person who... engages in the business of advising others...as to the value of securities or as to the advisability of investing in, purchasing, or selling securities...," but expressly excludes lawyers from this definition so long as their "performance of such services [are] solely incidental to the practice of [their] profession." No attorney exemption, however, is set forth in Section 15 of the Act.[12] Accordingly, the Court declines to adopt an exemption for attorneys from broker registration requirements under the Act based on public policy grounds.

Defendants also argue they are exempt from registering as brokers because it is undisputed Defendants' clients' EB-5 investments were not traded on a national securities exchange. Section 15(a) provides:

> It shall be unlawful for any broker or dealer... (***other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange***) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

15 U.S.C. § 78o(a)(1) (emphasis added). The plain language of Section 15(a)

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and were required to register as brokers under the Act. *See Eastside Church of Christ v. Nat'l Plan, Inc.*, 391 F.2d 357, 361 (5th Cir. 1968) (the fact that securities at issue may be exempt from registration under the Act "does not relate to the antifraud or broker-dealer registration provisions" of the Act).

[12] Under general principles of statutory interpretation, where the legislature expressly excluded attorneys from the definition of investment advisor under the Investment Advisors Act, but did not exclude attorneys from the definition of investment advisors in the Securities Exchange Act, this demonstrates the legislature did not intend to exclude attorneys from broker registration requirements under the Securities Exchange Act. *See, e.g., F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 514-15 (1963).

requires both exclusive intrastate business and non-use of any facility of a national securities exchange to be exempt from the Act's broker registration requirements. *Id.* Here, however, the undisputed evidence demonstrates Defendants' business was not "exclusively intrastate." Accordingly, Section 15(a)'s limited exclusion for non-registration does not apply to Defendants.[13]

(2) *Hansen* Factors

Courts in the Ninth Circuit have considered the *Hansen* factors[14] in determining whether an individual qualifies as a "broker" covered by the Act, including whether the individual:

(1) is an employee of the issuer of the security;[15]
(2) received transaction-based income such as commissions rather than a salary;
(3) sells or sold securities from other issuers;
(4) was involved in negotiations between issuers and investors;
(5) advertising for clients;
(6) gave advice or made valuations regarding the investment;
(7) was an active finder of investors; and
(8) regularly participates in securities transactions.

See S.E.C. v. Braslau, 2014 WL 6473378, at *5 (C.D. Cal. Nov. 17, 2014); *S.E.C. v. Holcom*, 2015 WL 11233426, at *4, *6 (S.D. Cal. Jan. 8, 2015) (citing *Hansen*, 1984 WL 2413, at *10); *S.E.C. v. Small Bus. Capital Corp.*, 2013 WL 4455850, at

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[13] In arguing they were not required to register as brokers because the EB-5 investments were not traded using exchange facilities, Defendants rely on the heading for Section 15(a) of the Act, which does not reference intrastate business and simply states: "Registration of all persons ***utilizing exchange facilities*** to effect transactions; exemptions." 15 U.S.C. § 78o(a)(1)(emphasis added). Defendants, however, cannot rely on the heading of Section 15(a) rather than the plain language of the statute, for purposes of determining whether they were required to register as brokers under Section 15(a). *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947).

[14] *See S.E.C. v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984).

[15] There is no genuine issue of material fact that Defendants were not employees of the regional centers. (*See* evidence cited in support of Defendants Statement of Fact No. 48.)

*14 (N.D. Cal. Aug. 16, 2013).[16]

Here, the undisputed evidence demonstrates: (1) Feng received transaction-based income in the form of commissions or referral fees for referring his clients to the regional centers; (2) Defendants have provided services in connection with the EB-5 Program since 2010, Feng started trading securities in 2003, and operated a hedge fund from 2008 to 2014 for which he conducted securities transactions;[17] (3) Defendants advertised for clients and were active finders of investors by promoting EB-5 projects on the internet and through Feng's website; (4) Defendants were involved in negotiations between regional centers and investors by interfacing directly with regional centers regarding his clients' EB-5 investments, asking regional centers numerous questions regarding the projects, and negotiating with regional centers as to the amount of administrative fees and rebates on Defendants' clients' behalf;[18] and (5) Defendants gave advice regarding investments by conducting research and performed due diligence regarding EB-5 investment projects and providing lists of EB-5 regional centers they recommended clients to invest in.[19] Accordingly, each of the *Hansen* factors—

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[16] Some courts have found the transaction-based compensation factor should be given substantial weight in determining whether the person is a broker under the Act. *See, e.g., Landegger*, 2013 WL 5444052, at *6; *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011); *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006).

[17] Feng declares he has "never sold securities" (Feng Decl. ¶ 35), which directly contradicts his prior sworn testimony and therefore cannot be used to create a genuine issue of material fact. Accordingly, the Court disregards this portion of Feng's declaration as a "sham" declaration. *See Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991).

[18] Feng declares he has "never been involved in negotiating the financial terms of [EB-5] investments on [his] clients' behalf." (Feng Decl. ¶22.) The Court disregards this portion of Feng's declaration as a "sham" declaration because it directly contradicts his prior sworn testimony and cannot be used to create a genuine issue of material fact. *See Nelson*, 571 F.3d at 927; *Kennedy*, 952 F.2d at 266-67.

[19] Feng declares he "do[es] not perform any analysis, or make any recommendations to [his] clients based on whether certain projects offer a higher financial return than others." (Feng Decl. ¶¶ 20, 37.) The Court disregards this portion of Feng's declaration as a "sham" declaration because it directly

other than the employee of issuer factor—demonstrate Defendants acted as brokers under the Act.[20]

The Court therefore finds Defendants were brokers subject to registration requirements under Section 15(a) of the Act.

* * *

It is undisputed Defendants never registered as a broker. Accordingly, the Court finds Defendants failed to register as brokers in violation of Section 15(a) of the Act.

E. Securities Fraud—Section 17(a)(2), Section 10(b), and Rule 10b-5

The SEC's first and second causes of action are for violation of Section 17(a)(2) and Section 10(b) of the Act, and Rule 10b-5. "Section 17(a) Act, Section 10(b), and Rule 10b–5 forbid making [1] a material misstatement or omission [2] in connection with the offer or sale of a security [3] by means of interstate commerce."[21] *S.E.C. v. Phan*, 500 F.3d 895, 907-08 (9th Cir. 2007) (internal quotations and citations omitted); *see also S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010).[22] Violations of Section 10(b)

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contradicts his prior sworn testimony and cannot be used to create a genuine issue of material fact. *See Nelson*, 571 F.3d at 927; *Kennedy*, 952 F.2d at 266-67.

[20] Notwithstanding the *Hansen* factors, Defendants, relying on *S.E.C. v. M&A West, Inc.*, 2005 WL 1514101 (N.D. Cal. June 20, 2005), *aff'd*, 538 F.3d 1043 (9th Cir. 2008), and *S.E.C. v. Mapp*, 2016 U.S.Dist.LEXIS 140141 (E.D. Tex. Oct. 7, 2016), argue they did not act as brokers because there were only "three isolated incidents" during which a client wired funds to Feng, who then transferred the funds to the escrow agent specified by the regional center. Both *M&A West* and *Mapp* are distinguishable because those cases dealt with situations where there was no evidence (or no allegations) that the defendant had been entrusted with assets or authorized to transact for the account of others. In contrast, here it is undisputed that "[f]rom time to time, an investor would wire funds to Feng, who handled the transfer of funds to the regional centers." (*See* evidence cited in support of SEC Statement of Fact No. 147.)

[21] The parties do not address the interstate commerce factor, but it is undisputed Defendants had offices in the United States and China, Defendants' EB-5 clients were from China, and Defendants' clients made investments with regional centers in the United States as part of the EB-5 Program.

[22] Defendants argue there is no evidence the regional centers actually or reasonably relied on Defendants' alleged misrepresentations. However, "the SEC, unlike a private plaintiff, is not required to establish reliance for a § 10b or Rule 10b–5 securities fraud action." *S.E.C. v. All. Leasing Corp.*, 28 F. App'x 648, 652

and Rule 10b–5 "require *scienter*," whereas [v]iolations of Sections 17(a)(2) . . . require a showing of negligence." *Phan*, 500 F.3d at 908.

(1) Material Omissions

A fact "is material 'if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" *Platforms Wireless Int'l Corp.*, 617 F.3d at 1092 (quoting *Phan*, 500 F.3d at 908).[23]

Feng declares: (1) he did not voluntarily disclose regional centers paid him a referral fee prior to February 2015; (2) he only acknowledged he received a referral fee from regional centers if clients asked him; and (3) as of February 2015 he began to disclose he would receive referral fees in the engagement agreements his clients signed prior to retaining Feng's legal services. (Feng Decl. ¶ 34.)[24] The SEC offers evidence Defendants' clients would have chosen a cheaper investment or asked to receive a portion of Defendants' commissions if they had

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(9th Cir. 2002) (citing *S.E.C. v. Rana Research Inc.*, 8 F.3d 1358, 1363-64 (9th Cir. 1993)).

[23] "Determining materiality in securities fraud cases should ordinarily be left to the trier of fact." *Phan*, 500 F.3d at 908 (internal quotations and citation omitted). "Materiality typically cannot be determined as a matter of summary judgment because it depends on determining a hypothetical investor's reaction to the alleged misstatement." *Id.* "Only if the established omissions are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality is the ultimate issue of materiality appropriately resolved as a matter of law by summary judgment." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Here, the parties agree materiality may be determined as a matter of law. Moreover, the Court finds no reasonable minds can differ on whether Defendants' omissions were material. (*See infra.*)

[24] Defendants focus on the fact Feng disclosed receiving commissions if clients asked him. The burden to disclose, however, is on Defendants—it is not clients' burden to inquire whether Defendants have a conflict of interest. Moreover, it is undisputed only 10-20% of Feng's clients specifically asked if Feng was being compensated by regional centers. (*See* evidence cited in support of SEC Statement of Fact No. 199.) Moreover, the SEC legal ethics expert opined that Feng's purported "disclosure" in his legal services agreements after February 2015 fails to meet applicable ethical disclosure requirements. (*See* Wendel Decl. ¶¶ 23-24.)

known Defendants received money from the regional centers.[25]

The Court finds Defendants' omissions regarding receipt of referral fees are material as a matter of law. *See S.E.C. v. All. Leasing Corp.*, 28 F. App'x 648, 652 (9th Cir. 2002) (defendant's failure to disclose a 30% commission was material as a matter of law to the investor's assessment of the strength of the potential investment because "reasonable minds cannot differ on the question of materiality") (quoting *TSC Indus.*, 426 U.S. at 450); *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) (noting "[i]n deciding whether to buy a given stock, a reasonable investor would consider it important that, in contrast to the purchase of most stocks, the broker would receive a 5% commission from the purchase of this particular (house) stock," and therefore "reject[ing] Defendants' argument that the bonus commissions are immaterial as a matter of law"); *Schaffer Family Inv'rs LLC v. Sonnier*, 2016 WL 6917269, at *6 (C.D. Cal. July 5, 2016) (finding defendant's misrepresentation he did not have any financial benefit in connection with investments made by plaintiffs were material misrepresentations as a matter of law where defendant admitted "he did in fact receive 'finder's fees' and commissions . . . in connection with the investments made by Plaintiffs throughout the period from 2008 to 2013").[26]

Moreover, "[i]t is indisputable that ***potential*** conflicts of interest are 'material' facts with respect to clients." *Vernazza v. S.E.C.*, 327 F.3d 851, 859 (9th Cir.), *amended*, 335 F.3d 1096 (9th Cir. 2003) (emphasis added).[27] Here,

[25] *See* Escalante Decl. Ex. 201, Fenglei Bao 7/15/15 SEC Inv. Test. 29:1-33:4; *id.* Ex. 207, Xiangyang Guo 7/28/15 SEC Inv. Test. 29:16-30:19; *id.* Ex. 206, Feng Depo. 292:2-284:1.

[26] Defendants' omissions regarding receipt of commissions is material as a matter of law, even assuming the overall cost to clients was the same regardless of the commission received by Defendants. *See Laurienti*, 611 F.3d at 535, 541 (rejecting defendant's contention that omissions regarding bonus commissions paid to brokers for house stocks were "immaterial as a matter of law" despite fact overall cost to the client was the same, regardless of the commission received by the broker).

[27] *See also S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 201 (1963); *Chasins*, 438 F.2d at 1172.

Feng testified there was a potential conflict of interest with respect to Defendants' receipt of commissions/referral fees from regional centers.[28]

(2) In Connection With the Offer or Sale of a Security

Defendants promoted certain regional centers to their clients but failed to disclose their financial interest (i.e., receipt of commissions/referral fees) in those regional centers. Defendants' clients in turn invested in securities offered by those regional centers recommended by Defendants. Therefore, Defendants' omissions "coincided" with a securities transaction. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006). *See also Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043, 1052 (N.D. Cal. 2002), *aff'd sub nom. Feitelberg v. Merrill Lynch & Co.*, 353 F.3d 765 (9th Cir. 2003) (finding alleged misfeasance was "clearly . . . 'in connection with' the sale of securities" where plaintiff alleged defendant's analysts issued positive research reports to increase or maintain the price of the securities of the company reported on and alleged the investing public was victimized by this practice because the public "***relied on what they thought was objective advice***") (emphasis added). Accordingly, the Court finds Defendants' omissions were in connection with the offer or sale of a security.[29]

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[28] *See* Escalante Decl. Ex. 204, Feng 12/2/14 SEC Inv. Test. 112:23-113:23; *id.* Ex. 205, Feng 2/13/15 SEC Inv. Test. 299:16-303:1. Feng also declared he changed his standard legal service agreement in February 2015 to state the following: "Client may obtain other advisory services from an overseas consulting firm which is controlled by Attorney; as disclosed in EB-5 offering documents, the consulting firm may receive compensation from sponsor companies to cover necessary marketing and administrative fees[.] . . . ***The compensation has the risk of impacting Attorney's judgment on the project*** . . .." (Feng Decl. ¶ 34 n.4 (emphasis added).)

[29] The Court rejects Defendants' contention that the commissions they received were not in connection with the offer or sale of a security because it was "based on an immigration event" which "related solely to the approval of an EB-5 application." *See S.E.C. v. Zandford*, 535 U.S. 813, 821 (2002) (The Supreme Court has "refused to read the [Act] so narrowly" such that a fraud that did not take place within the context of a securities exchange is not prohibited by § 10(b)," and has noted the Act "must be read flexibly, not technically and restrictively" in determining whether a fraud was in connection with the purchase or sale of securities.).

(3) Scienter/Negligence

"Scienter can be established by intent, knowledge, or in some cases 'recklessness.'" *Platforms Wireless Int'l Corp.*, 617 F.3d at 1092 (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568–69 (9th Cir.1990) (en banc)). Recklessness that constitutes scienter "is conduct that consists of a highly unreasonable act, or omission, that is an 'extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *S.E.C. v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001) (quoting *Hollinger*, 914 F.2d at 1569). Negligence for purposes of Section 17(a)(2) and (3) is the "fail[ure] to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation." *S.E.C. v. Schooler*, 2015 WL 3491903, at *10 (S.D. Cal. June 3, 2015).

The SEC offers undisputed evidence that Defendants knowingly failed to disclose their receipt of commissions to their clients because they wanted to avoid having to negotiate with clients about rebating portions of the commissions.[30] Accordingly, there is no genuine issue of material fact regarding whether Defendants acted with scienter in failing to disclose their receipt of commissions.

(4) Scheme to Defraud

Section 17(a)(1) makes it "unlawful for any person in the offer or sale of any securities . . . to employ any device, scheme, or artifice to defraud" or "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(1), (3). Similarly, Rule 10b-5(a) and (c) make it "unlawful for any person, directly or indirectly, . . . (a) To employ any device, scheme, or artifice to defraud, . . . or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud

[30] "[W]hether or not [Defendants] believed that the investment program was a security is not material to scienter." *All. Leasing Corp.*, 28 F. App'x at 651-52.

or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(a), (c). To be liable for a scheme to defraud under Section 17(a) and Rule 10b-5, a defendant must have "committed a manipulative or deceptive act in furtherance of the scheme." *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997). *See also Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 938 (9th Cir. 2009). Specifically, the defendant "must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme. It is not enough that a *transaction* in which a defendant was involved had a deceptive purpose and effect; the defendant's *own conduct* contributing to the transaction or overall scheme must have had a deceptive purpose and effect." *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds by Simpson v. Homestore.com*, 519 F.3d 1041, 1041-42 (9th Cir. 2008) (emphasis in original).

As to Defendants' clients, there is no genuine issue of material fact based on the evidence before this Court that (1) Feng would try to make it appear the rebate was coming from the regional center, rather than from Feng, because he wanted his clients to think he was negotiating on their behalf; (2) Feng believed if his client knew the rebate was coming from Feng, the client would demand that Feng rebate the rest of the referral fee/commission from Feng; (3) when Feng does negotiate for a regional center to rebate a fee, in some instances 100% of the rebate is coming from Feng's marketing fee but Feng does not disclose this to his clients. (*See* evidence cited in support of SEC's Statement of Fact Nos. 210-212.) Accordingly, it is undisputed Defendants acted to create a "false appearance of fact" to clients that rebates were coming from regional centers in order to prevent Defendants' clients from demanding money from Feng.

As to regional centers, there is no genuine issue of material fact based on the evidence before this Court that:

(1) Feng was solely responsible for setting up ABCL, has sole

control over ABCL's bank account, and is the sole beneficial owner of ABCL;

(2) ABCL had no employees other than employees of Feng's law firm;

(3) Although Xing Tan was added as a 50% owner of ABCL in December 2014, she has no dealings with clients or regional centers, has no authority over ABCL's bank account, and has never received compensation from ABCL;

(4) Feng represented to regional centers he was working with individuals in China who were procuring investors and who demanded payment of referral fees;

(5) Feng had his relatives execute referral agreements on behalf of ABCL with some regional centers even though the relatives had no role in procuring investors;

(6) Xiuyuan Tan signed agreements with regional centers wherein she identified herself as "President" of ABCL;

(7) Xiuyuan Tan signed a marketing agreement with regional center DCRC-Skyland wherein DCRC-Skyland agreed to pay Tan a fee of $30,000 per client;

(8) Feng emailed regional center DCRC-Skyland on January 11, 2014 and wrote "attached is the signed marketing agreement to our agent in China";

(9) Xiuyuan Tan is Feng's mother and had nothing to do with the procurement of investors and did not provide services under the marketing agreements she signed with regional centers;

(10) Feng never told DCRC regional center that Xiuyuan Tan was his mother, that she had no role in finding overseas EB5 investors, and that she had no role at ABCL;

(11) DCRC-Skyland regional center wired $210,000 in commissions to a bank in Hong Kong to an account in the name of Huizhen Xi, Feng's mother-in law;

(12) Feng did not disclose to DCRC that Huizhen Xi was Feng's mother-in-law who had nothing to do with the procurement of investors or otherwise providing services under the agreement with DCRC;

(13) DCRC regional center entered into a foreign finder agreement with ABCL on September 16, 2015, wherein ABCL represented neither ABCL, its general partners, managing members, directors, executive officers nor any other officer is a citizen of the US, ABCL did not directly or indirectly maintain a physical office in the United States, and ABCL and its representatives will conduct all of their activities outside the U.S.;

> (14) DCRC wired commissions to an account in the name of ABCL for finding investors;
>
> (15) Feng never told DCRC regional center that Feng is a 50% owner of ABCL; and
>
> (16) DCRC would likely have ceased doing business with Feng and his Chinese "agents" had Feng disclosed his relationship to ABCL and those "agents."[31]

Defendants contend regional centers knew Defendants were using overseas agents and overseas companies related to Defendants to accept payments from regional centers, relying on deposition testimony from Brian Ostar, a representative of EB-5 Capital regional center, who testified that he asked Feng, "Do you have a sister agency in China who we can pay" referral fees. (Holmes Decl. Ex. 14, Ostar Depo. 68:4-14.) Defendants argue "sister" agency did not mean a company with no relationship to Feng, and therefore regional centers asked for and knew Chinese agents and ABCL had relationships with Feng. The evidence offered by Defendants, however, is limited to one regional center. Moreover, the next nine lines of Ostar's deposition, which were excluded by Defendants, provide:

> Q. [When you asked if Feng has a "sister agency" in China you could pay,] [d]id you mean an unrelated entity with which -- with whom Mr. Feng dealt with in China?
> A. Yes.
> Q. And in writing that sentence, did you mean to suggest to Mr. Feng that he should set up a paper company so that he could indirectly receive referral fees?
> . . .
> THE WITNESS: No.

(Ostar Depo. 68:15-24.) Accordingly, Defendants fail to offer evidence demonstrating regional centers were aware of Defendants' relationship with ABCL and overseas agents. It is therefore undisputed Defendants acted to create a "false appearance of fact" to regional centers regarding Defendants' relationship

[31] *See* evidence cited in support of SEC's Statement of Fact Nos. 86-100, 105-107, 113-116, 249, 257, 320-325, 327, 328, 332, 333, 346, 336-338, 341, 348, 352.

with ABCL and Chinese agents who received referral fees but did not procure investors.

The Court thus finds Defendants violated Sections 17(a) and 10b-5 based on a scheme to defraud clients and regional centers.

F. Disgorgement of Profits and Prejudgment Interest

"The district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of the securities laws." *S.E.C. v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir.1998) (citations omitted). "Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *Id.* *See also Platforms Wireless*, 617 F.3d at 1099-100 (affirming award of prejudgment interest in securities fraud action). Joint and several liability for the disgorgement of illegally obtained proceeds is appropriate "[w]here two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws." *Platforms Wireless*, 617 F.3d at 1098 (citing *First Pac. Bancorp*, 142 F.3d at 1191-92).

The Court finds Defendants are jointly and severally liable for disgorgement of profits in the amount of $1,268,000 for commissions received by Defendants in connection with the EB-5 Program, and prejudgment interest in the amount of $468,012.

G. Civil Penalties

The Act authorizes three tiers of civil penalties, the amount of which is to be "determined by the court in light of the facts and circumstances." 15 U.S.C. §§ 77t(d), 78u(d)(3)(B). Second tier penalties may be imposed where the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 78u(d)(3)(B), 77t(d)(2).[32]

[32] The maximum second-tier penalty for violations that occurred between 2010 and March 5, 2013 is the greater of (1) $75,000 per violation for a natural person or $375,000 per violation for "any other person"; or (2) the gross amount of

Since Defendants' violation of the Sections 10(b) and 17(a) of the Act and Rule 10b-5 were based on fraudulent omissions, second tier penalties per violation are proper here. Moreover, Defendants' fraud continued to occur after March 5, 2013,[33] such that second-tier penalties of $80,000 per violation by Feng and $400,000 per violation by Defendant Law Offices may be imposed.

Accordingly, the Court imposes $160,000 in civil penalties against Defendant Feng and $800,000 in civil penalties against Defendant Feng & Associates as requested by the SEC.

H. Permanent Injunction

To obtain a permanent injunction against Defendants, "the SEC had the burden of showing there [is] a reasonable likelihood of future violations of the securities laws." *S.E.C. v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). "The existence of past violations may give rise to an inference that there will be future violations." *Id.* (citation omitted). "In predicting the likelihood of future violations, a court must assess the totality of the circumstances surrounding the defendant and his violations," and "considers factors such as the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the likelihood, because of defendant's professional occupation, that future violations might occur; and the sincerity of his assurances against future violations." *Id.* (citation omitted).

Here, the evidence before the Court demonstrates Defendants are immigration attorneys who have been involved in the EB-5 Program since 2010,

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pecuniary to the defendant as a result of the violation. 17 C.F.R. §§ 201.1004, 201.1005. The maximum second-tier penalty for violations that occurred after March 5, 2013 is the greater of (1) $80,000 per violation for a natural person or $400,000 per violation for "any other person"; or (2) the gross amount of pecuniary to the defendant as a result of the violation. 17 C.F.R. §§ 201.1004, 201.1005.

[33] Defendant Feng admits he did not disclose receipt of fees from regional centers until 2015. (*See supra.*) Furthermore, it is undisputed Feng did not disclose his relationship with ABCL and his Chinese "agents" with regional centers. (*See supra.*)

continue to advise clients in connection with the EB-5 Program, and have clients with pending EB-5 petitions. Moreover, based on the evidence before the Court, there is no genuine issue of material fact that (1) Defendant Feng created a new off-shore entity, called Kilogram, and a new law firm called HC Law because various regional centers refused to do business with ABCL and Defendants as a result of the SEC's action; (2) Feng has a 50% ownership interest in Kilogram; and (3) Feng has not disclosed his ownership interest in Kilogram to regional centers that have contracted with it. (*See* evidence cited in support of SEC's Statement of Fact Nos. 120-126.) Accordingly, a permanent injunction is warranted here because the evidence demonstrates a reasonable likelihood Defendants will continue to engage in conduct in violation of the Act. *See, e.g., Murphy*, 626 F.2d at 655; *S.E.C. v. Currency Trading Int'l, Inc.*, 2004 WL 2753128, at *11 (C.D. Cal. Feb. 2, 2004); *Cross Fin. Servs., Inc.*, 908 F. Supp. at 734.

IV. CONCLUSION

Accordingly, the Court **GRANTS** the SEC's Motion For Summary Judgment, and **DENIES** Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: June 29, 2017.

HON. CONSUELO MARSHALL
United States District Judge

EXHIBIT 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. HUI FENG and LAW OFFICES OF FENG & ASSOCIATES P.C., Defendants.	Case No. 15-cv-09420 **AMENDED ORDER RE: MOTIONS FOR SUMMARY JUDGMENT**

The matters before the Court are: (1) Plaintiff Securities and Exchange Commission's ("SEC's") Motion For Summary Judgment; and (2) Defendants Hui Feng's ("Feng's") and Law Offices of Feng & Associates P.C.'s ("Law Office's") (collectively, "Defendants'") Motion For Summary Judgment. (Dkt. Nos. 61, 66.)

I. BACKGROUND

The EB-5 Immigrant Investor Program was created by Congress in 1992 to stimulate the U.S. economy with capital investment from foreign investors. Foreign investors who invest $500,000 or $1,000,000 capital in a domestic commercial enterprise may petition the United States Citizenship and Immigration Services ("USCIS") (the "I-526 Petition") and receive conditional permanent

residency status. Many EB-5 investments are administered by entities called "regional centers."

This securities action arises from Defendants' (who are immigration attorneys) receipt of undisclosed commissions from regional centers in connection with Defendants' clients' EB-5 Immigrant Investor Program (the "EB-5 Program") investments. The SEC's Complaint assert the following three causes of action under the Securities Exchange Act ("the Act"): (1) Fraud in the Offer or Sale of Securities, 15 U.S.C. § 77q(a); (2) Fraud in Connection with the Purchase or Sale of Securities, 15 U.S.C. § 78j(b); and (3) Failure to Register as a Broker-Dealer, 15 U.S.C. § 78o(b).

The SEC's first cause of action for Fraud in the Offer or Sale of Securities alleges Defendants violated Section 17(a) of the Act, which provides:

> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> **(1)** to employ any device, scheme, or artifice to defraud, or
>
> **(2)** to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> **(3)** to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a).

The SEC's second cause of action for Fraud in Connection with the Purchase or Sale of Securities alleges Defendants violated Section 10(b) of the Act and Rule 10b-5. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so

> registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U.S.C. § 78j(b). One of the rules promulgated under the Act is Rule 10b-5, which provides: "It shall be unlawful for any person ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

The second and third causes of action for securities fraud allege: (1) Defendants failed to disclose to clients that Defendants received commissions from regional centers for referring Defendants' clients to invest in a regional center's EB-5 offerings; and (2) Defendants falsely represented to regional centers that foreign-based persons or a foreign-based entity were responsible for finding EB-5 investors, when in reality Defendant Feng's relatives or an entity controlled by Feng received commissions for referring clients.

The SEC's third cause of action for Failure to Register as a Broker-Dealer alleged Defendants violated Section 15 of the Act, which provides:

> (a) . . . It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section. . . .
>
> (b) . . . A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78o. The third cause of action alleges Defendants failed to register as

brokers under Section 15 in connection with their EB-5 activities.

II. STATEMENT OF LAW

On a motion for summary judgment, the Court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact. *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 609-10 (9th Cir. 2003); Fed. R. Civ. P. 56. Summary judgment against a party is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. *Id.* at 248.

The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Rather, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant's] favor." *Anderson*, 477 U.S. at 255. But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Id.* at 252. "Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citations omitted).

III. DISCUSSION

A. Evidentiary Objections

The Court rules on the parties' evidentiary objections as follows:

The SEC's Request for Evidentiary Rulings On Specified Objections (Dkt. No. 80): The SEC's objection No. 18 is SUSTAINED as to ABCL maintaining offices in China, and otherwise OVERRULED. The SEC's remaining objections are SUSTAINED.

Defendants' Request for Evidentiary Ruling on Specified Objections (Dkt. No. 75-3): Defendants' objections are OVERRULED.

Defendants' Request for Evidentiary Ruling on Specified Objections (Dkt. No. 81-3): Defendants' objections Nos. 3, 23, and 24 are SUSTAINED. Defendants' objection No. 28 is SUSTAINED as to Ekins Deposition page 41, line 22 through page 42 line 4, and OVERRULED as to Ekins Deposition page 41, lines 19 to 21. Defendants' remaining objections are OVERRULED.[1]

B. Defendants' Requests for Judicial Notice

Defendants request the Court take judicial notice of various administrative materials and news articles. (*See* Dkt. Nos. 67, 75-2, 81-1.) The Court may only take judicial notice of the existence of the documents, but not the truth of the contents therein. *See* Fed. R. Evid. 402; *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). The Court finds the existence of the documents for which Defendants seek judicial notice is not relevant, and therefore denies Defendants' requests for judicial notice.

C. Whether the EB-5 Investments Are "Securities" Under the Act

Defendants seek summary judgment as to all causes of action on the ground the EB-5 investments are not "securities" covered by the Act. Defendants also oppose the SEC's summary judgment motion on the same basis.

Section 3(a)(10) of the Act defines "security" to include, among other things, an "investment contract." 15 U.S.C. § 78c(a)(10) (emphasis added).[2]

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[1] Consistent with the rulings on the objections, the Court did not consider evidence for which an objection was sustained.

[2] Specifically, "security" is defined under the Act as:

[A]ny note, stock, treasury stock, security future, security-based swap,

"Congress' purpose in enacting the securities laws was to regulate *investments,* in whatever form they are made and by whatever name they are called." *S.E.C. v. Edwards*, 540 U.S. 389, 393 (2004) (citation omitted) (emphasis in original). "To that end, it enacted a broad definition of 'security,' sufficient 'to encompass virtually any instrument that might be sold as an investment.'" *Id. See also Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990) ("In defining the scope of the market that it wished to regulate [via the federal securities laws], Congress painted with a broad brush."); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality."); *S.E.C. v. C.M. Joiner Leasing Corp.,* 320 U.S. 344, 351 (1943) ("Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a 'security.'").

In *S.E.C. v. W.J. Howey Co.*, the Supreme Court defined an "investment contract" as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts

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> bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, ***investment contract***, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78c(a)(10) (emphasis added). The term "investment contract" is not defined in the Act.

of the promoter or a third party." 328 U.S. 293, 298-99 (1946). The Ninth Circuit has held the definition of "investment contract" set forth in *Howey* created a three-part test requiring: "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." *Warfield v. Alaniz*, 569 F.3d 1015, 1020 (9th Cir. 2009) (citation omitted). The third prong of this test "involves two distinct concepts: whether a transaction involves any expectation of profit and whether expected profits are the product of the efforts of a person other than the investor." *Id.*

"[W]hile the subjective intent of the purchasers may have some bearing on the issue of whether they entered into investment contracts, [the Court] must focus [its] inquiry on what the purchasers were offered or promised." *Warfield*, 569 F.3d at 1021. Therefore, "[u]nder *Howey*, courts conduct an objective inquiry into the character of the instrument or transaction offered based on what the purchasers were 'led to expect.'" *Id.* (citing *Howey*, 328 U.S. at 298-99); *see also C.M. Joiner Leasing Corp.*, 320 U.S. at 352-53 ("The test [for determining whether an instrument is a security] ... is what character the instrument is given in commerce *by the terms of the offer*, the plan of distribution, and the economic inducements held out to the prospect.") (Emphasis added.); *Edwards*, 540 U.S. at 392 (payphone sale and buyback scheme involved investment contracts where promotional materials noted "potential for ongoing revenue generation").

The parties disagree as to whether the third prong of the *Howey* test is met.[3]

Regulations governing the EB-5 Program, which became effective in November 2011, provides: "To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk ***for the purpose of generating a return on the capital placed at***

[3] Defendants do not contend the first or second prongs of the *Howey* test is not satisfied here.

risk." 8 C.F.R. § 204.6 (emphasis added). Based on the evidence before the Court, there is no genuine issue of material fact that (1) the terms of the EB-5 investments note a potential for profit;[4] (2) many of the private placement memoranda for the EB-5 investments describe the offerings as "securities";[5] and (3) the regional centers' offerings were designed to meet the requirements set forthe in 8 C.F.R. § 204.6 that capital must be invested for the purpose of generating a return.[6]

Defendants nevertheless argue the third prong re: expectation of profits is

[4] *See, e.g.*, Escalante Decl. Ex. 151 at p.1282 ("However, investment in the Partnership also offers investors an opportunity for a non-guaranteed annual return as described in the Offering Memorandum. With essential investment elements of risk and return incorporated in the Offering Memorandum, the Partnership complies with the terms of the program regulations."), Ex. 156 at p.1317 (same), Ex. 164 at p.1699 ("In the case of Lam Group's Pearl Street Project, the EB-5 investment is indeed generating a 1.5% return on the investment, however, the language did not specify that the 1.5% interest would be distributed to the individual investors; rather the return is maintained at the level of the new commercial enterprise. To remedy the ambiguity, the Regional Center has amended its offering documents to reflect that the EB-5 investors would individually be earning an interest payment."); Feng Decl. Ex. 2 (0.5% annual return on investment), Ex. 3 (4.25% annual interest income), Ex. 4 (up to 4% annual interest income), Ex. 82 at p.3 (6% annual return on investment); Ex. 7 (0.5% annual return on investment), Ex. 8 (0.5% annual return on investment), Ex. 80 (up to 5% annual interest income), Ex. 81 (up to 4.5% annual interest income), Ex. 82 (5% annual interest income), Ex. 83 (6.25% annual interest rate of return).)

[5] *See* evidence cited in support of SEC Statement of Fact Nos. 21-22, 27-28, 30-32; *see also* Feng Decl. Ex. 2 at p.6 ("THE UNITS ARE RESTRICTED SECURITIES UNDER THE SECURITIES ACT."), Ex. 3 at p.i ("THE SECURITIES OFFERED HEREBY CANNOT BE OFFERED OR SOLD IN THE UNITED STATES OR TO "U.S. PERSONS" (AS SUCH TERM IS DEFINED IN REGULATIONS, PROMULGATED UNDER THE SECURITIES ACT) UNLESS THE SECURITIES ARE REGISTERED UNDER THE SECURITIES ACT, OR AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT IS AVAILABLE."), Ex. 4 at p.i (same), Ex. 80 at p.i (same), Ex. 81 at p.i (same), Ex. 82 at p.i (same), Ex. 83 at p.ie (same).) *See SEC v. United Ben. Life Ins. Co.*, 387 U.S. 202, 211 (1967) ("In the enforcement of an act such as this it is not inappropriate that promoters' offering be judged as being what they were represented to be."); *Warfield*, 569 F.3d at 1021 ("[C]ourts have frequently examined the promotional materials associated with an instrument or transaction in determining whether an investment contract is present.").

[6] *See* evidence cited in support of SEC Statement of Fact No. 50. *See also* Escalante Decl. Ex. 187 (filing with USCIS wherein Feng represented that "Investor's investment entitles her to a share of profits and cash flows generated by the business of CMB Group IV.").

not satisfied here because: (1) the EB-5 investments were motivated by Defendants' clients' desire for permanent resident status in the U.S.;[7] and (2) the terms of the EB-5 investments demonstrate Defendants' clients had no expectation of profits because EB-5 clients were required to pay mandatory administrative fees to regional centers[8] which cost more than the actual profit made by their EB-5 investments.[9]

First, the expectation of profits prong can be satisfied even where investments are made primarily for other reasons in addition to profit. Defendants argue the EB-5 investments were not solely made for profits, and therefore are not investment contracts, relying on dicta in *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975). In *Forman*, the Supreme Court noted in dicta:

> [T]he basic test for distinguishing the transaction [involving a security] from other commercial dealings is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment ([e.g.,] sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, ([e.g.,] dividends on the investment based on savings and loan association's profits). In

[7] It is undisputed representatives of regional centers acknowledge EB-5 investors hope to obtain green cards. (*See* evidence cited in support of Defendants' Statement of Fact No. 34.)

[8] Defendants submit offering documents for EB-5 investments between regional centers and Defendants' clients demonstrating clients were required to pay administrative fees ranging from $30,000 to $65,000. (*See* Feng Decl. Exs. 3, 4, 7, 8, 80, 81, 82, 83, 110.)

[9] Defendants also contend the SEC has "historically conceded that an EB-5 investment without an expectation of profit is not a security," and request that the Court take judicial notice of a January 18, 2002 No Action Letter issued by the SEC. (*See* Dkt. No. 67.) The Court can only take judicial notice of the existence of the SEC's no action letter, and not the truth of the contents of therein. (*See supra* at p.5 (denying Defendants' requests for judicial notice).) *See* Fed. R. Evid. 402; *Lee*, 250 F.3d at 690. Moreover, the SEC's no action letter is based on "the facts presented" before the SEC in an unrelated matter, and is not binding on this Court. *See Aventa Learning, Inc. v. K12 Inc.*, 2011 WL 13100748, at *4 (W.D. Wash. Mar. 28, 2011); *Holmes v. Bartlett*, 2004 WL 793190, at *3 (D. Or. Mar. 30, 2004), *report and recommendation adopted*, 2004 WL 1173138 (D. Or. May 21, 2004).

> such cases the investor is ***attracted solely by the prospects of a return*** on his investment. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased—to occupy the land or to develop it themselves. . . —the securities laws do not apply.

421 U.S. at 852-53 (emphasis added) (internal quotations and citations omitted). The Ninth Circuit and Second Circuit, however, have both held post-*Forman* that investments promoted primarily for tax benefits nevertheless satisfied the expectation of profits prong under the *Howey* test. *See S.E.C. v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 463-64 (9th Cir. 1985); *S.E.C. v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577 (2d Cir. 1982), *cert. denied*, 459 U.S. 1086 (1982). Therefore, evidence demonstrating Defendants' clients were also motivated to make EB-5 investments to obtain permanent residency in the United States does not preclude a determination that the EB-5 investments involved an expectation of profits and are therefore securities. *See S.E.C. v. Liu*, 2016 U.S. Dist. LEXIS 181536, at *9-12 (C.D. Cal. Aug. 17, 2016) (finding EB-5 investments were securities under the Act despite defendants' contention investors' did not have a "primary profit motive," reasoning although "nobody would dispute that EB-5 investors are motivated in significant part by obtaining lawful permanent residency in the United States[,] . . . the fact that the acquisition of EB-5 shares comes with unrelated benefits does not somehow convert the shares from securities into something else").

Second, Defendants cite to no authority in support of the proposition there can be no "expectation of profits" where clients are required to pay fees greater than their actual profits. The district court's opinion in *S.E.C. v. Liu* is persuasive on this point:

> The fact that [EB-5] investors paid a significant fee to invest . . .—a fee larger than the projected profits—does not alter this conclusion [that the instruments are securities under the Act]. Defendants have produced no legal authority for the proposition that the size of an investment fee can alter the nature of an investment contract itself. An [EB-5] investor who pays a fee to purchase securities has nonetheless purchased securities. ***The question here is not whether some combination of EB-5 shares and fees are profitable securities, but whether the shares themselves . . . qualify as investment***

> ***contracts. . . . Conflating fees paid to administer an offering with the proceeds of the offering itself makes little sense when determining whether the proceeds of the offering were expected to be profitable.***

2016 U.S. Dist. LEXIS 181536, at *12 (emphasis added). Moreover, the issue is not whether investors actually received a profit, but whether there was an expectation of profit based on the objective terms of the offerings. *See Warfield*, 569 F.3d at 1020. Therefore, evidence Defendants' clients were required to pay administrative fees for their EB-5 investments is irrelevant in determining whether there was an "expectation of profits" under the *Howey* test.

Here, although it is undisputed EB-5 investors are also motivated to make investments to obtain permanent residency in the United States, the EB-5 regulations require, and the terms of the EB-5 investments demonstrate capital contributions were made by Defendants' clients for the purpose of generating a return. Accordingly, the Court finds the EB-5 investments are investment contracts and therefore securities governed by federal securities laws and regulations.[10]

D. Whether Defendants Acted As "Brokers" Covered By the Act

Section 3(a)(4) of the Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." 15 U.S.C. § 78c(a)(4). The purpose of Section 15(a)'s broker registration requirement is to ensure that "securities are [only] sold by a salesman who understands and appreciates both the nature of the securities he sells and his responsibilities to the investor to whom he sells." *Roth v. S.E.C.*, 22 F.3d 1108, 1109 (D.C. Cir. 1994). *See also Edwards*, 549 U.S. at 393 ("Congress' purpose in enacting the securities laws was to regulate *investments,* in whatever form they are made and by whatever name they are called.").[11]

[10] *See S.E.C. v. Liu*, 2016 U.S. Dist. LEXIS 181536, at *9-12; *see also Edwards*, 540 U.S. at 392; *Warfield*, 569 F.3d at 1021; *S.E.C. v. U.S. Reservation Bank & Trust*, 289 F. App'x 228, 230-31 (9th Cir. 2008).

[11] Whether a security is exempt from registration and therefore not sold on an exchange facility is irrelevant to the issue of whether Defendants acted as brokers

(1) Exemptions from Broker Registration

Defendants argue they should be exempt from the Act's broker-registration requirements as a matter of public policy since attorneys already have heightened fiduciary duties owed to their clients. Defendants rely on 11 U.S.C. §80b-2(a)(11) of the Investment Advisers Act of 1940, which defines an "investment advisor" as "any person who... engages in the business of advising others...as to the value of securities or as to the advisability of investing in, purchasing, or selling securities...," but expressly excludes lawyers from this definition so long as their "performance of such services [are] solely incidental to the practice of [their] profession." No attorney exemption, however, is set forth in Section 15 of the Act.[12] Accordingly, the Court declines to adopt an exemption for attorneys from broker registration requirements under the Act based on public policy grounds.

Defendants also argue they are exempt from registering as brokers because it is undisputed Defendants' clients' EB-5 investments were not traded on a national securities exchange. Section 15(a) provides:

> It shall be unlawful for any broker or dealer... (***other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange***) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

15 U.S.C. § 78o(a)(1) (emphasis added). The plain language of Section 15(a)

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and were required to register as brokers under the Act. *See Eastside Church of Christ v. Nat'l Plan, Inc.*, 391 F.2d 357, 361 (5th Cir. 1968) (the fact that securities at issue may be exempt from registration under the Act "does not relate to the antifraud or broker-dealer registration provisions" of the Act).

[12] Under general principles of statutory interpretation, where the legislature expressly excluded attorneys from the definition of investment advisor under the Investment Advisors Act, but did not exclude attorneys from the definition of investment advisors in the Securities Exchange Act, this demonstrates the legislature did not intend to exclude attorneys from broker registration requirements under the Securities Exchange Act. *See, e.g., F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 514-15 (1963).

requires both exclusive intrastate business and non-use of any facility of a national securities exchange to be exempt from the Act's broker registration requirements. *Id.* Here, however, the undisputed evidence demonstrates Defendants' business was not "exclusively intrastate." Accordingly, Section 15(a)'s limited exclusion for non-registration does not apply to Defendants.[13]

(2) *Hansen* Factors

Courts in the Ninth Circuit have considered the *Hansen* factors[14] in determining whether an individual qualifies as a "broker" covered by the Act, including whether the individual:

(1) is an employee of the issuer of the security;[15]
(2) received transaction-based income such as commissions rather than a salary;
(3) sells or sold securities from other issuers;
(4) was involved in negotiations between issuers and investors;
(5) advertising for clients;
(6) gave advice or made valuations regarding the investment;
(7) was an active finder of investors; and
(8) regularly participates in securities transactions.

See S.E.C. v. Braslau, 2014 WL 6473378, at *5 (C.D. Cal. Nov. 17, 2014); *S.E.C. v. Holcom*, 2015 WL 11233426, at *4, *6 (S.D. Cal. Jan. 8, 2015) (citing *Hansen*, 1984 WL 2413, at *10); *S.E.C. v. Small Bus. Capital Corp.*, 2013 WL 4455850, at

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[13] In arguing they were not required to register as brokers because the EB-5 investments were not traded using exchange facilities, Defendants rely on the heading for Section 15(a) of the Act, which does not reference intrastate business and simply states: "Registration of all persons ***utilizing exchange facilities*** to effect transactions; exemptions." 15 U.S.C. § 78o(a)(1)(emphasis added). Defendants, however, cannot rely on the heading of Section 15(a) rather than the plain language of the statute, for purposes of determining whether they were required to register as brokers under Section 15(a). *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947).

[14] *See S.E.C. v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984).

[15] There is no genuine issue of material fact that Defendants were not employees of the regional centers. (*See* evidence cited in support of Defendants Statement of Fact No. 48.)

*14 (N.D. Cal. Aug. 16, 2013).[16]

Here, the undisputed evidence demonstrates: (1) Feng received transaction-based income in the form of commissions or referral fees for referring his clients to the regional centers; (2) Defendants have provided services in connection with the EB-5 Program since 2010, Feng started trading securities in 2003, and operated a hedge fund from 2008 to 2014 for which he conducted securities transactions;[17] (3) Defendants advertised for clients and were active finders of investors by promoting EB-5 projects on the internet and through Feng's website; (4) Defendants were involved in negotiations between regional centers and investors by interfacing directly with regional centers regarding his clients' EB-5 investments, asking regional centers numerous questions regarding the projects, and negotiating with regional centers as to the amount of administrative fees and rebates on Defendants' clients' behalf;[18] and (5) Defendants gave advice regarding investments by conducting research and performed due diligence regarding EB-5 investment projects and providing lists of EB-5 regional centers they recommended clients to invest in.[19] Accordingly, each of the *Hansen* factors—

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[16] Some courts have found the transaction-based compensation factor should be given substantial weight in determining whether the person is a broker under the Act. *See, e.g., Landegger*, 2013 WL 5444052, at *6; *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011); *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006).

[17] Feng declares he has "never sold securities" (Feng Decl. ¶ 35), which directly contradicts his prior sworn testimony and therefore cannot be used to create a genuine issue of material fact. Accordingly, the Court disregards this portion of Feng's declaration as a "sham" declaration. *See Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991).

[18] Feng declares he has "never been involved in negotiating the financial terms of [EB-5] investments on [his] clients' behalf." (Feng Decl. ¶22.) The Court disregards this portion of Feng's declaration as a "sham" declaration because it directly contradicts his prior sworn testimony and cannot be used to create a genuine issue of material fact. *See Nelson*, 571 F.3d at 927; *Kennedy*, 952 F.2d at 266-67.

[19] Feng declares he "do[es] not perform any analysis, or make any recommendations to [his] clients based on whether certain projects offer a higher financial return than others." (Feng Decl. ¶¶ 20, 37.) The Court disregards this portion of Feng's declaration as a "sham" declaration because it directly

other than the employee of issuer factor—demonstrate Defendants acted as brokers under the Act.[20]

The Court therefore finds Defendants were brokers subject to registration requirements under Section 15(a) of the Act.

* * *

It is undisputed Defendants never registered as a broker. Accordingly, the Court finds Defendants failed to register as brokers in violation of Section 15(a) of the Act.

E. Securities Fraud—Section 17(a)(2), Section 10(b), and Rule 10b-5

The SEC's first and second causes of action are for violation of Section 17(a)(2) and Section 10(b) of the Act, and Rule 10b-5. "Section 17(a) Act, Section 10(b), and Rule 10b–5 forbid making [1] a material misstatement or omission [2] in connection with the offer or sale of a security [3] by means of interstate commerce."[21] *S.E.C. v. Phan*, 500 F.3d 895, 907-08 (9th Cir. 2007) (internal quotations and citations omitted); *see also S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010).[22] Violations of Section 10(b)

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contradicts his prior sworn testimony and cannot be used to create a genuine issue of material fact. *See Nelson*, 571 F.3d at 927; *Kennedy*, 952 F.2d at 266-67.

[20] Notwithstanding the *Hansen* factors, Defendants, relying on *S.E.C. v. M&A West, Inc.*, 2005 WL 1514101 (N.D. Cal. June 20, 2005), *aff'd*, 538 F.3d 1043 (9th Cir. 2008), and *S.E.C. v. Mapp*, 2016 U.S.Dist.LEXIS 140141 (E.D. Tex. Oct. 7, 2016), argue they did not act as brokers because there were only "three isolated incidents" during which a client wired funds to Feng, who then transferred the funds to the escrow agent specified by the regional center. Both *M&A West* and *Mapp* are distinguishable because those cases dealt with situations where there was no evidence (or no allegations) that the defendant had been entrusted with assets or authorized to transact for the account of others. In contrast, here it is undisputed that "[f]rom time to time, an investor would wire funds to Feng, who handled the transfer of funds to the regional centers." (*See* evidence cited in support of SEC Statement of Fact No. 147.)

[21] The parties do not address the interstate commerce factor, but it is undisputed Defendants had offices in the United States and China, Defendants' EB-5 clients were from China, and Defendants' clients made investments with regional centers in the United States as part of the EB-5 Program.

[22] Defendants argue there is no evidence the regional centers actually or reasonably relied on Defendants' alleged misrepresentations. However, "the SEC, unlike a private plaintiff, is not required to establish reliance for a § 10b or Rule 10b–5 securities fraud action." *S.E.C. v. All. Leasing Corp.*, 28 F. App'x 648, 652

and Rule 10b–5 "require *scienter*," whereas [v]iolations of Sections 17(a)(2) . . . require a showing of negligence." *Phan*, 500 F.3d at 908.

(1) Material Omissions

A fact "is material 'if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" *Platforms Wireless Int'l Corp.*, 617 F.3d at 1092 (quoting *Phan*, 500 F.3d at 908).[23]

Feng declares: (1) he did not voluntarily disclose regional centers paid him a referral fee prior to February 2015; (2) he only acknowledged he received a referral fee from regional centers if clients asked him; and (3) as of February 2015 he began to disclose he would receive referral fees in the engagement agreements his clients signed prior to retaining Feng's legal services. (Feng Decl. ¶ 34.)[24] The SEC offers evidence Defendants' clients would have chosen a cheaper investment or asked to receive a portion of Defendants' commissions if they had

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(9th Cir. 2002) (citing *S.E.C. v. Rana Research Inc.,* 8 F.3d 1358, 1363-64 (9th Cir. 1993)).

[23] "Determining materiality in securities fraud cases should ordinarily be left to the trier of fact." *Phan*, 500 F.3d at 908 (internal quotations and citation omitted). "Materiality typically cannot be determined as a matter of summary judgment because it depends on determining a hypothetical investor's reaction to the alleged misstatement." *Id.* "Only if the established omissions are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality is the ultimate issue of materiality appropriately resolved as a matter of law by summary judgment." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Here, the parties agree materiality may be determined as a matter of law. Moreover, the Court finds no reasonable minds can differ on whether Defendants' omissions were material. (*See infra.*)

[24] Defendants focus on the fact Feng disclosed receiving commissions if clients asked him. The burden to disclose, however, is on Defendants—it is not clients' burden to inquire whether Defendants have a conflict of interest. Moreover, it is undisputed only 10-20% of Feng's clients specifically asked if Feng was being compensated by regional centers. (*See* evidence cited in support of SEC Statement of Fact No. 199.) Moreover, the SEC legal ethics expert opined that Feng's purported "disclosure" in his legal services agreements after February 2015 fails to meet applicable ethical disclosure requirements. (*See* Wendel Decl. ¶¶ 23-24.)

known Defendants received money from the regional centers.[25]

The Court finds Defendants' omissions regarding receipt of referral fees are material as a matter of law. *See S.E.C. v. All. Leasing Corp.*, 28 F. App'x 648, 652 (9th Cir. 2002) (defendant's failure to disclose a 30% commission was material as a matter of law to the investor's assessment of the strength of the potential investment because "reasonable minds cannot differ on the question of materiality") (quoting *TSC Indus.*, 426 U.S. at 450); *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) (noting "[i]n deciding whether to buy a given stock, a reasonable investor would consider it important that, in contrast to the purchase of most stocks, the broker would receive a 5% commission from the purchase of this particular (house) stock," and therefore "reject[ing] Defendants' argument that the bonus commissions are immaterial as a matter of law"); *Schaffer Family Inv'rs LLC v. Sonnier*, 2016 WL 6917269, at *6 (C.D. Cal. July 5, 2016) (finding defendant's misrepresentation he did not have any financial benefit in connection with investments made by plaintiffs were material misrepresentations as a matter of law where defendant admitted "he did in fact receive 'finder's fees' and commissions . . . in connection with the investments made by Plaintiffs throughout the period from 2008 to 2013").[26]

Moreover, "[i]t is indisputable that ***potential*** conflicts of interest are 'material' facts with respect to clients." *Vernazza v. S.E.C.*, 327 F.3d 851, 859 (9th Cir.), *amended*, 335 F.3d 1096 (9th Cir. 2003) (emphasis added).[27] Here,

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[25] *See* Escalante Decl. Ex. 201, Fenglei Bao 7/15/15 SEC Inv. Test. 29:1-33:4; *id.* Ex. 207, Xiangyang Guo 7/28/15 SEC Inv. Test. 29:16-30:19; *id.* Ex. 206, Feng Depo. 292:2-284:1.

[26] Defendants' omissions regarding receipt of commissions is material as a matter of law, even assuming the overall cost to clients was the same regardless of the commission received by Defendants. *See Laurienti*, 611 F.3d at 535, 541 (rejecting defendant's contention that omissions regarding bonus commissions paid to brokers for house stocks were "immaterial as a matter of law" despite fact overall cost to the client was the same, regardless of the commission received by the broker).

[27] *See also S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 201 (1963); *Chasins*, 438 F.2d at 1172.

Feng testified there was a potential conflict of interest with respect to Defendants' receipt of commissions/referral fees from regional centers.[28]

(2) In Connection With the Offer or Sale of a Security

Defendants promoted certain regional centers to their clients but failed to disclose their financial interest (i.e., receipt of commissions/referral fees) in those regional centers. Defendants' clients in turn invested in securities offered by those regional centers recommended by Defendants. Therefore, Defendants' omissions "coincided" with a securities transaction. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006). *See also Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043, 1052 (N.D. Cal. 2002), *aff'd sub nom. Feitelberg v. Merrill Lynch & Co.*, 353 F.3d 765 (9th Cir. 2003) (finding alleged misfeasance was "clearly . . . 'in connection with' the sale of securities" where plaintiff alleged defendant's analysts issued positive research reports to increase or maintain the price of the securities of the company reported on and alleged the investing public was victimized by this practice because the public "***relied on what they thought was objective advice***") (emphasis added). Accordingly, the Court finds Defendants' omissions were in connection with the offer or sale of a security.[29]

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[28] *See* Escalante Decl. Ex. 204, Feng 12/2/14 SEC Inv. Test. 112:23-113:23; *id.* Ex. 205, Feng 2/13/15 SEC Inv. Test. 299:16-303:1. Feng also declared he changed his standard legal service agreement in February 2015 to state the following: "Client may obtain other advisory services from an overseas consulting firm which is controlled by Attorney; as disclosed in EB-5 offering documents, the consulting firm may receive compensation from sponsor companies to cover necessary marketing and administrative fees[.] . . . ***The compensation has the risk of impacting Attorney's judgment on the project*** . . .." (Feng Decl. ¶ 34 n.4 (emphasis added).)

[29] The Court rejects Defendants' contention that the commissions they received were not in connection with the offer or sale of a security because it was "based on an immigration event" which "related solely to the approval of an EB-5 application." *See S.E.C. v. Zandford*, 535 U.S. 813, 821 (2002) (The Supreme Court has "refused to read the [Act] so narrowly" such that a fraud that did not take place within the context of a securities exchange is not prohibited by § 10(b)," and has noted the Act "must be read flexibly, not technically and restrictively" in determining whether a fraud was in connection with the purchase or sale of securities.).

(3) Scienter/Negligence

"Scienter can be established by intent, knowledge, or in some cases 'recklessness.'" *Platforms Wireless Int'l Corp.*, 617 F.3d at 1092 (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568–69 (9th Cir.1990) (en banc)). Recklessness that constitutes scienter "is conduct that consists of a highly unreasonable act, or omission, that is an 'extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *S.E.C. v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001) (quoting *Hollinger*, 914 F.2d at 1569). Negligence for purposes of Section 17(a)(2) and (3) is the "fail[ure] to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation." *S.E.C. v. Schooler*, 2015 WL 3491903, at *10 (S.D. Cal. June 3, 2015).

The SEC offers undisputed evidence that Defendants knowingly failed to disclose their receipt of commissions to their clients because they wanted to avoid having to negotiate with clients about rebating portions of the commissions.[30] Accordingly, there is no genuine issue of material fact regarding whether Defendants acted with scienter in failing to disclose their receipt of commissions.

(4) Scheme to Defraud

Section 17(a)(1) makes it "unlawful for any person in the offer or sale of any securities . . . to employ any device, scheme, or artifice to defraud" or "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(1), (3). Similarly, Rule 10b-5(a) and (c) make it "unlawful for any person, directly or indirectly, . . . (a) To employ any device, scheme, or artifice to defraud, . . . or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud

[30] "[W]hether or not [Defendants] believed that the investment program was a security is not material to scienter." *All. Leasing Corp.*, 28 F. App'x at 651-52.

or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(a), (c). To be liable for a scheme to defraud under Section 17(a) and Rule 10b-5, a defendant must have "committed a manipulative or deceptive act in furtherance of the scheme." *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997). *See also Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 938 (9th Cir. 2009). Specifically, the defendant "must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme. It is not enough that a *transaction* in which a defendant was involved had a deceptive purpose and effect; the defendant's *own conduct* contributing to the transaction or overall scheme must have had a deceptive purpose and effect." *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds by Simpson v. Homestore.com*, 519 F.3d 1041, 1041-42 (9th Cir. 2008) (emphasis in original).

As to Defendants' clients, there is no genuine issue of material fact based on the evidence before this Court that (1) Feng would try to make it appear the rebate was coming from the regional center, rather than from Feng, because he wanted his clients to think he was negotiating on their behalf; (2) Feng believed if his client knew the rebate was coming from Feng, the client would demand that Feng rebate the rest of the referral fee/commission from Feng; (3) when Feng does negotiate for a regional center to rebate a fee, in some instances 100% of the rebate is coming from Feng's marketing fee but Feng does not disclose this to his clients. (*See* evidence cited in support of SEC's Statement of Fact Nos. 210-212.) Accordingly, it is undisputed Defendants acted to create a "false appearance of fact" to clients that rebates were coming from regional centers in order to prevent Defendants' clients from demanding money from Feng.

As to regional centers, there is no genuine issue of material fact based on the evidence before this Court that:

(1) Feng was solely responsible for setting up ABCL, has sole

control over ABCL's bank account, and is the sole beneficial owner of ABCL;

(2) ABCL had no employees other than employees of Feng's law firm;

(3) Although Xing Tan was added as a 50% owner of ABCL in December 2014, she has no dealings with clients or regional centers, has no authority over ABCL's bank account, and has never received compensation from ABCL;

(4) Feng represented to regional centers he was working with individuals in China who were procuring investors and who demanded payment of referral fees;

(5) Feng had his relatives execute referral agreements on behalf of ABCL with some regional centers even though the relatives had no role in procuring investors;

(6) Xiuyuan Tan signed agreements with regional centers wherein she identified herself as "President" of ABCL;

(7) Xiuyuan Tan signed a marketing agreement with regional center DCRC-Skyland wherein DCRC-Skyland agreed to pay Tan a fee of $30,000 per client;

(8) Feng emailed regional center DCRC-Skyland on January 11, 2014 and wrote "attached is the signed marketing agreement to our agent in China";

(9) Xiuyuan Tan is Feng's mother and had nothing to do with the procurement of investors and did not provide services under the marketing agreements she signed with regional centers;

(10) Feng never told DCRC regional center that Xiuyuan Tan was his mother, that she had no role in finding overseas EB5 investors, and that she had no role at ABCL;

(11) DCRC-Skyland regional center wired $210,000 in commissions to a bank in Hong Kong to an account in the name of Huizhen Xi, Feng's mother-in law;

(12) Feng did not disclose to DCRC that Huizhen Xi was Feng's mother-in-law who had nothing to do with the procurement of investors or otherwise providing services under the agreement with DCRC;

(13) DCRC regional center entered into a foreign finder agreement with ABCL on September 16, 2015, wherein ABCL represented neither ABCL, its general partners, managing members, directors, executive officers nor any other officer is a citizen of the US, ABCL did not directly or indirectly maintain a physical office in the United States, and ABCL and its representatives will conduct all of their activities outside the U.S.;

(14) DCRC wired commissions to an account in the name of ABCL for finding investors;

(15) Feng never told DCRC regional center that Feng is a 50% owner of ABCL; and

(16) DCRC would likely have ceased doing business with Feng and his Chinese "agents" had Feng disclosed his relationship to ABCL and those "agents."[31]

Defendants contend regional centers knew Defendants were using overseas agents and overseas companies related to Defendants to accept payments from regional centers, relying on deposition testimony from Brian Ostar, a representative of EB-5 Capital regional center, who testified that he asked Feng, "Do you have a sister agency in China who we can pay" referral fees. (Holmes Decl. Ex. 14, Ostar Depo. 68:4-14.) Defendants argue "sister" agency did not mean a company with no relationship to Feng, and therefore regional centers asked for and knew Chinese agents and ABCL had relationships with Feng. The evidence offered by Defendants, however, is limited to one regional center. Moreover, the next nine lines of Ostar's deposition, which were excluded by Defendants, provide:

> Q. [When you asked if Feng has a "sister agency" in China you could pay,] [d]id you mean an unrelated entity with which -- with whom Mr. Feng dealt with in China?
> A. Yes.
> Q. And in writing that sentence, did you mean to suggest to Mr. Feng that he should set up a paper company so that he could indirectly receive referral fees?
> . . .
> THE WITNESS: No.

(Ostar Depo. 68:15-24.) Accordingly, Defendants fail to offer evidence demonstrating regional centers were aware of Defendants' relationship with ABCL and overseas agents. It is therefore undisputed Defendants acted to create a "false appearance of fact" to regional centers regarding Defendants' relationship

[31] *See* evidence cited in support of SEC's Statement of Fact Nos. 86-100, 105-107, 113-116, 249, 257, 320-325, 327, 328, 332, 333, 346, 336-338, 341, 348, 352.

with ABCL and Chinese agents who received referral fees but did not procure investors.

The Court thus finds Defendants violated Sections 17(a) and 10b-5 based on a scheme to defraud clients and regional centers.

F. Disgorgement of Profits and Prejudgment Interest

"The district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of the securities laws." *S.E.C. v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir.1998) (citations omitted). "Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *Id.* *See also Platforms Wireless*, 617 F.3d at 1099-100 (affirming award of prejudgment interest in securities fraud action). Joint and several liability for the disgorgement of illegally obtained proceeds is appropriate "[w]here two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws." *Platforms Wireless*, 617 F.3d at 1098 (citing *First Pac. Bancorp*, 142 F.3d at 1191-92).

The Court finds Defendants are jointly and severally liable for disgorgement of profits in the amount of $1,268,000 for commissions received by Defendants in connection with the EB-5 Program, and prejudgment interest in the amount of $130,517.09.

G. Civil Penalties

The Act authorizes three tiers of civil penalties, the amount of which is to be "determined by the court in light of the facts and circumstances." 15 U.S.C. §§ 77t(d), 78u(d)(3)(B). Second tier penalties may be imposed where the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 78u(d)(3)(B), 77t(d)(2).[32]

[32] The maximum second-tier penalty for violations that occurred between 2010 and March 5, 2013 is the greater of (1) $75,000 per violation for a natural person or $375,000 per violation for "any other person"; or (2) the gross amount of

Since Defendants' violation of the Sections 10(b) and 17(a) of the Act and Rule 10b-5 were based on fraudulent omissions, second tier penalties per violation are proper here. Moreover, Defendants' fraud continued to occur after March 5, 2013,[33] such that second-tier penalties of $80,000 per violation by Feng and $400,000 per violation by Defendant Law Offices may be imposed.

Accordingly, the Court imposes $160,000 in civil penalties against Defendant Feng and $800,000 in civil penalties against Defendant Feng & Associates as requested by the SEC.

H. Permanent Injunction

To obtain a permanent injunction against Defendants, "the SEC had the burden of showing there [is] a reasonable likelihood of future violations of the securities laws." *S.E.C. v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). "The existence of past violations may give rise to an inference that there will be future violations." *Id.* (citation omitted). "In predicting the likelihood of future violations, a court must assess the totality of the circumstances surrounding the defendant and his violations," and "considers factors such as the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the likelihood, because of defendant's professional occupation, that future violations might occur; and the sincerity of his assurances against future violations." *Id.* (citation omitted).

Here, the evidence before the Court demonstrates Defendants are immigration attorneys who have been involved in the EB-5 Program since 2010,

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pecuniary to the defendant as a result of the violation. 17 C.F.R. §§ 201.1004, 201.1005. The maximum second-tier penalty for violations that occurred after March 5, 2013 is the greater of (1) $80,000 per violation for a natural person or $400,000 per violation for "any other person"; or (2) the gross amount of pecuniary to the defendant as a result of the violation. 17 C.F.R. §§ 201.1004, 201.1005.

[33] Defendant Feng admits he did not disclose receipt of fees from regional centers until 2015. (*See supra.*) Furthermore, it is undisputed Feng did not disclose his relationship with ABCL and his Chinese "agents" with regional centers. (*See supra.*)

continue to advise clients in connection with the EB-5 Program, and have clients with pending EB-5 petitions. Moreover, based on the evidence before the Court, there is no genuine issue of material fact that (1) Defendant Feng created a new off-shore entity, called Kilogram, and a new law firm called HC Law because various regional centers refused to do business with ABCL and Defendants as a result of the SEC's action; (2) Feng has a 50% ownership interest in Kilogram; and (3) Feng has not disclosed his ownership interest in Kilogram to regional centers that have contracted with it. (*See* evidence cited in support of SEC's Statement of Fact Nos. 120-126.) Accordingly, a permanent injunction is warranted here because the evidence demonstrates a reasonable likelihood Defendants will continue to engage in conduct in violation of the Act. *See, e.g., Murphy*, 626 F.2d at 655; *S.E.C. v. Currency Trading Int'l, Inc.*, 2004 WL 2753128, at *11 (C.D. Cal. Feb. 2, 2004); *Cross Fin. Servs., Inc.*, 908 F. Supp. at 734.

IV. CONCLUSION

Accordingly, the Court **GRANTS** the SEC's Motion For Summary Judgment, and **DENIES** Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: August 10, 2017.

HON. CONSUELO MARSHALL
United States District Judge

EXHIBIT 4

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

HUI FENG and LAW OFFICES OF FENG & ASSOCIATES P.C.,

Defendants.

Case No. 2:15-cv-09420-CBM-SS

FINAL JUDGMENT AGAINST HUI FENG AND LAW OFFICES OF FENG & ASSOCIATES, P.C.

Consistent with the Court's Amended Order re: Motions for Summary Judgment, judgment is entered in favor of Plaintiff Securities and Exchange Commission ("SEC"), and against Defendants Hui Feng and Law Offices of Feng & Associates P.C. (collectively, "Defendants"), as follows:

I.

1. Defendants are permanently enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

A. to employ any device, scheme, or artifice to defraud;

B. to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

C. to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

2. As provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendants' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendants or anyone described in 2(a).

II.

3. Defendants are permanently enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

A. to employ any device, scheme, or artifice to defraud;

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

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

4. As provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendants' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendants or anyone described in 4(a).

III.

5. Defendants are permanently enjoined from violating, directly or indirectly, Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a), which makes it unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make sue of any facility of a national securities exchange), to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

6. As provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) any officers, agents, servants, employees, and

attorneys of Defendants; and (b) other persons in active concert or participation with Defendants or anyone described in 6(a).

IV.

7. Defendants are also liable, jointly and severally with each other, for disgorgement of $1,268,000 representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $130,517.09, for a total of $1,398,517.09. Defendants shall satisfy this obligation by paying $1,398,517.09 to the Securities and Exchange Commission within thirty (30) days after entry of this Final Judgment.

8. Defendants may transmit payment electronically to the SEC, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendants may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; the defendant as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

9. Defendants shall simultaneously transmit photocopies of evidence of payment and case identifying information to the SEC's counsel in this action. By making this payment, Defendants relinquish all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to any of the defendants.

10. Pursuant to 15 U.S.C. § 7246, the SEC shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the SEC staff determines that the Fund will not be distributed, the SEC shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

11. The SEC may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendants shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

V.

12. In addition to their obligations to pay disgorgement and prejudgment interest: (1) Feng shall pay a civil penalty in the amount of $160,000; and (2) Law Offices of Feng & Assocs. shall pay a civil penalty in the amount of $800,000. Defendants' civil penalties are ordered pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3).

13. Defendants may transmit payment electronically to the SEC, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendants may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

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and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; the defendant as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

14. Defendants shall simultaneously transmit photocopies of evidence of payment and case identifying information to the SEC's counsel in this action. By making this payment, Defendants relinquish all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to any of the defendants.

15. Pursuant to 15 U.S.C. § 7246, the SEC shall hold the funds and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the SEC staff determines that the Fund will not be distributed, the SEC shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

VI.

16. Solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by any of the Defendants under this Final Judgment is a debt for the violation by Defendants of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

VII.

17. This Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

Dated: August 10, 2017

HON. CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

EXHIBIT 5

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

- - - - - - - - - - - - - - - -

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	CASE NO.
V.	)	2:15-cv-09420-CBM-SS
HUI FENG AND LAW OFFICES OF FENG & ASSOCIATES P.C.,	)	
Defendants.	)	

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VIDEOTAPED DEPOSITION OF HUI FENG

THURSDAY, DECEMBER 15, 2016

BEHMKE REPORTING AND VIDEO SERVICES, INC.

BY: CHRISTINA VALERY, CSR NO. 14140

160 SPEAR STREET, SUITE 300

SAN FRANCISCO, CALIFORNIA 94105

(415) 597-5600

Videotaped Deposition of HUI FENG, taken on behalf of Plaintiff, at 444 South Flower Street, Suite 900, Los Angeles, California, commencing at 9:42 A.M., THURSDAY, DECEMBER 15, 2016, before Christina Valery, Certified Shorthand Reporter No. 14140, pursuant to Notice of Videotaped Deposition.

THE VIDEOGRAPHER: Thank you. Your court reporter today is Christina Valery, certified shorthand reporter, contracted by Behmke Reporting and Video Services. She will now administer the oath.

HUI FENG,

having been first duly sworn, testified as follows:

THE VIDEOGRAPHER: Please proceed.

EXAMINATION

BY MR. SEARLES:

Q. Good morning, Mr. Feng. Have you been deposed before?

A. Yes.

Q. How many times?

A. One, two -- twice.

Q. All right. Are you including in that the testimony you've provided to the SEC?

A. Including -- including that in today's?

Q. Not today. You previously were -- your testimony was taken on two different dates --

A. Right.

Q. -- by the SEC in connection with this case?

A. Right.

Q. Do all of them pay referral fees or --
A. Yes.
Q. -- or -- yes?
A. That's an industry norm.
Q. Uh-huh?
A. I mean, SEC has investigated -- I don't know -- probably 200 regional centers, and, you know how many regional centers don't pay and how many regional centers pay, so maybe you can disclose that information to us. Right? I know there's an industry sweep. You are going through every regional center, all the immigration attorneys. We don't know that.
Q. All right. And with respect to the regional centers that ABCL does business with, we are, again, talking about the same 10 to 20?
A. ABCL does -- yes.
Q. All right. And with respect to the -- with respect to the regional centers that ABCL does business with, you've been involved in the review of the regional centers' offerings?
A. Yes.
Q. All right.
A. I'm legal counsel, yeah.
Q. All right. And you had the specialty in that area to conduct that analysis; correct?

office entitled to receive?

A. Nothing.

Q. Nothing?

A. None. Nothing.

Q. All right. So then with respect to the allegation here of the 3,100,000, is that an accurate figure as to what ABCL is entitled to receive?

A. Or -- yes. Right.

Q. Yes. And then Kilogram, we talked about, is just another 350 out there?

A. Right.

Q. All right. I just wanted to get -- make sure we weren't having a dispute over numbers --

A. Okay.

Q. -- at the end of the day.

MR. SEARLES: All right. Why don't we take our break for lunch then?

THE WITNESS: Okay.

MR. HOLMES: How long do you want to take?

THE VIDEOGRAPHER: We're off the record. The time is 12:00 noon.

(At 12:00 P.M., a lunch recess was taken until 1:09 P.M. of the same day.)

(Nothing omitted nor deleted. See next page.)

Thursday, December 15, 2016; P.M. SESSION

THE VIDEOGRAPHER: We're back on the record. The time is 1:09.

EXAMINATION RESUMED

BY MR. SEARLES:

Q. Mr. Feng, when did you first get involved in the EB-5 business, if that's a fair way of characterizing it?

A. It was in 2009 at the request of clients.

Q. All right. And to date then, how many clients have you represented up to the point of presenting an I-526 petition?

A. Roughly 150.

Q. All right. And how many of those clients at the time you were representing them were located in the United States?

A. Very few. Maybe -- you mean among the 150?

Q. Uh-huh.

A. Maybe five, ten.

Q. I see. Because some of them are on student visas; correct?

A. Yes.

Q. Okay. Or some other legal immigration status?

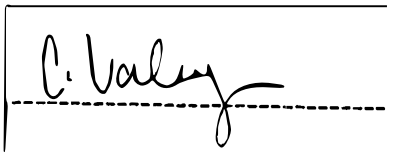
STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I hereby certify that the witness in the foregoing deposition, HUI FENG, was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth, in the within-entitled cause; that said deposition was taken at the time and place herein named; that the deposition is a true record of the witness's testimony as reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer.

I further certify that I am not interested in the outcome of the said action, nor connected with, nor related to any of the parties in said action, nor to their respective counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of December, 2016.

Reading and signing was: __X__ Requested



CHRISTINA VALERY, CSR NO. 14140
STATE OF CALIFORNIA

EXHIBIT 6

me	Phone Number	Regional Center Project	Proximate Date of Contract	Investment Amount	Management Fee	Loan Term	Interest Rate	Total Interest to Clients	RC Referral fee	Paid (Yes/No)	Rebate Agreed	Rebate Paid	3rd Party Referral Fee	3rd Party Fee Paid	Legal Fee Phase 1	Legal Fee Phase 2	Legal Fee Phase 3	Tot
ing		CMB 4	2010	$ 500,000	$ 30,000	6	1%	$ 30,000	$ 15,000	YES					$ 12,000	$ -	$ -	$
ing		CMB 7	2011	$ 500,000	$ 35,000	6	1%	$ 30,000	$ 20,000	YES					$ 5,000	$ 5,000	$ -	$
an		CMB 10	4/27/2012	$ 500,000	$ 35,000	6	1%	$ 30,000	$ 25,000	YES	$ 10,000	Yes			$ 2,000	$ 4,000	$ -	$
Liu		CMB 10	4/28/2012	$ 500,000	$ 35,000	6	1%	$ 30,000	$ 25,000	YES	$ 10,000	Yes			$ 2,000	$ 4,000	$ -	$
Guo		CMB 10	4/30/2012	$ 500,000	$ 35,000	6	1%	$ 30,000	$ 25,000	YES	$ 10,000	Yes			$ 2,000	$ 4,000	$ -	$
ia		CMB 10	5/7/2012	$ 500,000	$ 35,000	6	1%	$ 30,000	$ 25,000	YES	$ 10,000	Yes			$ 2,000	$ 4,000	$ -	$
ioumi		CMB 10	5/14/2012	$ 500,000	$ 35,000	6	1%	$ 30,000	$ 25,000	YES					$ 10,000		$ -	$
ng		CMB 8	7/24/2012	$ 500,000	$ 45,000	6	1%	$ 25,000	$ 35,000	YES	$ 20,000	Yes			$ 4,000	$ 3,750	$ -	$
ric		Klausner Sawmill	11/22/2012	$ 500,000	$ 45,000	5	0.50%	$ 12,500	$ 33,000	YES					$ 1,000	$ 6,000	$ 3,000	$
ng		ADF SLS	2/1/2013	$ 500,000	$ 45,000	5	0.50%	$ 12,500	$ 35,000	YES			$ 2,500	Yes	$ 10,000		$ -	$
ing		ADF SLS	3/1/2013	$ 500,000	$ 45,000	5	0.50%	$ 12,500	$ 35,000	YES			$ 2,500	Yes	$ 4,000		$ -	$
ang		ADF SLS	3/2/2013	$ 500,000	$ 45,000	5	0.50%	$ 12,500	$ 35,000	YES			$ 2,500	Yes	$ 12,000		$ -	$
ing		ADF SLS	3/3/2013	$ 500,000	$ 45,000	5	0.50%	$ 12,500	$ 35,000	YES			$ 2,500	Yes	$ 15,000		$ -	$
g Li		ADF SLS	3/4/2013	$ 500,000	$ 45,000	5	0.50%	$ 12,500	$ 35,000	YES			$ 2,500	Yes	$ 12,000		$ -	$
iao		CMB 12	3/6/2013	$ 500,000	$ 45,000	5	5%	$ 125,000	$ 70,000	YES	$ 15,000	Yes			$ 4,000		$ -	$
ao		WRCI Genesis	4/1/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes					$ 3,000	$ 1,000	$ -	$
Liu		CMB 20	4/12/2013	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 35,000	Yes					$ 13,000		$ -	$
		CMB 11	5/3/2013	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 35 000	Yes					$ 13,000		$ -	$
in		CMB 11	6/1/2013	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 35,000	Yes					$ 15,000		$ -	$
iao		CMB 11	6/3/2013	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 35,000	Yes					$ 15,000		$ -	$
Li		CMB 11	7/17/2013	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 35,000	Yes					$ 5,000	$ 5,000	$ -	$
Lin		CMB 8	8/6/2013	$ 500,000	$ 45,000	6	1%	$ 25,000	$ 35,000	Yes	$ 20,000	Yes			$ 15,000		$ -	$
hang		DCRC Skyland	8/27/2013	$ 500,000	$ 48,000	5	0.50%	$ 12,500	$ 30 000	Yes					$ 1,000		$ 9,000	$
Yu		WRCI Genesis	8/28/2013	$ 500,000	$ 25,000	5	0	0	$ 5,000	Yes					$ 7,500	$ 7,500	$ -	$
ia		WRCI Genesis	8/29/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes	$ 20,000	Yes			$ 7,500	$ 2,500	$ -	$
		WRCI Genesis	9/12/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes			$ 17,500	Yes	$ 10,000		$ -	$
Yu		CMB 30	9/13/2013	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 35,000	Yes	$ 20,000	Yes			$ 7,500	$ 7,500	$ -	$
ing		WRCI Genesis	9/18/2013	$ 500,000	$ 25,000	5	0	0	$ 5 000	Yes					$ 12,000		$ -	$
iao		WRCI Genesis	9/23/2013	$ 500,000	$ 25,000	5	0	0	$ 5,000	Yes					$ 7,500	$ 7,500	$ -	$
in		WRCI Genesis	10/1/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes	$ 20,000	Yes			$ 7,500	$ 7,500	$ -	$
Yue		WRCI Genesis	10/2/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes	$ 20,000	Yes			$ 10,000		$ -	$
Fu		WRCI Genesis	10/3/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes	$ 20,000	Yes			$ 10,000		$ -	$
in		WRCI Genesis	10/4/2013	$ 500,000	$ 50,000	5	0	0	$ 30 000	Yes	$ 10,000	Yes			$ 10,000		$ -	$
Jei		WRCI Genesis	10/17/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes					$ 7,500	$ 7,500	$ -	$
in		WRCI Genesis	10/18/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes					$ 15,000		$ -	$
Hu		WRCI Genesis	10/19/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes			$ 20,000	Yes	$ 15,000		$ -	$
ia		WRCI Genesis	10/24/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes	$ 20,000	Yes			$ 10,000		$ -	$
		WRCI Genesis	10/28/2013	$ 500,000	$ 50,000	5	0	0	$ 30 000	Yes					$ 7,500	$ 7,500	$ -	$
ai		WRCI Genesis	10/29/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes					$ 7,500	$ 7,500	$ -	$
hang		Lam Group	10/30/2013	$ 500,000	$ 50,000	5	0.50%	$ 12,500	$ 30,000	No			$ 20,000		$ 7,500	$ 5,500	$ 2,000	$
ena Xue		WRCI Genesis	11/1/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes			$ 17,500	Yes	$ 7,000	$ 5,000	$ 3,000	$
Liu		WRCI Genesis	11/2/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes					$ 7,500	$ 7,500	$ -	$
Jil		WRCI Genesis	11/4/2013	$ 500,000	$ 50,000	5	0	0	$ 30 000	Yes					$ 7,500	$ 7,500	$ -	$
hang		WRCI Genesis	11/7/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes			$ 20,000	Yes	$ 15,000		$ -	$
ing		WRCI Genesis	11/8/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes					$ 15,000		$ -	$
Zhou		WRCI Genesis	11/13/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	No					$ 6,000	$ 6,000	$ -	$
in Huang		CMB 32	11/15/2013	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 35,000	No					$ 15,000		$ -	$
ling		WRCI Genesis	11/18/2013	$ 500,000	$ 50,000	5	0	0	$ 30 000	Yes					$ 13,000		$ -	$
		WRCI Genesis	11/21/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	Yes					$ 15,000		$ -	$
iao		WRCI Genesis	12/1/2013	$ 500,000	$ 50,000	5	0	0	$ 30,000	No					$ 7,500	$ 7,500	$ -	$
		CMB 32	12/16/2013	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 35,000	No					$ 10,000		$ -	$
ong		CMB 32	12/19/2013	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 35,000	No			$ 20,000		$ 7,500	$ 7,500	$ -	$
ang		DCRC Skyland	1/2/2014	$ 500,000	$ 48,000	5	0.50%	$ 12,500	$ 30 000	no					$ 7,500	$ 7,500	$ -	$
R		CMB 33	1/3/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No			$ 20,000		$ 7,500	$ 7,500	$ -	$
Cang		USA LLC	1/4/2014	$ 500,000	NA	NA	NA	NA	0				NA		$ 10,000		$ -	$
ang		USA LLC	1/5/2014	$ 500,000	NA	NA	NA	NA	-				NA		$ 10,000		$ -	$
hen		CMB 32	1/9/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40,000	No	$ 20,000				$ 7,500	$ 7,500	$ -	$
ai		Lam Group	1/10/2014	$ 500,000	$ 50,000	5	0.50%	$ 12,500	$ 30 000	No					$ 15,000		$ -	$
in		CMB 33	1/14/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 15,000		$ -	$
		DCRC Skyland	1/20/2014	$ 500,000	$ 48,000	5	0.50%	$ 12,500	$ 30,000	no			$ 20,000		$ 5,000		$ -	$
ai		DCRC Skyland	1/22/2014	$ 500,000	$ 48,000	5	0.50%	$ 12,500	$ 30,000	Yes					$ 7,500	$ 7,500	$ -	$
Li		DCRC Skyland	1/31/2014	$ 500,000	$ 48,000	5	0.50%	$ 12,500	$ 30,000	no					$ 15,000		$ -	$
		DCRC Skyland	2/7/2014	$ 500,000	$ 48,000	5	0.50%	$ 12,500	$ 30 000	no					$ 15,000		$ -	$
Ju		CMB 33	2/8/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 15,000		$ -	$
		Undecided	2/24/2014	$ -									$ 20,000		$ 7,500	$ 7,500	$ -	$
Liu		CMB 33	3/6/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No	$ 20,000				$ 5,000	$ 5,000	$ -	$
n		DCRC Skyland	3/18/2014	$ 500,000	$ 48,000	5	0.50%	$ 12,500	$ 30,000	no					$ 15,000		$ -	$
an		CMB 33	3/19/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 5,000	$ 5,000	$ -	$
an		CMB 33	3/20/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 5,000	$ 5,000	$ -	$
Li		CMB 33	3/21/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 15,000		$ -	$
Li		CMB 33	3/22/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 15,000		$ -	$
ge		CMB 33	3/28/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 7,500	$ -	$
ge		CMB 33	3/31/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No			$ 20,000		$ 8,000	$ 5,000	$ 2,000	$
ge		CMB 33	4/1/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 7,500	$ -	$

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		CMB 33	4/2/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No	$ 10,000		$ 15,000		$ 7,500	$ 7,500	$ -	$
		CMB 33	4/3/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 7,500	$ -	$
		CMB 19	4/4/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40,000	No					$ 15,000		$ -	$
		CMB 19	4/5/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40,000	No					$ 15,000	$ -	$ -	$
		CMB 19	4/6/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40 000	No					$ 7,500	$ 7,500	$ -	$
		CMB 19	4/7/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 4,500	$ -	$
		CMB 33	4/8/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 7,500	$ -	$
		CMB 33	4/9/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No			$ 20,000		$ 7,500	$ 7,500	$ -	$
		CMB 29	4/10/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 7,500	$ -	$
		CMB 19	4/11/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40 000	No					$ 7,500	$ 4,000	$ 3,500	$
		CMB 19	4/12/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 7,500	$ -	$
		EB5 capital	5/5/2014	$ 500,000	$ 45,000	5	1%	$ 25,000	$ -	NA					$ 6,000	$ 3,000	$ 3,000	$
		DCRC Water	5/10/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35,000	No			$ 20,000		$ 12,000		$ -	$
		CMB 27	5/11/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 5,000	$ 5,000	$ 2,000	$
		CMB 23	6/9/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40 000	No					$ 7,500	$ 7,500	$ -	$
		DCRC Water	6/16/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35,000	No					$ 7,500	$ 7,500	$ -	$
		CMB 19	6/17/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 7,500	$ -	$
		CMB 28	6/25/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 5,000	$ 5,000	$ 5,000	$
		CMB 29	6/27/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 15,000		$ -	$
		CMB 29	6/30/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40 000	No					$ 15,000		$ -	$
		DCRC Water	7/6/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35,000	No					$ 15,000		$ -	$
		CMB 29	7/11/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 4,500	$ 4,500	$ 4,500	$
		CMB 19	7/24/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 7,500	$ -	$
		Lam Group	7/28/2014	$ 500,000	$ 50,000	5	0.50%	$ 12,500	$ 35,000	No			$ 20,000		$ 7,500	$ 7,500	$ -	$
		DCRC Water	7/29/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35,000	No					$ 15,000		$ -	$
		CMB 19	8/2/2014	$ 500,000	$ 45,000	6	1%	$ 30,000	$ 40,000	No					$ 8,000	$ 5,000	$ 2,000	$
		CMB 29	9/2/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 7,500	$ 5,000	$ 2,500	$
		DCRC Water	9/5/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35,000	No	$ 20,000				$ 5,000	$ 5,000	$ -	$
		DCRC Water	9/18/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35,000	No					$ 8,000	$ 5,000	$ 2,000	$
		DCRC Water	9/23/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35 000	No					$ 7,500	$ 7,500	$ -	$
		CMB 29	9/26/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 40,000	No					$ 7,000	$ 3,000	$ 2,000	$
		Undecided	10/15/2014												$ 8,000	$ 5,000	$ 2,000	$
		EB5 capital	10/18/2014	$ 500,000	$ 50,000	5	1%	$ 25,000	$ 47,500	No					$ 5,000	$ 5,000	$ 5,000	$
		EB5 capital	10/20/2014	$ 500,000	$ 50,000	5	1%	$ 25,000	$ 47,500	No					$ 15,000		$ -	$
		WRCI McCoy	10/29/2014	$ 500,000	$ 55,000	5	0	0	$ 45,000	No			$ 20,000		$ 5,000	$ 5,000	$ 5,000	$
		EB5 capital	10/30/2014	$ 500,000	$ 50,000	5	1%	$ 25,000	$ 47,500	No					$ 6,000	$ 6,000	$ -	$
		DCRC Water	11/20/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35,000	No					$ 6,000	$ 6,000	$ 3,000	$
		DCRC Water	12/1/2014	$ 500,000	$ 49,000	5	0.50%	$ 12,500	$ 35,000	No					$ 12,000	$ -	$ -	$
		DCRC Water	12/2/2014	$ 500,000	$ 49,000	5	0.50%	$ 12500	$ 35,000	No			$ 20,000		$ 6,000	$ 6,000	$ 3,000	$
		CMB 48	12/10/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45 000	No			$ 20,000		$ 7,500	$ 7,500	$ -	$
		CMB 48	12/11/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45,000	No					$ 6,000	$ 6,000	$ 3,000	$
		CMB 48	12/15/2014	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45,000	No					$ 10,000		$ -	$
		Undecided	1/19/2015	$ -											$ 7,500	$ 7,500	$ -	$
		EB5 capital	2/1/2015	$ 500,000	$ 50,000	5	1%	$ 25,000	$ 47500	No			$ 25,000		$ 15,000		$ -	$
		CMB 48	2/2/2015	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45 000	No					$ 7,500	$ 7,500	$ -	$
		CMB 40	2/3/2015	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45,000	No					$ 7,500	$ 7,500	$ -	$
		CMB 35	3/15/2015	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45,000	No	$ 20,000				$ 6,000	$ 6,000	$ -	$
		CMB 48	3/30/2015	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45,000	No	$ 20,000				$ 15,000		$ -	$
		WRCI McCoy	4/24/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No			$ 20,000		$ 5,000	$ 5,000	$ 5,000	$
		EB5 capital	5/5/2015	$ 500,000	$ 50,000	5	1%	$ 25,000	$ 47 500	No			$ 20,000		$ 7,500	$ 7,500	$ -	$
		WRCI McCoy	5/10/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No					$ 7,500	$ 7,500	$ -	$
		WRCI McCoy	5/11/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No					$ 7,500	$ 7,500	$ -	$
		Undecided	5/29/2015												$ 7,500	$ 7,500	$ -	$
		WRCI McCoy	6/25/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No					$ 7,500	$ 7,500	$ -	$
		WRCI McCoy	6/26/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No			$ 3,000		$ 7,500	$ 7,500	$ -	$
		WRCI McCoy	7/1/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No					$ 6,000	$ 6,000	$ -	$
		WRCI McCoy	7/2/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No			$ 20,000		$ 7,500	$ 7,500	$ -	$
		WRCI McCoy	7/3/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No			$ 3,000		$ 6,000	$ 6,000	$ -	$
		WRCI McCoy	7/4/2015	$ 500,000	$ 55,000	5	0	0	$ 45,000	No			$ 30,000		$ 15,000		$ -	$
		CMB 48	7/15/2015	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45 000	No			$ 30,000		$ 7,500	$ 7,500	$ -	$
		CMB 48	7/24/2015	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45,000	No					$ 12,000		$ -	$
		CMB 48	8/21/2015	$ 500,000	$ 50,000	6	1%	$ 30,000	$ 45,000	No			$ 30,000		$ 15,000		$ -	$
		WRCI McCoy	9/3/2015	$ 500,000	$ 55,000	5	0	0	$ 47,500	No					$ 15,000	0	0	$

Exhibit 2 P

EXHIBIT 7

Escalante, Kristin

From: Hui Feng <hui.feng@fenglaweb5.com>
Sent: Monday, July 03, 2017 7:00 PM
To: Hui Feng
Subject: Heading to the 9th circuit judicial review from the 4th of July

Upon more study of the lower court's order on the summary judgment motion, I find it is a ludicrous opinion demonstrating a complete or purposefully misunderstanding of the current jurisprudence of the federal securities law within the 9th circuit. While I am working with my attorneys on the appeal to the 9th circuit, I will just share some key citations from the 9th circuit case law to help the EB-5 industry practitions in their continuing fight agaist the SEC's idiotic and treasonous enforcement activity upon the EB-5 program and immigration attorneys. As I have stated before, it is every citizen's civic and patriotic duty to fight against abusive and oppressive government actions under which spirit this country was founded on July 4 of 1776. While the lower court judicial review over the government actions have failed its obligation in this case, I hope the 9th circuit, created by the Constitution as the next layer of checks and balances against government abuse will carry out its mission and responsbility fair and square.

1. **In re Cutera Securities Litigation, 610 F. 3d 1103 - Court of Appeals, 9th Circuit 2010: It is not enough for the investors to plead that Cutera failed to make a full disclosure about its sales force. "Rule 10b-5 [prohibits] only misleading and untrue statements, not statements that are incomplete.... Often, a statement will not mislead even if it is incomplete or does not include all relevant facts." *Brody v. Transitional Hosps. Corp.*,280 F.3d 997, 1006 (9th Cir.2002). Rubke v. Capitol Bancorp Ltd., 551 F.3d 1156, 1164 (9th Cir. 2009): A securities fraud complaint based on a purportedly misleading omission must "specify the reason or reasons why the statements made by [the defendant] were misleading or untrue, not simply why the statements were incomplete." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir.2002).**

2. **WPP Luxembourg Gamma Three v. Spot Runner, Inc., 655 F. 3d 1039 - Court of Appeals, 9th Circuit 2011: Courts have generally held that "[a] Rule 10b-5(a) and/or (c) claim cannot be premised on the alleged misrepresentations or omissions that form the basis of a Rule 10b-5(b) claim." *Lautenberg Found. v. Madoff*, 2009 WL 2928913, at *12 (D.N.J. Sept. 9, 2009); *see also* Lentell v. Merrill Lynch & Co., 396 F.3d 161, 177 (2d Cir.2005) ("[W]here the sole basis for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b-5(a) and (c)."). We now affirm that holding and expressly extend it to the current situation. A defendant may only be liable as part of a fraudulent scheme based upon**

misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions.

3. See, e.g., Santa Fe Indus. v. Green, 430 U.S. 462, 478–89 (1977) (holding that the Securitiese Exchange Act is limited in scope to its textual provisions and does not conflict with state law regardinge corporate misconduct, particularly corporate mismanagement). Further: **It is also readily apparent thate the conduct alleged in the complaint was not "manipulative" within the meaning of the statute.e "Manipulation" is "virtually a term of art when used in connection with securities markets." *Ernst & Ernst*, 425 U. S., at 199. The term refers generally to practices, such as wash sales, matchede orders, or rigged prices, that are intended to mislead investors by artificially affecting markete activity. See, e. *g.*, § 9 of the 1934 Act, 15 U.S. C. § 78i (prohibiting specific manipulativee practices); *Ernst & Ernst, supra*, at 195, 199 n. 21, 205. No doubt Congress meant to prohibit thee full range of ingenious devices that might be used to manipulate securities prices. But we do note think it would have chosen this "term of art" if it had meant to bring within the scope of § 10 (b)e instances of corporate mismanagement such as this, in which the essence of the complaint is thate shareholders were treated unfairly by a fiduciary.e**

4. In US v. Laurienti which the lower court cites, it is held that:

We recognize that brokerages often have complicated compensation systems and that brokers sometimes receive additional compensation on client purchases of particular securities products. Our holding today does not mean that all compensation arrangements are necessarily "material" even within a trust relationship and therefore could lead to criminal (and civil) liability. For example, de minimis variations in compensation among different securities products would be immaterial as a matter of law. *See* *Szur*, 289 F.3d at 211-12 (holding that some information "borders on insignificant minutia, the omission of which could never be actionable for fraud" (internal quotation marks omitted)). **Additionally, courts have recognized that, depending on the circumstances, even minimal disclosures can meet the broker's obligation to disclose. *See, e.g., Benzon,* 420 F.3d at 612 (holding that the brokers met their disclosure obligations because of a prospectus disclosure that brokers "*may* receive different compensation for selling each Class of share"); *Press*, 218 F.3d at 130 (holding that the brokers satisfied their disclosure obligations because of "general disclosures" in fund prospectuses and "Statements of Additional Information" filed with the SEC by the managers of the money market funds).** The bonus commissions here fall into neither category. The difference between a commission of $50 on the sale of a non-house stock and a commission of thousands of dollars on the sale of a house stock is not a de minimis difference in compensation.

5. The lower court tried to distinguish this case from M&A West and Mapp and Kramer by focusing on Defendants having helped their clients transfer some of the investment funds through attorney escrow accounts in 3 occasions. First, those transactions are rare for the purpose of helping clients to circumvent the foreign exchange control mechanisms in China. They were done at the request and order of the clients with no service fees charged or any discretion by Defendants, all as part of the legal services for his clients. Second, there were only 3 occasions recognized by the court record. Defendants had about 150 EB-5 immigration clients. Even if the 3 occasions out of 150 clients are being treated as securities transactions by Defendants, that fact alone can hardly qualify Defendants as being "regularly participating in securities transactions".

6. A fun and intriguing read on 9th circuit opinion in RETAIL WHOLESALE DEPARTMENT STORE UNION LOCAL 338RETIREMENT FUND v. HEWLETT PACKARD CO MARK HURD, 2017 U.S. App. LEXIS 955 (9th Cir. Jan. 19, 2017): "Just as there was no statement capable of being factually misleading, there was no omission that could have been actionable as misleading."

If the lower court has ever been smarter, this case should have been dismissed long time ago. The judical review by the lower court is a complete mockery and sham on the American judical system. It is a complete waste of taxpayers' money and demonstrating a clear and present necessity to cut down the SEC budget deep enough so that the SEC cannot waste more our money on frivolous law suits like this one. Curiously, the SEC has not filed another law suit against more immigration attorneys on broker registration issue since this case started.

Further the SEC's position that the immigration attorneys need to register as brokers before advising clients on EB-5 immigration program will simply give EB-5 immigration service business exclusively to overseas immigration consulting agencies which are not licensed by any state or federal agency. This position is wrong, unpatriotic and destructive to American interest and to the interest of the overseas clients who still want to immigrate to the United States. By prohibiting immigration attorneys from providing legal services to overseas clients who want to immigrate to the United States through EB-5 program, the SEC is eliminating the legal due diligence review conducted upon the EB-5 offering programs by hundreds of domestically licensed attorneys. It will only expose more overseas clients to potential fraud conducted by EB-5 program issuers and their overseas marketing agents. It is a good question for everyone to ask why some officials at the SEC will go out of their way to help overseas immigration agencies to retain virtual monopoly over the American EB-5 immigration services. What national or personal interest are they trying to serve?

As I have stated last week, regardless what the SEC or the courts say about the EB-5 program, I will continue to provide my best service to my clients who are seeking to immigrate to the United States through EB-5 program. It is my first amendment right to conduct legal due diligence on EB-5 programs to protect the interest of my clients.

Another 4th of July is coming. It is good time for every educated fellow American to reflect, in the context of this legal struggle, what is the best interest for this country.

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EXHIBIT 8

Escalante, Kristin

From:	Hui Feng <hui.feng@fenglaweb5.com>
Sent:	Tuesday, July 18, 2017 7:34 PM
To:	Hui Feng
Subject:	Chairman Jay Clayton is cleaning the house.

While we are preparing to appeal to the 9th circuit on the "speechless" lower court order on my case. New SEC Chairman is already shifting the SEC from the frivolous broker registration law suits to capital formation with the help of finders. Finders have been authorized by the California state legislation and been recommended by the SEC Advisory Committee on Small and Emerging Companies for a couple of years. Amazingly, the previous bureaucrats at the SEC took no action to facilitate capital formation through issuing any guideline on finders. Instead, the clueless officials at the SEC chose to engage in this frivolous law suit at taxpayer's expense under the pretense of the broker registration violation against immigration attorneys who contribute to the job creation and protect the interests of the overseas clients through legal due diligence work on the EB-5 projects.

This case is a disgrace to this great nation. For the public interest of the United States, we have to appeal to the 9th circuit!

Public Statement

Opening Remarks Before the SEC Advisory Committee on Small and Emerging Companies

Chairman Jay Clayton

May 10, 2017

Good morning everyone, and thank you, Steve [Graham] and Sara [Hanks]. I would like to extend a warm welcome to Joe [Shepard], and thank you to Shelley [Parratt]. I am grateful to you and the other members of this important committee for the opportunity to speak to you today.

I am pleased that my first public remarks as Chairman could be to this very important group. As these are my first public remarks, I would be remiss if I did not start with a few thank-yous:

First, to President Trump for having the confidence in me to nominate me for this position.

Second, to all those I met during the confirmation process. I know that I am better prepared for this important role as a result of that process.

Third, to the dedicated women and men of the SEC who have made me feel at home. Thank you and I am very much looking forward to working with each of you.

Facilitating capital formation is one of the central tenets of the SEC's mission and it is a focus that this committee and I share. One of my priorities is for the Commission to focus on facilitating capital-raising opportunities for all companies, including, and importantly, small- and medium-sized businesses. Doing so will not only help those companies, but it also will provide expanded opportunities for investors, help our economy grow, facilitate innovation, and further job creation.

As I mentioned during my confirmation hearing, I understand the many challenges facing small- and medium-sized businesses, as well as the importance of those businesses to our local economies and, collectively, our national economy. I appreciate your willingness to share your knowledge and insights about smaller and emerging companies and the challenges they face.

This committee has already made important recommendations that have facilitated the ability of small and emerging companies to raise capital, and for investors of all types to participate and benefit from their growth. The topics on your agenda today – including finders, the underwriting of small offerings and the tick size pilot, among others – represent discussions that we should be having and that I expect will provide a basis for action. I look forward to your thoughts and any recommendations that stem from your deliberations.

Finally, this is Public Service Recognition Week, and I want to close my remarks with a few words from our town hall yesterday. This agency and this committee are all about the people. There are no widgets here at the SEC. It's about smart, caring people analyzing and implementing the law in an environment that is ever-changing, with the lauded goal of increasing the opportunities for all to participate in America's growth. With your hard work, you are ably assisting that effort. Thank you.


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EXHIBIT 9

Escalante, Kristin

From: Hui Feng <hui.feng@fenglaweb5.com>
Sent: Friday, July 28, 2017 7:01 PM
To: Hui Feng
Subject: We help our clients avoid risky EB-5 projects to achieve immigration success.

http://nypost.com/2017/07/13/staten-island-ferris-wheel-project-on-hold-indefinitely/

https://therealdeal.com/2017/07/21/new-york-wheel-delays-could-spell-disaster-for-projects-eb-5-investors/

The past week saw another massive EB-5 project carrying 400 immigrant familys' American dreams crashing down.

This is the kind of legal due diligence work we conduct on EB-5 projects so that our clients will avoid getting into them. Again, as before, none of my 150 plus clients participated in dozens of the failed EB-5 projects being exposed so far. The clueless SEC and a federal district court require the immigration attorneys to obtain a broker license first before we can help our clients avoid this kind of risky projects. What kind of nonesense are they trying to tell us? Even if the EB-5 program involved securities, does it mean the immigration attorneys have to obtain broker license to advise their clients? Do all the attorneys who are involved in securities transactions need to register as a broker first? The last time I checked, the SEC has not required all law firm partners and associates who facilitate securities transactions be registered as a broker yet. Then why do the immigration attorneys advising EB-5 transactions have to do so? It is a complete nonsense. For a moment, I am thinking America has become a 3rd world country with a corrupt and arbitrary goverment agency and a judical system that is equally bankrupt in terms of delivering fairness and justice.

To call the SEC clueless may not be correct. After all, these are reasonably intelligent men and women who, I assume, have actually graduated from law schools and passed the bar exams. The really clueless people should not be able to do that. After more than 5 years of investigation about EB-5 industry, it is not plausible they can still be clueless about the purpose of the EB-5 program. Everyone in a jury probably knows that the purpose of the EB-5 program for overseas clients is about immigration,not about investment return.

Given the above, I will leave the public to wonder why the SEC is still trying to impose broker registration requirement upon immigration attorneys which, if implemented, will essentially remove legal due diligence review on these risky EB-5 projects by immigration attorneys. It could lead to an investigation of a fraud or crime against the US Congress or American people.

While the SEC both ignored the facts and manipulated the facts for its unspeakable agenda, and the lower federal court was foolish enough to go along with the SEC like an underling, we will see if the 9th circuit will have the courage and the decency to tell the truth and make the right judgement for the interest of the public.

We have to "fight for people who cannot fight for themselves." --- A Few Good Men.

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EXHIBIT 10

Escalante, Kristin

From:	Hui Feng <hui.feng@fenglaweb5.com>
Sent:	Wednesday, October 18, 2017 5:13 PM
To:	Koston Hui Feng
Cc:	Bendell, Spencer E.; Bergstrom, Megan; Berry, John W.; Ceresney, Andrew; claytonj; Connolly, Christine; Escalante, Kristin; Irwin, Magnolia; jclayton; Layne, Michele W.; Searles, Donald; Murray, Brenda P.; Fields, Brent J.; Errett, Robert; CBM_Chambers
Subject:	17-10-6 Notice of Appeal
Attachments:	17-10-6 Notice of Appeal.pdf; 17-10-10 Scheduling Order.pdf

Attached is the Notice of Appeal filed by my attorneys. I have requested my attorneys to add my name to the attorneys for the appeal as soon as possible.

This is not really a securities law case, this is in fact a civil rights case where a small citizen has to fight against the abuse and persecution arbitrarily imposed by a federal agency called the SEC. The US Constitution offers its citizens judicial protection of their liberty and freedom against arbitrary government actions. When a federal district court has failed its responsbility to do that, we are rightly appealing to the 9th circuit to seek judcial review and protection based on the following grounds:

1. The SEC officials have shamelessly manipulated the facts and misinterpreted the securities law in its documents;
2. The district court has failed to be impartial in finding the facts and misapplied the laws and legal precedents in its ajudication of the case.

This case will test the depth of wisdom of the 9th circuit jurisprudence. It is a fairly simple case to be dismissed based on my reading of the 9th circuit legal precedents. However, you never know if the 9th circuit will show its wisdom in this case as it has done so in others.

All professionals and citizens are welcome to file amicus briefs in support of our democracy and freedom against official abuse. Government abuse will only escalate when the majority remains silent at individual persecution.

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Escalante, Kristin

From: Hui Feng <hui.feng@fenglaweb5.com>
Sent: Wednesday, October 18, 2017 9:49 PM
To: Hui Feng
Cc: Bendell, Spencer E.; Bergstrom, Megan; Berry, John W.; Ceresney, Andrew; claytonj; Connolly, Christine; Escalante, Kristin; Irwin, Magnolia; jclayton; Layne, Michele W.; Searles, Donald; Murray, Brenda P.; Fields, Brent J.; Errett, Robert; CBM_Chambers
Subject: Re:17-10-6 Notice of Appeal

Just like to add that this case will not really test the wisdom of the 9th circuit judges because it is such a simple case that is not worth much analysis, but more importantly their intellectual integrity. Until this case, I had the faith in our government officials to do the right thing for the interest of the public and I have not thought that the SEC officials will be so lack of integrity to manipulate the facts so that it can persecute citizens who contribute to the interest of the United States through providing immigration services to EB-5 programs and the federal district court will be so biased to help the SEC in its persecutions in ignorance of its Constitutional duty to be impartial in adjudicating all cases.

Let's all pray the 9th circuit will have the integrity and impartiality in adjudicating this simple and easy case.

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---------- Original ----------
From: "Hui Feng"<hui.feng@fenglaweb5.com>;
Date: Wed, Oct 18, 2017 07:12 PM
To: "Koston Hui Feng"<hui.feng@fenglaweb5.com>;
Cc: "Bendell, Spencer E."<bendells@sec.gov>; "bergstromm"<bergstromm@sec.gov>; "berryj"<berryj@sec.gov>; "ceresneya"<ceresneya@sec.gov>; "claytonj"<claytonj@sec.gov>; "connollyc"<connollyc@sec.gov>; "escalantek"<escalantek@sec.gov>; "Irwin, Magnolia"<irwinma@sec.gov>; "jclayton"<jclayton@sec.gov>; "laynem"<laynem@sec.gov>; "Searles, Donald"<searlesd@sec.gov>; "murrayb"<murrayb@sec.gov>; "fieldsb"<fieldsb@sec.gov>; "Errettr"<Errettr@sec.gov>; "CBM_Chambers"<CBM_Chambers@cacd.uscourts.gov>;
Subject: 17-10-6 Notice of Appeal

Attached is the Notice of Appeal filed by my attorneys. I have requested my attorneys to add my name to the attorneys for the appeal as soon as possible.

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district court has failed its responsbility to do that, we are rightly appealing to the 9th circuit to seek judcial review and protection based on the following grounds:

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This case will test the depth of wisdom of the 9th circuit jurisprudence. It is a fairly simple case to be dismissed based on my reading of the 9th circuit legal precedents. However, you never know if the 9th circuit will show its wisdom in this case as it has done so in others.

All professionals and citizens are welcome to file amicus briefs in support of our democracy and freedom against official abuse. Government abuse will only escalate when the majority remains silent at individual persecution.


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EXHIBIT 11

From:	Hui Feng
To:	ALJ
Cc:	Lindell, Joseph; Shields, Kathy Moore; Elliot, Cameron; Errett, Robert; CBM_Chambers; Piwowar, Michael; Stein, Kara; Bendell, Spencer E.; Bergstrom, Megan; Berry, John W.; Ceresney, Andrew; Connolly, Christine; Escalante, Kristin; Irwin, Magnolia; Layne, Michele W.; Searles, Donald; daytonw
Subject:	Re:3-18209 Hui Feng, et al.
Date:	Friday, October 27, 2017 10:23:28 AM
Attachments:	72B651F2@5905FB75.296BF359

Whether this email response will be ignored or stricken, it does not matter. It is just a form not the substance. This email is only for those who still have a conscience and care about the truth.

This case is a simple one. The SEC officials manipulated the facts from the depositions and arbitrarily found immigration attorneys serving EB-5 immigration program as stock brokers who effect securities transactions. Applying the same logic, every accoutant, business consultants, bankers, attorneys, legal secretaries, regulators who are involved in advising clients, facilitating, negotiating, preparing, reviewing and enforcing any securities transactions should be found as brokers as well. Or anyone who receives compensation for providing such services should be found as a broker. Anyone who does not dislcose how much they make from providing such services with public filings are committing securities fraud. It is a ridiculous proposition and an insult to the conscience and intelligence of anyone who is not mentally insane. This is the modern day "emperor without clothes" case and so far no one dares to pop this big bubble lie for fear of losing their jobs or promotions.

In total, there are maybe 50,000 EB-5 clients who filed with the USCIS for immigration benefits. I helped about 150 of them, 0.3% of the total. The SEC should disclose who are the "brokers" that helped the rest 99.7% of the EB-5 cases and how many of them are registerd with the SEC and for those who are not registered, what the SEC is planning to do next. The simple truth is that probably less than 3% of the total immigrant clients are helped by registered brokers and so far the SEC just filed this one single case against me as if I am single-handedly responsbile for this industry phenomenon. There is no precedent before this case was filed and curiously, there was no subsequent case being filed two years since then. Some immigration attorneys chose to settle their cases with a no admit no denial of wrongdoing bargain over the past two years because they cannot afford to fight their cases both financially and mentally against the taxpayper money funded big bully SEC. Many more refused to settle and are now watching how this case will end up in the 9th circuit.

Now the case is pending appeal at the 9th circuit. We will see if the 9th circuit will have the wisdom and the integrity to tell the simple truth.

All case details are in the distric court filings for those who want to know the truth. I am not funded by American taxpayers and have no resouces to repeat the same thing again.

Hui Feng 917-533-1895

———— Original ————

From: "ALJ"<ALJ@SEC.GOV>;
Date: Fri, Oct 27, 2017 10:28 AM
To: "Hui Feng"<hui.feng@fenglaweb5.com>; "Searles, Donald"<SearlesD@sec.gov>;
Cc: "Lindell, Joseph"<lindellj@SEC.GOV>;
Subject: 3-18209 Hui Feng, et al.

<!--[if mso 9]--> <!--[endif]-->

Reminder of the telephonic prehearing conference on Monday October 30 at 2 EDT.

Division of Enforcement: Please arrange for a court reporter and circulate a dial-in number

for the phone call.

Thank you.

Kathy Shields

EXHIBIT 12

Escalante, Kristin

From:	Hui Feng <hui.feng@fenglaweb5.com>
Sent:	Sunday, December 17, 2017 10:14 AM
To:	Hui Feng
Cc:	ALJ; Bendell, Spencer E.; Bergstrom, Megan; Berry, John W.; Ceresney, Andrew; claytonj; claytonw; Connolly, Christine; Elliot, Cameron; Errett, Robert; Guido, Kenneth J.; Hall, Sarah; Irwin, Magnolia; Stein, Kara; Piwowar, Michael; CBM_Chambers; Searles, Donald; Escalante, Kristin
Subject:	SEC is determined to sell American immigration interest to overseas immigration agencies
Attachments:	SEC v. Steve Qi.pdf

"First they came for the communists, and I did not speak out - because I was not a communist;
Then they came for the socialists, and I did not speak out - because I was not a socialist;
Then they came for the trade unionists, and I did not speak out - because I was not a trade unionist;
Then they came for the Jews, and I did not speak out - because I was not a Jew;
Then they came for me - and there was no one left to speak out for me."

Last week, the SEC filed a new case against another immigration law firm in LA based on the similar facts to mine (See the attached document). This time the lead attorney is the SEC General Counsel Mr. Guido. Now it is clear that the SEC's highest office is determined to deprive overseas immigrant clients American immigration counsel and give the entire EB-5 advisory business to the overseas immigration agencies.

I belive this is a knowingly or reckless treasonous activity committed by the SEC against the interest of the United States. In the mean time, the SEC is also huring the interst of the overseas immigrant clients that the SEC is claiming to protect.

Based on the SEC's law suit, all immigration attorneys have to be registered as a broker in order to provide EB-5 advisory services to overseas immigrant clients. The SEC has not required the same for all the other attorneys routinely advising corporate securities transactions in the United States. By singling out EB-5 immigration transactions, the SEC is arbitrarily enforcing the securities law upon a business that is beyond the SEC's business.

American Bar Association and American Immigration Lawyers Association should take their responsiblities to support our effort to appeal to the 9th circuit to correct the SEC's mistakes and stop their abuse of power and waste of taxpayers' money on similar cases like this.

Some general tips about the litigation with the SEC:

1.eThe SEC will lie and is biased. Some people inside the SEC have no professional ethics. They have a job toe do and they will lie about the facts so that they can win the case. In a depoition, they will coax a witness toe speak somehthing against you. When a witness does not provide what they want to hear, they will try again ande again by bagering the witness with the same or similar line of questions in hoping to get something to supporte their argument. In a typical 100 page document, thousands of lines of deposition, the SEC will single out onee sentence against you and put it in their statement to the court to prove their case. They will not consider ore present the rest overwhelming evidence supporting the opposite conclusion.e

2. The SEC is not rational. The SEC could easily issue some guidelines on EB-5 advisory business and explains the difference between immigration service and investment brokering for the industry to follow. Instead, they chose to engage in this costly multi-year litigation to try their luck in the hope that the federal judiciary somehow will agree to their expansion of athority to require all attorneys advising EB-5 immigration sercvies to be registered as a broker. It could be that the SEC is so interally disorganized to issue any guidelines and they have to use litigation to cover up their failure in rule making. As everyone in the EB-5 industry knows, the industry is already dying due to lenghthy waiting time for green card quota and increasing number of high profile EB-5 projects failures. Since 95% of the EB-5 advisory business has been controled by the overseas immigration agencies, all kinds of unscrupulous EB-5 projects are being offered and sold to the overseas immigrant clients by these overseas agencies without any due diligence review by immigration attorneys like myself. The SEC's enforcement action against immigration attorneys will only make things worse.

3.sPrepare to litigate to the appeals court at least. The federal district court case is run by one judge who coulds easily be biased for whatever the SEC's position is. This one judge will then try to justify its oppion bys overlooking all the contary evidence and selectlvely misapplying and misinterpreting the case law precedents tos reach the desired conclusion. The appeals court is run by a 3 judge panel and is usually more intellectual ands less biased and will provide a well-reasoned opinion as a legal precedent to settle the issue for the public tos follow.s

4.s The litigation is costly. The litigation with the SEC, unless you represent yourself, will cost anywheres between $300,000 to $500,000 by smaller firms and $2 to $3 million by big firms. The cost on Americans taxpayers for any case is never disclosed by the SEC (that is a fraud against American people by SEC'ss parlance). Considering how little money is at stake after all the service costs and litigation costs involving EB-5s immigration attorney cases, it is usually not worth it unless you are fighting for the interest of the public againsts the abuse and persecution by the SEC. That is probably why the SEC chose small immigration law firms tos litigate as low hanging fruit. Most small immigration firms will likely choose to settle instead of fighting 2 or 3s years for the interest of the public.s

Hui Feng 917-533-1895