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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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11 SECURITIES AND EXCHANGE
12 COMMISSION,

13 Plaintiff,

14 vs.

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

17 Defendants.
18

Case No. 15-cv-09420-CBM(SSx)

**ORDER DENYING DEFENDANTS’
MOTION FOR JUDGMENT ON
THE PLEADINGS**

19 Before the Court is Defendants Hui Feng and Law Offices of Feng &
20 Associates’ (collectively, “Defendants”) Motion for Judgment on the Pleadings
21 (the “Motion”). (Dkt. No. 40.)

22 **I. PROCEDURAL BACKGROUND**

23 The Securities Exchange Commission (“SEC”) filed a complaint on
24 December 7, 2015, asserting the following three causes of action against
25 Defendants¹: (1) Fraud in the Offer or Sale of Securities, Violations of Section
26

27 ¹ The Complaint alleges Defendant Hui Feng is an immigration attorney, and
28 Defendant Feng & Associates is a law firm founded by and primarily operated by
Feng. (Compl. ¶¶ 9-10.)

1 17(a) of the Securities Act (the “Act”); (2) Fraud in Connection with the Purchase
 2 or Sale of Securities, Violations of Section 10(b) of the Act and Rule 10b-5; and
 3 (3) Failure to register as a broker-dealer in violation of Section 15(a) of the Act.
 4 The SEC’s claims arise from the alleged offering and sale of EB-5 investments² to
 5 Defendants’ immigration law clients without disclosing commissions Defendants
 6 received from Promoters, and Defendants’ alleged false representation to
 7 Promoters that foreign-based persons were responsible for finding investors rather
 8 than Feng. Defendants filed an answer to the Complaint on February 16, 2016.
 9 (Dkt. No. 9.)

10 II. LEGAL STANDARD

11 A. Fed. R. Civ. Proc. 12(c)

12 Under Rule 12(c), the Court “inquires whether the complaint at issue
 13 contains ‘sufficient factual matter, accepted as true, to state a claim of relief that is
 14 plausible on its face.’” *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1131 (9th Cir.
 15 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A motion for
 16 judgment on the pleadings may be based on either a lack of a cognizable legal
 17 theory or the absence of sufficient facts alleged under a cognizable legal theory.
 18 *Somers v. Apple, Inc.*, 729 F.3d 953, 959-60 (9th Cir. 2013). In a motion for a
 19 judgment on the pleadings for failure to state a claim, the Court accepts as true all
 20 well-pleaded allegations of material fact and construes them in a light most
 21 favorable to the non-moving party. *Blantz v. Cal. Dep’t of Corr. & Rehab.*, 727
 22 F.3d 917, 922 (9th Cir. 2013). The Court must also assume as true contents of
 23 documents incorporated by reference. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
 24 2003). The Court may also consider facts contained in materials properly the

25 ² The Complaint alleges that Congress created the EB-5 immigrant investor
 26 program in 1992 (the “Program”), which sets aside permanent visas for foreign
 27 investors, who invest in certain capital investments administered by regional
 28 centers and limited partnerships (collectively, “Promoters”) approved of by the
 United States Citizenship and Immigration Services, and certain family members.
 (Compl. ¶¶ 5, 12-21.)

1 subject of judicial notice. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971,
2 981 n.18 (9th Cir. 1999).

3 **B. Fed. R. Civ. Proc. 9(b)**

4 When fraud is alleged in a party's pleading, Federal Rule of Civil Procedure
5 9(b) requires that the party's pleading state with particularity the circumstances
6 constituting the fraud. Fed. R. Civ. P. 9(b); *Kerns v. Ford Motor Co.*, 567 F.3d
7 1120, 1124 (9th Cir. 2009). "Averments of fraud must be accompanied by 'the
8 who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-*
9 *Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*,
10 137 F.3d 616, 627 (9th Cir. 1997)). The purpose of Rule 9(b) is to require
11 plaintiffs to plead fraud with sufficient particularity so that defendants have
12 "notice of the particular misconduct . . . so that they can defend against the charge
13 and not just deny that they have done anything wrong." *Kerns*, 567 F.3d at 1124.
14 "In a securities fraud action, a pleading is sufficient under Rule 9(b) if it identifies
15 the circumstances of the alleged fraud so that the defendant can prepare an
16 adequate answer." *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). *See also*
17 *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

18 **III. DISCUSSION**

19 **A. Requests for Judicial Notice**

20 Pending before the Court are four requests for judicial notice filed in
21 connection with the Motion. The Court: (1) **GRANTS** Defendants' requests for
22 judicial notice in their entirety (Dkt Nos. 41, 47); (2) **GRANTS** the SEC's first
23 request for judicial notice (Dkt. No. 44-1) as to Exhibits 1-4, 11-18, and 20, but
24 **DENIES** the request as to Exhibits 5-10 and 19; and (3) **DENIES** the SEC's
25 second request for judicial notice (Dkt. No. 49) in its entirety.³

26 _____
27 ³ The Court grants Defendants' request to strike the SEC's Response to
28 Defendants' Objections to Plaintiff's Request for Judicial Notice (Dkt. No. 52)
because it was filed without leave of court in violation of Local Rule 7-10 and this
Court's Standing Order.

B. Rule 9(b) – First and Second Causes of Action⁴

The Court finds the Complaint pleads fraud with sufficient specificity as required under Rule 9(b) with respect to the first and second causes of action.

As to the “who,” the Complaint alleges that Defendants failed to disclose to their immigration law clients participating in the Program that Defendants would receive or did receive commissions from Promoters (Compl. ¶¶ 4, 6-7, 27-28, 64-74), and that Defendants defrauded certain of the Promoters by failing to disclose Feng’s relationship with persons responsible for finding investors (Compl. ¶ 31, 75-92).⁵

With respect to “what,” the Complaint alleges that Defendants (1) did not disclose to their clients Defendants’ receipt of or right to receive commissions (Compl. ¶¶ 4, 49, 57-61, 64-74); and (2) omitted/misrepresented to Promoters that nominees were separate entities or persons tasked with finding investors when they were in fact Feng, Feng’s friends and family, and Defendants’ holding company Atlantic Business Consulting Limited formed and controlled by Feng to receive commissions (Compl. ¶¶ 11, 86-90).

As to the “when,” the Complaint alleges that Defendants began promoting EB-investments and recommending Promoters’ offerings to immigration law clients in 2010, but never disclosed Defendants’ receipt or right to receive commissions unless clients specifically asked. (Compl. ¶¶ 22, 28, 49, 71.) With respect to Promoters, the Complaint alleges that beginning around May 2013,

⁴ The SEC’s first and second causes of action are claims for fraud in the offer or sale of securities and fraud in connection with the purchase or sale of securities, respectively.

⁵ While the Complaint does not identify by name Defendants’ clients and the promoters who were allegedly defrauded, and does not differentiate between conduct by Feng individually versus Feng’s own law firm (for which Feng is the primary attorney), such information is within Defendants’ knowledge. *See Moore*, 885 F.2d at 540; *Waldrup v. Countrywide Fin. Corp.*, 2015 WL 93363, at *8 (C.D. Cal. Jan. 5, 2015); *Susilo v. Wells Fargo Bank, N.A.*, 796 F. Supp. 2d 1177, 1191 (C.D. Cal. 2011); *Wade v. Indus. Funding Corp.*, 1993 WL 650837, at *9 (N.D. Cal. Aug. 30, 1993); *Cox v. Aurora Elecs., Inc.*, 1993 WL 652792, at *6 (C.D. Cal. Oct. 18, 1993).

1 Feng represented to Promoters that individuals he designated to sign agreements
2 or receive commissions were “partners” or “agents” but never disclosed that these
3 persons were Feng, and/or Feng’s employees, relatives, and friends. (Compl. ¶¶
4 76-92.)

5 As to the “where,” the Complaint alleges Defendants (1) did not disclose
6 their receipt or right to receive commissions in connection with their clients’ EB-5
7 investments in retainer agreements with clients, private placement memoranda
8 coupled with other offering documents, or schedule K-1’s clients received; and (2)
9 did not disclose their relationship with finders of investors anywhere or at any
10 time, including in written referral agreements or through wire transfer payments
11 from Promoters. (Compl. ¶¶ 28, 40, 46, 61, 75.)

12 As to the “how,” the Complaint alleges that misrepresentations and
13 omissions to Defendants’ immigration law clients were material because: (1)
14 Defendants breached their fiduciary, legal and ethical duties to their legal clients
15 to disclose their receipt of commissions and conflicts of interest; (2) had
16 Defendants disclosed their receipt or right to receive commissions it would have
17 affected the clients assessment of Defendants’ objectivity and due diligence; (3)
18 the clients who did learn about the commission requested that Defendants refund
19 all or a portion of the commissions; and (4) Feng did not inform clients about the
20 commissions so he could avoid having to share or refund the commissions.
21 (Compl. ¶¶ 6, 67-74.) With respect to Promoters, the Complaint alleges that
22 Defendants’ failure to disclose their relationship to the entities/persons finding
23 investors was materially false and misleading because (1) certain Promoters would
24 not have continued paying Defendants if the Promoters knew that the agreements
25 were not signed by bona fide partners or agents; and (2) Promoters would not have
26 continued paying Defendants if Promoters knew that the commissions they were
27 paying were being wired to bank accounts held by Feng’s relatives, friends, and/or
28 his overseas holding company. (Compl. ¶¶ 81-92.)

Furthermore, Defendants filed an answer to the Complaint in February 2016—and waited four months after filing their answer to file the instant Motion—which demonstrates Defendants have been able to defend against the SEC’s fraud claims based on the allegations in the Complaint. *See Kaplan*, 49 F.3d at 1370; *Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).⁶

Accordingly, the Court **DENIES** Defendants’ Motion as to the first and second causes of action.

C. Unconstitutionally Vague Challenge – Third Cause of Action

Defendants argue they are entitled to judgment on the pleadings on the third cause of action for violation of Section 15(a) of the Act because the terms “security” and “broker” as used in Section 15(a) are unconstitutionally vague as applied in this case.⁷

There is “a presumption in favor of the constitutionality of an act of Congress.” *Parker v. Levy*, 417 U.S. 733, 757 (1974). A statute is not void-for-vagueness if it provides persons of ordinary intelligence with a reasonable opportunity to understand what is meant to be prohibited and does not authorize arbitrary or discriminatory enforcement. *F.C.C. v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012). Every concept within the statute, however, need not be precisely defined. *U.S. v. Mazurie*, 419 U.S. 544, 552 (1975). The Court must assess a constitutional challenge based on vagueness “in a common sense manner and in the context of the regulation’s statutory scheme.” *Hanrahan v. Cole*, 977 F.2d 589 (9th Cir. 1992). Where a void-for-vagueness challenge does not involve the First Amendment, the Court must examine the challenge in light of the facts of the case. *S.E.C. v. Gemstar-TV Guide Int’l, Inc.*, 401 F.3d 1031, 1048 (9th Cir.

⁶ *See also Miller v. Fuhu Inc.*, 2015 WL 2085490, at *7 (C.D. Cal. May 4, 2015); *Janda v. T-Mobile, USA, Inc.*, 2008 WL 4847116, at *4 (N.D. Cal. Nov. 7, 2008); *Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987).

⁷ Section 15(a) provides that it is unlawful for a “broker” or “dealer” to “induce or attempt to induce the purchase or sale of, any security” unless the person is registered as a “broker” or “dealer” with the SEC. 15 U.S.C. 78o.

2005). Statutes regulating businesses are subject to a less strict vagueness test. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Gemstar-TV Guide Int’l, Inc.*, 401 F.3d at 1048. Moreover, ignorance of the law does not mean that the statute is unconstitutionally vague. *See Sahab v. Baca*, 2014 WL 102410, at *8 (C.D. Cal. Jan. 8, 2014); *Jerman v. Carlisle et al.*, 559 U.S. 573, 574 (2010).

The Court finds the term “security” is not so vague that an ordinary immigration attorney such as Defendants would not reasonably suspect the EB-5 investments could be construed as securities under the Act. *See S.E.C. v. Edwards*, 540 U.S. 389, 393 (2004) (“Congress’ purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called. To that end, it enacted a broad definition of ‘security,’ sufficient ‘to encompass virtually any instrument that might be sold as an investment.’”). *See also Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943).

The Court further finds that the term “broker” is not unconstitutionally vague because a person of ordinary intelligence placed in the same circumstances as Defendants would reasonably suspect they could be construed as a “broker” under the Act.

The Court also finds Section 15(a) does not encourage arbitrary nor discriminatory enforcement. *See, e.g., Maiden v. Ducart*, 2016 WL 2654244, at *12 (E.D. Cal. May 10, 2016). *See also U.S. v. Petrillo*, 332 U.S. 1, 7 (1947); *Jones v. Brim*, 165 U.S. 180, 184 (1897).⁸

IV. CONCLUSION

The SEC pleads its fraud claims (the second and third causes of action) with

⁸ The fact that the SEC has not chosen to prosecute or enforce the Act against immigration lawyers until recently is irrelevant in determining whether the statute is unconstitutionally vague as applied in this case. *See* 15 U.S.C. § 78z; *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *U.S. v. Kinzler*, 55 F.3d 70, 74 (2d Cir. 1995).

1 sufficient specificity under Rule 9(b). Further, Section 15(a) is not
2 unconstitutionally vague because it provides persons of ordinary intelligence with
3 a reasonable opportunity to understand what is prohibited and does not encourage
4 arbitrary nor discriminatory enforcement in light of the alleged facts in this case.

5 Accordingly, the Court **DENIES** Defendants' Motion for Judgment on the
6 Pleadings.

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8 **IT IS SO ORDERED.**



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10 DATED: August 4, 2016.

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HON. CONSUELO MARSHALL
United States District Judge