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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HON. JUDGE CONSUELO B. MARSHALL,
JUDGE PRESIDING

SECURITIES AND EXCHANGE COMMISSION,)
)
) Plaintiff,)
)
) vs.) NO. CV-15-9420-CBM
)
) HUI FENG, et al.,)
)
) Defendants.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, March 22, 2016

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U.S. District Courthouse
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APPEARANCES :

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DIVISION OF ENFORCEMENT
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1 ***Los Angeles, California; Tuesday, March 22, 2016;***

2 ***8:30 A.M.***

3 ***-oOo-***

4 THE CLERK: Item Number 1, civil case 15-9420,
5 *Securities and Exchange Commission versus Hui Feng, et al.*
6 Counsel, state your appearance at the lectern,
7 please.

8 MR. BERRY: Good morning, Your Honor. It's John
9 Berry and Megan Bergstrom from the SEC.

10 THE COURT: Good morning.

11 MR. HOLMES: Good morning, Your Honor. Andrew
12 Holmes on behalf of Hui Feng and his law firm.

13 THE COURT: Good morning.

14 The matter before the Court this morning is
15 defendants' motion to transfer venue to the Eastern District
16 of New York.

17 And the parties have briefed the issues and the
18 Court's reviewed the briefs, and I just have a few questions
19 before ruling on the motion.

20 So for the SEC, the first question that I'd like
21 to ask is, why the case was filed in the Central District.

22 MR. BERRY: Thank you, Your Honor.

23 This case, Your Honor, as we point out in our
24 brief and in our Complaint, is about EB-5 fraud. And our
25 office actually has a little bit of a specialty in that kind

1 of fraud because a lot of the victims of that fraud are
2 Asian investors. So we deal quite a bit in this area. So
3 that's one reason.

4 The other reason, Your Honor, as we point out in
5 our briefs, is that this fraud concerns what are called
6 "regional centers." Regional centers are the facilities all
7 across the United States that offer these EB-5 security
8 investments to foreign investors.

9 And we allege in our Complaint, Your Honor, that
10 five regional centers were defrauded by Mr. Feng. And two
11 of those five regional centers are based in L.A. In fact,
12 it's one of the -- one of those centers is the reason we
13 actually started investigating this case.

14 Now, because of all that, Your Honor, the SEC's
15 L.A. office is the one that investigated this case, and it's
16 L.A.-SEC attorneys who are going to be litigating it. I'm
17 from L.A., Your Honor. My colleague, Megan Bergstrom, is
18 also going to be litigating it. In fact, she was the one
19 that investigated this case.

20 And the other attorney that noticed an appearance
21 in this case, Mr. Don Searles, is also of the L.A. office.

22 And just a point of fact. There are no New York
23 SEC attorneys working on this case. Other than knowing
24 maybe that the case exists, they know nothing about this
25 case.

1 Does that address your question, Your Honor?

2 THE COURT: It does. Just some follow-up
3 questions: Two of the centers are located in Los Angeles.
4 Are any of the other five located within the district, since
5 our district is not just Los Angeles? So the other three
6 located within the district?

7 MR. BERRY: No, Your Honor. The other three --
8 one's in Washington DC, one is based in Florida but has a
9 contact based in Illinois, and the third is actually based
10 in Illinois.

11 Now, just to be clear, just so the record is
12 complete, in our Complaint, we allege Mr. Feng took
13 undisclosed commissions from these five regional centers
14 that we just talked about. We also allege that he is due
15 additional commissions. It's also part of our Complaint. I
16 wouldn't describe it as the heart of our Complaint, and
17 there are other regional centers outside of those five that
18 I talked about. One happens to be from New York, but they
19 only -- Mr. Feng only had three clients go through that
20 regional center. The rest are primarily California-based,
21 Your Honor.

22 THE COURT: And you consider these centers to be
23 the victims if we think of the case as having a victim?

24 MR. BERRY: Yes, Your Honor. We think there are
25 two sets of victims here. The regional centers and the

1 clients of Mr. Feng.

2 THE COURT: And do you expect the -- someone from
3 the regional centers to actually be testifying at trial if
4 we actually get to trial?

5 MR. BERRY: We expect not only that someone from
6 the regional center will be testifying at trial, but we'd
7 actually also probably be taking their depositions as well.

8 And I should point out, Your Honor, we're not the
9 only ones who think that. Mr. Feng put in his papers that
10 he expects to take testimony from regional center witnesses.
11 He didn't identify which ones, but presumably if we're
12 targetting our case as a case -- fraud against the five
13 regional centers we talked about, which includes two in
14 L.A., presumably that means he is going to be calling the
15 California -- two California-based regional centers as
16 witnesses as well.

17 THE COURT: And also does that mean that the SEC
18 would be calling the other three -- or witnesses from the
19 other three regional centers who would have to travel to
20 L.A.?

21 MR. BERRY: It's possible, Your Honor. And I
22 should point out, with all the witnesses during discovery,
23 we certainly plan to be taking their depositions where it is
24 convenient for the witnesses. For example, those that are
25 in Illinois or Florida, we would plan to go there. Even

1 Mr. Feng, unless there's some unusual circumstance, we plan
2 to depose him in New York. So when we're talking about
3 coming to testify, we're only talking about trial.

4 THE COURT: And what's the expected testimony of
5 those from the centers? Can you just give me kind of a
6 generic -- what are they testifying about? I understand
7 that they are victims, but what would we expect their
8 testimony to be?

9 MR. BERRY: Well, not all of them are similarly
10 situated. I can describe in general, broad strokes. Part
11 of our fraud is that Mr. Feng collected commissions from
12 these regional centers to direct his clients to the regional
13 centers and for helping his clients invest with these
14 regional centers. To get those commissions, he basically
15 duped the regional centers into thinking that they were
16 paying real China-based agents to find these clients when,
17 in fact, these so-called "China-based agents" were just his
18 friends and family that he used as straw men. And so we're
19 going to be eliciting testimony about that.

20 THE COURT: Why would that matter to the centers?

21 MR. BERRY: I was just about to get to that, Your
22 Honor. They had actually -- some of them had actually
23 specifically told him that they couldn't pay the commissions
24 to Mr. Feng because they believe that these EB-5
25 investments, as obviously we do, are securities, and they

1 were concerned that if they paid commission to Mr. Feng, he
2 would be acting as an unregistered broker/dealer, which
3 actually is one of the allegations in our Complaint.

4 So they told him, "We cannot pay you directly."
5 And it's then that he fooled them, we allege, into believing
6 that what -- sorry -- he fooled them into believing that his
7 straw men -- his friends and family, including his
8 mother-in-law -- were the ones actually going out and
9 finding investors when, in fact, it really was him. And
10 this mattered to them because they didn't want to be dealing
11 with an unregistered broker/dealer.

12 THE COURT: And the "they" that you're referring
13 to are the representatives from the centers?

14 MR. BERRY: Yes, thank you, Your Honor.

15 THE COURT: So the centers were going to pay
16 something to someone? They just believed that they
17 shouldn't pay it to Mr. Feng; am I correct?

18 MR. BERRY: Again, speaking generally, because
19 it's not the same for each one in particular, but, generally
20 speaking, many of the centers were very concerned and
21 adamant that they could not pay Mr. Feng directly.

22 THE COURT: So by Mr. Feng indicating to them that
23 whatever the fraudulent or misleading activity is supposed
24 to be, then the centers actually paid commissions to those
25 individuals?

1 MR. BERRY: Paid commissions to those individuals
2 in China, thinking those people were the ones who actually
3 got the client to invest with the centers when, in fact, it
4 was Mr. Feng who was the one communicating with the clients
5 and bringing those clients to the regional centers and
6 helping them invest with regional centers. It's actually
7 undisputed, Your Honor, that these straw men, these friends
8 and family, including his mother-in law, all based in China,
9 didn't do anything.

10 THE COURT: And so did someone actually get these
11 commissions?

12 MR. BERRY: Well, that -- we allege that the
13 commissions ultimately went to Mr. Feng. Now, he's admitted
14 that some of them did.

15 THE COURT: But that may be in dispute.

16 MR. BERRY: I think that may be in dispute.

17 THE COURT: So is a part of your case the
18 misrepresentations and the fact that some of these centers
19 actually paid commission to Mr. Feng or to someone who
20 wasn't entitled to receive them?

21 MR. BERRY: Correct, Your Honor.

22 THE COURT: And you've indicated that the
23 depositions that you will take for those who are outside the
24 jurisdiction of this district, you'll go to wherever they
25 are to take their depositions?

1 MR. BERRY: That's correct. I say that -- I mean,
2 there may be some unusual circumstance that dictates
3 otherwise, but our intention now is to make it convenient
4 for the witnesses and to go where the witnesses are.

5 THE COURT: So why couldn't you do the same at
6 trial? Because it looks like the majority of your witnesses
7 may be outside the -- outside this district.

8 So you're going to wherever they are to make it
9 convenient for them to take their depositions. Why could
10 you not do the same for trial? Go to a location that may be
11 more convenient for the witnesses.

12 Now, I understand that the specialty in this area
13 is in the lawyers who are within the district, L.A. based,
14 but don't security lawyers travel all over the country
15 anyway?

16 MR. BERRY: Yes, Your Honor. Maybe I'm not
17 understanding the question. You suggest --

18 THE COURT: You're going to -- so there are
19 certain persons whose depositions you want to take; correct?

20 MR. BERRY: Correct.

21 THE COURT: And if they are outside of this
22 district, you have said you will go wherever they are to
23 take their depositions.

24 MR. BERRY: Yes, Your Honor.

25 THE COURT: So, quite often, it's the deposition

1 testimony that's used anyway at trial, wherever you may be
2 trying the case, but my question was: Since you're going to
3 be traveling outside of the district to take their
4 depositions, what's the inconvenience of going someplace
5 else to try the case? I mean, as I understand, your
6 argument is the L.A. lawyers are the ones who are handling
7 this case, and you identify you and the other lawyer who's
8 here this morning that you are L.A. based, this is your
9 specialty, but I just say, so what? You can just as easily
10 practice in New York or some other state. It just means
11 that the lawyers will be going to a place where it may be
12 more convenient for witnesses; correct?

13 MR. BERRY: That is true, Your Honor.

14 THE COURT: So what's the problem?

15 MR. BERRY: The problem, if you think about the
16 way this case will unfold -- I should point out, Your Honor,
17 one thing I think is critical to think about our case is
18 because since Dodd Frank was passed, we have nationwide
19 subpoena power. So we could bring the witnesses here for
20 trial.

21 THE COURT: So it includes not just serving the
22 subpoena on the witness in another jurisdiction, but the
23 rule, re if you live 100 miles outside of the district, you
24 can't be compelled to come to testify doesn't apply under
25 Dodd Frank?

1 MR. BERRY: Correct, Your Honor.

2 THE COURT: So what happens is -- does the SEC
3 then pay for transportation, for lodging, for all of that
4 for the witness that is compelled to come here?

5 MR. BERRY: That's what I was going to get into,
6 Your Honor. Yes, we do.

7 THE COURT: So how does that play out? So are we
8 balancing the money you're going to spend for the witnesses
9 that you're going to compel to travel outside of their home
10 states to come to this district with whatever expense is
11 going to be incurred, if there is going to be an expense,
12 for the lawyers from this district going to another district
13 to try this case, if the case is ever tried?

14 MR. BERRY: I think that's one way to think about
15 the balancing, Your Honor. We have plenty of trials in this
16 courthouse where we've subpoenaed witnesses outside the
17 district, and they've come here, and we've paid for them.
18 So it's not an unusual circumstance.

19 THE COURT: And I'm not suggesting that it is.
20 I'm just suggesting -- so if you're looking at the cost of
21 that -- and I don't know what the cost would be -- and if
22 one of the reasons that the L.A. lawyers who have the
23 expertise want to remain in this district rather than going
24 someplace else to try the case, if we assume that there's
25 going to be some expense there -- transportation, I suppose,

1 lodging -- how does that balance out?

2 MR. BERRY: Well, I think it balances out this
3 way: When you think about how the case is going to unfold,
4 we're going to have say several months of discovery and,
5 yes, we may be going outside the district, which is common
6 in our cases, to take depositions. But at that point, we
7 won't be compelling anybody here, so we won't be incurring
8 that cost. Then there may be some discovery motions,
9 summary judgment motions, that's all going to require --

10 THE COURT: And I get that, that's not going to
11 cost you anything. If it's in another district, then it may
12 be that one or both lawyers may go to the other district for
13 purposes of arguing any of these motions. Of course, you
14 could appear by video conferencing. You don't have to
15 actually travel there.

16 But if it was your preference to travel there and
17 you thought that was better, then you just have a lawyer
18 who's going to the Eastern District of New York or some
19 other district to argue a summary judgment motion. So I
20 understand all of that.

21 MR. BERRY: And we have had cases where we've had
22 to be in New York. And I can say to you that it is a burden
23 because not all of the judges allow video conference over in
24 New York, and so we have to send our lawyers over there
25 because it's our lawyers who know the case. New York

1 lawyers don't.

2 THE COURT: So that's what I'm saying, but what
3 you're balancing on the other side or what one would be
4 looking at would be the lawyers are here, it's convenient
5 for them, they have the expertise, but you may be paying for
6 witnesses who are coming from outside the district to come
7 here to testify.

8 MR. BERRY: That's the correct balancing that's
9 happening, but I should remind the Court that, as a
10 plaintiff, we have wide deference in picking the forum for
11 the convenience of us. And as long as the forum is a proper
12 venue -- I don't think anybody is disputing that this
13 district is the proper forum. And the securities laws
14 actually give us incredibly wide latitude. They have what
15 courts call "special venue provisions." We don't have to
16 have too much to bring us here. And it's their burden, the
17 defendants' burden to say that the other forum that they're
18 suggesting is more convenient, and I don't think they've met
19 that burden.

20 So, to me, that is the balancing test that should
21 be required, or should be looked at, as to whether or not
22 they have satisfied the burden to show that their proposed
23 forum in New York is the convenient forum. And I don't
24 think they've done that.

25 Mr. Feng worries about him coming here, and he

1 says it's going to make it difficult to sustain his
2 business, but he travels to China, he says, in his
3 declaration all the time. So I don't think it's going to be
4 that much of an inconvenience for him, especially since
5 there are going to be so few court appearances where he's
6 actually required to come here. He has a capable lawyer,
7 Mr. Holmes, who is in Los Angeles. Mr. Holmes signed and
8 filed Mr. Feng's answer in this case, the motion that is at
9 issue today.

10 The lawyer that they say in New York that is going
11 to be representing Mr. Feng, if it ever went to New York,
12 has never appeared in this case. No New York attorney has
13 appeared in this case. The lawyer that they say may take
14 over the case, if it goes to New York, wasn't even involved
15 in the investigation that predated this case.

16 So his able attorney is here, he's not going to be
17 inconvenienced to come here. In the end, the balancing --
18 the way we look at it, it's much more of a burden for us
19 than it is for him. And it's his burden to show otherwise.

20 THE COURT: Well, if we kind of take the lawyers
21 out of it, what's convenient for the lawyers and we focus
22 more, as we generally do when we're analyzing forum non
23 conveniens, on witnesses. So I would like for both sides
24 when you address this, let's talk about the convenience of
25 the witnesses, not so much what's convenient for the

1 lawyers.

2 So anything else that the SEC wishes to place on
3 the record concerning my first question: Why did you file
4 here? I think you've answered it, but there may be
5 something more --

6 MR. BERRY: I think I have. And just to make a
7 little bit of a rebuttal, if I may, about the point about
8 the lawyers. I certainly understand your point about
9 focusing on witnesses. I think that's an appropriate thing
10 to look at here, but when you think about a government
11 entity, the only people appearing in any appearances --
12 trial, summary judgment hearings, conferences -- are the
13 lawyers. For Mr. Feng, his complaint is that he's going to
14 have to come here personally. And, as I said before, that
15 is not going to be much of an inconvenience for him.

16 THE COURT: And if we take the lawyers out of it,
17 we don't have any inconvenience to witnesses for all of the
18 motions, so what we're really talking about is if the case
19 goes to trial, those witnesses that would have to travel --
20 and you've indicated that you can compel those witnesses
21 outside the jurisdiction to be present, if they're witnesses
22 that you wish to call, and you would take care of the costs
23 to those witnesses?

24 MR. BERRY: That's correct.

25 THE COURT: And so I'll hear what the defendant

1 has to say about that on the other side.

2 MR. BERRY: Thank you, Your Honor.

3 THE COURT: A couple of more questions. And this
4 is witnesses also, but it may be premature to try to answer
5 this question. But these questions are: How many witnesses
6 does the SEC intend to call at trial? So as you think about
7 the case now, maybe you can answer that with that in mind.
8 Where each of the witnesses reside. And I think you
9 probably answered this question: What is each witnesses'
10 expected testimony, and how that might be relevant to the
11 case.

12 So the questions are: How many witnesses would
13 you intend to call at trial? Where do those witnesses
14 reside, the ones that you are thinking now you would
15 probably call at trial. The expected testimony of those
16 witnesses, and why is that relevant when we look at the
17 elements of the case that you -- on which you must prevail?

18 MR. BERRY: Okay. Thank you, Your Honor. I
19 should preface my answer to the question that we're not the
20 movant here --

21 THE COURT: I understand who has the burden, but I
22 am actually looking at convenience of witnesses, so that's
23 kind of where I'm focusing.

24 MR. BERRY: I understand, Your Honor. Just so
25 long as we're all clear that it's their burden to show this

1 more than us.

2 THE COURT: I got that message from the very
3 beginning. I know that.

4 MR. BERRY: So how many I think you indicated --
5 that's actually a little bit difficult to gauge at this
6 point. As I said, the heart of our case involves five
7 regional centers. The biggest bulk of that are L.A. based,
8 so clearly we would anticipate --

9 THE COURT: Those two witnesses.

10 MR. BERRY: Absolutely. And maybe more from each
11 of the centers.

12 Whether or not we need others, it's hard to say.
13 We may need one or more from the Illinois, DC, or Florida
14 areas. The clients -- there are 47 clients that we allege
15 that Mr. Feng directed to these five regional centers --

16 THE COURT: But are those the individuals who are
17 in China?

18 MR. BERRY: That's what I was going to get to,
19 Your Honor.

20 THE COURT: Yeah, and so they have to travel
21 anyway. So for purposes of looking at this motion, that's
22 almost a neutral factor or not one that the Court would
23 consider or not one that the Court would place weight on.
24 Because as I see it, they're outside of the United States.
25 So they're going to have to get to the United States. So

1 whether it's better for them to fly to L.A. or better for
2 them to fly to New York so -- and then they're going to have
3 the expense of lodging and food and everything else. So
4 actually I'm not putting much weight on those witnesses. So
5 if we exclude those, then we can just talk about witnesses
6 who are already in the United States that the SEC may call
7 at trial.

8 MR. BERRY: Thank you, Your Honor. One point
9 about those China-based witnesses, however, before I get to
10 your question is that, you know, what's interesting about
11 those witnesses, I should point out that -- I think it's
12 undisputed by both sides -- the majority of the 47 clients
13 we're talking about are China-based witnesses.

14 Now, Mr. Feng has put in his reply, we thought a
15 little late, but 28 declarations -- 20 of the declarations
16 that he was using to support his case are all China-based.

17 THE COURT: And I saw that. And so, as I said,
18 I'm not putting much weight, if any, on those witnesses who
19 are going to be traveling anyway if they're called at trial.
20 And they are likely the witnesses that will be called at
21 trial, because even though we might use video conferencing
22 for witnesses that are within the United States, I don't
23 know what the circumstance would be if we tried to do that
24 with witnesses outside the United States. I just don't have
25 any experience with that.

1 So let's focus on those witnesses who are within
2 the United States that the SEC may call at trial and where
3 they reside.

4 MR. BERRY: Sure, Your Honor. My point only was
5 that the majority don't fit into this category.

6 THE COURT: The parties briefed it. I read the
7 briefs. I know that.

8 MR. BERRY: The minority of witnesses who are not
9 China-based, the records are a little bit clear. Mr. Feng
10 has the best records of where those are located.

11 THE COURT: But I'm thinking from your
12 perspective, so I'm looking at your case now since you are
13 the plaintiff in the case and just understanding the case
14 the way you understand it, in order to make the case and
15 carry the burden, it's those witnesses that you may have to
16 call at trial. Now, I understand maybe none of these
17 witnesses will come to trial because the parties will use
18 their deposition testimony, all of that, I get that. But if
19 that were not the case and you were calling them, that's
20 what I'm looking at for purposes of the weight and balance.

21 MR. BERRY: One thing I should point out --

22 THE COURT: So we have two so far, the two in
23 L.A., and you answered one or two others from the regional
24 centers, and they would come from Illinois or Florida;
25 right?

1 MR. BERRY: Or Washington DC.

2 THE COURT: So now carry on, witnesses now.

3 MR. BERRY: The 47 clients that we say were
4 defrauded with these undisclosed commissions that Mr. Feng
5 received as I was saying, Mr. Feng has the best records of
6 where they are. Our best estimate now is that we would be
7 calling a handful, maybe up to five.

8 THE COURT: And where do you believe they are? I
9 assume those are people that you think are in the
10 United States?

11 MR. BERRY: Yes, Your Honor. One is in
12 California, up in Northern California. We identified that
13 person in our papers. It is actually difficult to --

14 THE COURT: So is the answer: You just don't
15 know?

16 MR. BERRY: I think that's the best answer because
17 I think it's difficult to determine exactly what they may
18 say. There's a little bit of a language barrier that we had
19 when we took their investigative testimony.

20 THE COURT: Are they also witnesses for whom
21 English is not their first language?

22 MR. BERRY: Yes, Your Honor. And I should point
23 out in our cases, we don't have to prove, unlike a private
24 securities fraud plaintiff, reliance. We do have to prove
25 materiality, and we can do that a number of ways. One way

1 can be investor testimony, but we don't have to use investor
2 testimony to show reliance. So investor testimony is not as
3 critical as, say, in a private securities fraud case. So we
4 think we can get a lot of our evidence without using
5 investor testimony.

6 We often do call investor testimony, especially in
7 jury trials, but it's not as if in our cases we bring in
8 dozens of investors to testify. We typically are fairly
9 narrow in our reach and we're just going to have to figure
10 that out, we think, in discovery, Your Honor.

11 THE COURT: Any other witnesses that, at this
12 point, you're thinking you would probably call at trial?

13 MR. BERRY: Well, Mr. Feng.

14 THE COURT: But he's a party. So, again, not
15 putting much weight on that.

16 MR. BERRY: And it could be some third party,
17 other third-party testimony. Certainly there could be
18 expert testimony, for example. I don't think you're going
19 to put any weight on that --

20 THE COURT: Experts don't count.

21 MR. BERRY: I think right now, unless
22 Ms. Bergstrom corrects me, it's really focused on the
23 regional centers and the clients in terms of true
24 third-party witnesses.

25 THE COURT: Another question. And you may have

1 responded to this; and if you think you have, you can so
2 indicate. What are the costs to the SEC or to the
3 government if this case is transferred to New York, other
4 than costs related to the attorneys? Is there any other
5 costs that you're concerned about if the case is transferred
6 to New York, costs to the SEC, other than what it may cost
7 for the SEC lawyers to go to New York to try a case?

8 MR. BERRY: I'm not sure I could put a dollar
9 figure on it, Your Honor. I don't think. Maybe this is
10 where we can agree to disagree. I think that the cost of
11 sending the attorneys to New York is a big burden, but you
12 want to put that aside. The cost of trying this case in New
13 York. We've got to fly people possibly all over the
14 country, including the people --

15 THE COURT: Well, it only looks like those two who
16 are in L.A., at least at this point.

17 MR. BERRY: Well, that may be our most important
18 witnesses.

19 THE COURT: Well -- so -- so that would be a cost.

20 MR. BERRY: That would be a cost.

21 THE COURT: I don't think that the parties gave us
22 any evidence on this, but I may have missed it. What
23 evidence did the parties submit regarding where the relevant
24 agreements were negotiated and executed?

25 MR. BERRY: Well, make sure I understand. There

1 are two agreements we put in the record. I think you're
2 talking about, for example, the subscription agreements
3 between the China-based investor clients and the regional
4 centers. Those had to be -- the way I think about it, under
5 the terms of the agreement, this subscription and the
6 investors could not be deemed accepted until the regional
7 center accepted and signed them where they are located. So,
8 for example --

9 THE COURT: So the two witnesses from the centers
10 that are L.A. based, then you would say that the contracts
11 were negotiated and executed in L.A.? So in this district?

12 MR. BERRY: I would say that they are deemed
13 accepted in L.A.

14 THE COURT: So what does that do to the -- where
15 were they negotiated, and where were they executed?

16 MR. BERRY: Well, they were --

17 THE COURT: If you had to answer that question
18 based upon what you know about the case now, what would your
19 answer be?

20 MR. BERRY: Well, one thing I should point you to
21 --

22 THE COURT: Is that L.A. based? Would you say
23 that's L.A.? You said they were accepted in L.A.. So would
24 you say L.A. to where they were negotiated and executed?

25 MR. BERRY: I would say they're L.A. based, but I

1 need to explain it a little bit. So page 5 of our
2 opposition, the middle paragraph, goes through the evidence
3 if you want to refer to it after the hearing, but they were
4 negotiated by Mr. Feng and the regional centers. So if he's
5 negotiating --

6 THE COURT: So where did those negotiations take
7 place?

8 MR. BERRY: Typically by phone, as I understand
9 it, or by email.

10 THE COURT: He would have been in his office
11 probably in New York, and the representative from the center
12 would have been in L.A., at least for those two?

13 MR. BERRY: That's correct, Your Honor, as I
14 understand it.

15 THE COURT: Where would you say they were
16 executed? "Executed" has a legal meaning, so --

17 MR. BERRY: Right. Executed by the regional
18 centers where they are located. Where the investors signed
19 them, I don't know. I'm guessing in China.

20 THE COURT: We don't want you to guess, so maybe
21 we won't try to get you to try to answer that question about
22 the investors.

23 So, for the regional centers, you would say the
24 agreements were executed for the two who are in L.A. and --
25 L.A. For the ones that are located in Illinois, Florida, or

1 DC, they would have been executed there?

2 MR. BERRY: Correct, Your Honor. Except, as I
3 understand it, for example, the Florida regional center,
4 even though the Florida regional center is based in Florida,
5 the main contact that Mr. Feng dealt with was in Illinois.
6 You reach the same result, but just to clarify the record on
7 that.

8 Also, Your Honor, you talked about negotiation and
9 execution. I would submit that for securities transactions,
10 the key issue is: Where was the contract or where was the
11 investment consummated?

12 THE COURT: All right. So if we use that term,
13 where was the investment consummated?

14 MR. BERRY: And for the two regional centers in
15 California, it was clearly consummated in the L.A. area
16 because the money was sent here --

17 THE COURT: And then for the other three, would it
18 be wherever those centers are located?

19 MR. BERRY: Generally. It's not in the record as
20 clear because we didn't make that point, it's not our
21 burden, but generally speaking, yes.

22 THE COURT: And, again, if you've answered this,
23 you can tell me.

24 You've submitted evidence of what appears to be
25 those regional center agreements. How are those agreements

1 relative to this case? So what were the centers agreeing to
2 do?

3 MR. BERRY: When you ask about contracts, there
4 are the subscription agreements --

5 THE COURT: I didn't use the word "contracts," I
6 used the word "agreements." So is that what you call them?
7 Whatever was being agreed upon by these centers with another
8 person, you would call those "agreements" from the various
9 centers?

10 MR. BERRY: Can I describe the agreements to make
11 sure we're on the same page? They are subscription
12 agreements that the investors signed with the regional
13 centers, and those are the agreements that I was just
14 talking about --

15 THE COURT: Those are the ones I'm talking about.
16 So the relevance there is what?

17 MR. BERRY: They show that the investment
18 contract, as I mentioned, were consummated in the district
19 where the regional center is. Therefore, in this district
20 for the two key regional centers here.

21 THE COURT: And what were they agreeing to do?

22 MR. BERRY: They were accepting, under the
23 subscription agreements, accepting the investment of the
24 clients that Mr. Feng sent to these centers.

25 THE COURT: And that -- and they're relevant

1 because?

2 MR. BERRY: Because, for purposes of this motion,
3 they're relevant to show where these investments were
4 consummated.

5 THE COURT: For purposes of the case for which you
6 have the burden of proof, why are they relevant?

7 MR. BERRY: For purposes of the case, they would
8 be -- I think Ms. Bergstrom may want to jump up and correct
9 me -- but for purposes of the case, they are relevant to
10 help, for example, with whether or not these investment
11 contracts were securities. I understand Mr. Feng is going
12 to be making that argument.

13 They would also be relevant for just the general
14 terms and conditions of the investment that's at the heart
15 of this case.

16 THE COURT: And the reason that the -- let's take
17 the two representatives from the centers in L.A. -- the
18 reason that you would be calling them is to just lay the
19 foundation?

20 MR. BERRY: For those agreements --

21 THE COURT: For these agreements.

22 MR. BERRY: That's one reason we would call them.

23 THE COURT: And what's the other reason?

24 MR. BERRY: Well, they were the victims of the
25 fraud.

1 THE COURT: So? I'm trying to get to what is
2 their testimony going to be when you get to that trial.

3 MR. BERRY: Their testimony will be about the
4 negotiations of that contract, the role Mr. Feng had in that
5 contract, how those investment contracts were consumated,
6 what they believed and understood their commissions were
7 being paid for, what services, and who were performing them.

8 THE COURT: And they would say that they believed
9 the commissions were being paid to these, what you've
10 described to be, relatives of Mr. Feng, but they didn't know
11 they were relatives?

12 MR. BERRY: In some instances, they actually knew
13 that they were relatives. Their understanding, due to
14 misrepresentations of Mr. Feng, was that these people in
15 China, the friends and family, were the ones who were
16 actually going out in China and finding investors to invest
17 with these regional centers.

18 THE COURT: And you would say, based on the
19 evidence that you've uncovered, that was not true?

20 MR. BERRY: That is, I almost would say, is
21 undisputably not true.

22 THE COURT: So that's one of the
23 misrepresentations or fraudulent activity?

24 MR. BERRY: That's correct, Your Honor. So they
25 would be testifying about all of that as well.

1 THE COURT: Let's see if I have any more questions
2 for the SEC.

3 Do the special venue provisions under 15 U.S.C.
4 77v, as in "Victor," small a in parens, and 78aa allow the
5 SEC to bring suit in any district where the defendants'
6 transact business generally, or only where they transacted
7 the business at issue in this case?

8 MR. BERRY: Well, those two provisions -- one of
9 them is Section 22a of the Securities Act and the other is
10 27 of the Exchange Act are interpreted very broadly. The
11 one which is section -- 15 U.S.C. Section 77v(a) says, we
12 can bring any action in any district where the offer or sale
13 took place, and that's why I was talking about it's critical
14 to us as where the transaction was consummated. And so
15 because of the evidence I just discussed, the transactions
16 with the two regional centers in the L.A. area, those
17 transactions were consummated here for the reasons I
18 mentioned.

19 The Exchange Act provision, which is 15 USC
20 Section 78aa(a) says that we can bring an action in any
21 district where the violation occurred or where the defendant
22 transacts business --

23 THE COURT: Any business or the business that is
24 specific to this case?

25 MR. BERRY: The provision just states "transacts

1 business." It's not specific to this case. And as courts
2 have interpreted these provisions to be read so broadly that
3 I think the terms they've used is that it's so liberally
4 construed that it doesn't take much for us to satisfy these
5 venue provisions.

6 THE COURT: And so, therefore, since we have
7 centers in Illinois, Florida, or DC, you could have actually
8 brought the -- filed the case in any of those districts as
9 well; correct?

10 MR. BERRY: That's correct, Your Honor.

11 THE COURT: As far as the specific rules that
12 we're talking about.

13 And you may not know the answer to this, so this
14 may be a question for the defense: What is the time period
15 that you believe the defendants transacted business within
16 this district?

17 MR. BERRY: I believe it's in our Complaint. I'd
18 have to quickly look --

19 THE COURT: So it would be the time frame that you
20 allege in the Complaint?

21 MR. BERRY: That's correct, Your Honor. I think
22 it's about two years. Doing that from memory.

23 THE COURT: Okay. I think that's it.

24 So I'll let the defendants' counsel respond to
25 anything that the plaintiff has said, and I do have some

1 specific questions that I'll ask. But you can certainly
2 correct plaintiff's counsel if you think he said anything
3 that's incorrect.

4 MR. BERRY: Thank you, Your Honor.

5 MR. HOLMES: Thank you, Your Honor. I appreciate
6 the Court's directed questions, and I'll try to respond to
7 those the same way that you just went through them with
8 counsel for the SEC.

9 One of the principal issues here, I think, is --
10 obviously as you just addressed and you started the
11 questioning and you ended the questioning with where could
12 the SEC have brought the case, and why was it brought here
13 as opposed to somewhere else. So I'll start there.

14 Nobody is contesting that the Central District is
15 one of the places this case could have been brought. We
16 didn't pretend to contest that in our papers. All we're
17 saying is, as the Court pointed out on this 1404 motion that
18 it's inconvenient for -- in the general balance to have the
19 case heard here as opposed to in New York. That's the issue
20 that the motion is directed at.

21 THE COURT: And why is New York so convenient,
22 other than the fact that the attorney is New York based?

23 MR. HOLMES: Well, first, there's that, as are any
24 other witnesses who have worked with him in his office. He
25 does have, I think our papers said, either four or five

1 employees. There have been other historical employees that
2 may have relevant evidence or information. They're all in
3 New York.

4 THE COURT: They're employees. So give me the
5 number of non-employee witnesses.

6 MR. HOLMES: Okay. There's one regional center
7 that's been identified as in New York. So there's at least
8 one witness there. And as we've identified in our papers,
9 there are a large number of former clients -- current or
10 former clients of Mr. Feng, through this EB-5 process and
11 otherwise, that are in the greater New York area. We
12 submitted declarations from --

13 THE COURT: How many of them? Just refresh my
14 recollection as to that. Former clients in the New York
15 area that would be within the district court that's within
16 the Eastern District of New York? How many are they?

17 MR. HOLMES: I don't have a specific number for
18 that. What I can tell you is that there are roughly 20 who
19 are in the sort of greater New York area in the Northeast.

20 THE COURT: They may be in the Eastern District or
21 they could be in the Southern District or someplace else.

22 MR. HOLMES: I think in that sort of larger
23 Northeast, we're also talking about Boston, we're also
24 talking about areas like that.

25 THE COURT: The New England area?

1 MR. HOLMES: Yes.

2 THE COURT: Why are these former clients, why
3 would their testimony be relevant?

4 MR. HOLMES: Well, they're among those that the
5 SEC is alleging were misled.

6 There are two categories of victims that the SEC
7 has alleged in the Complaint. One is the regional centers
8 because of the payment of these referral fees and how it was
9 done, or commission, or whatever you want to call it. And
10 the other is that these particular EB-5 investor clients
11 were somehow misled as well by -- I think the principal
12 issue there is that they were not told that these
13 commissions or referral fees were going to be paid.

14 THE COURT: And so you mentioned 20.

15 MR. HOLMES: And that's in Mr. Feng's declaration
16 in the moving papers, and then there are also, as counsel
17 noted, 28 declarations that were submitted with a reply.
18 And there's a table that we put in the reply brief itself
19 identifying where some of those investors are. Four of them
20 are actually in New York that we were able to get in time
21 declarations to submit. There are a number of others who
22 are also in New York, but there are those four.

23 There's also one that we submitted who is in
24 Boston, so traveling to New York is not that large of an
25 inconvenience.

1 And the very final investor on the list of the
2 non-L.A. or non-New York-based folks is Mr. -- actually it's
3 John Wu, who is in Florida. The other investors are
4 overseas as you noted. And I understand your take on that
5 as not being important because getting on a plane is getting
6 on a plane when you're flying overseas.

7 THE COURT: Let's look at the 20 that you're
8 talking about, 20 former clients, and let's just assume that
9 all of them were called at trial. Probably that would not
10 be the case, but for this discussion, let's assume all would
11 be called at trial. Could I have again the breakdown of
12 where those 20 are located? Because we have four in New
13 York, one in Boston, one in Florida, but that only accounts
14 for six.

15 MR. HOLMES: All I can tell you right now, based
16 on what I have in front of me, is that there are -- not
17 counting the Florida one who isn't counted in that roughly
18 20, there are another 16. I'm terrible at math.

19 THE COURT: And they are all on the East Coast, is
20 that what you're representing?

21 MR. HOLMES: In the East Coast, Northeast.

22 THE COURT: None of them are in California?

23 MR. HOLMES: None of those are. There are some
24 who are in California.

25 THE COURT: Of that 20?

1 MR. HOLMES: No, no, no. No, the 20 I'm talking
2 about are strictly in the Northeast.

3 THE COURT: All right.

4 MR. HOLMES: And I think importantly, the one
5 California investor that the SEC identified as one of the
6 bases for keeping the case here is perfectly willing to go
7 to New York and did submit a declaration to that effect.

8 THE COURT: And that's a good question to ask too.
9 It may be too early to know, but of those witnesses who are
10 not within this district that may be called by the defendant
11 at trial, how many of them would be also willing to come to
12 this district? So is that something that's been explored?
13 Because often we find witnesses that are perfectly willing
14 to go to another location for trial. It's a matter of cost,
15 and somebody has to pay for them, but they would come. They
16 don't have to pay their own way so --

17 MR. HOLMES: That's certainly an issue and that
18 falls into one of the other considerations that we'll get
19 to. But to address that question in particular, I'm certain
20 that the guy in California would show up in California.
21 That part's easy.

22 I'm certain that the two regional center witnesses
23 that are in California would just as soon be in California.
24 And it's probably true that at least some of the others
25 would come to California.

1 THE COURT: We just don't know how many and don't
2 know at this point what that cost would be.

3 MR. HOLMES: Right. And I do know that the
4 roughly 20 that we have spoken to that are in the Northeast
5 would prefer to be in the Northeast because they are either
6 already there or they have family that's there. So they can
7 go and visit them in conjunction with whatever else is going
8 on that they might be compelled to go.

9 THE COURT: And you know this because you've
10 talked to them about this subject or you just assume that
11 that is the case?

12 MR. HOLMES: I'd say for 15 -- I don't have exact
13 number, but roughly 15 of them we've talked to about it.
14 The other five or so, that I'm thinking of, we know are
15 either in the area or have children in the area, in the
16 greater New York area. So those five, I think, it's a
17 reasonable assumption. The other 15 or so, we've actually
18 had contact with about this.

19 But because we sort of just went to the relative
20 cost issue, I think that's an important consideration.
21 Mr. Feng is essentially a solo. He has his own law firm.
22 There are two defendants, him and his law firm, but it's
23 essentially his law firm. So he doesn't have an unlimited
24 supply of funds in order to litigate this case. He's done
25 all right, but it's nothing compared to the power and

1 ability of the federal government to litigate a case.

2 Why is that important? Well, if we have this
3 broad subpoena power that anybody can exercise in this case
4 where we can bring someone from anywhere in the country to
5 go anywhere to testify -- two things come -- make that an
6 important factor. One, Mr. Feng is extremely important as a
7 witness and as the person who knows what really happened in
8 this case, so he should be present at all of the
9 depositions. So the ability -- if we're going to use this
10 long-arm statute that allows us to draw people in, the
11 ability to bring them to New York where he is and minimize
12 his own inconvenience is, I think, paramount.

13 Also --

14 THE COURT: And the SEC has said, to the extent
15 that they would be taking depositions of some of these
16 witnesses, that they're prepared to go where those witnesses
17 are.

18 So if the majority of those people are on the East
19 Coast, then they would be going to the East Coast. I don't
20 know what city, but then it's not going to be as costly for
21 Mr. Feng because it's easier for him to get there.

22 MR. HOLMES: And that may be true, but we don't --
23 at this point, I know that there are roughly 20 --

24 THE COURT: What cost figure do you think we're
25 talking about? Have you kind of reduced that to some number

1 that you have in mind?

2 MR. HOLMES: It very hard to estimate for the same
3 reason that the SEC had a difficult time estimating that.
4 All we know is that these clients are throughout the
5 United States and some are overseas.

6 THE COURT: So we're not counting the overseas
7 ones because we know that is going to be a cost to anyone,
8 either side, who decides to call them. But I'm wondering,
9 you're saying he's a sole practitioner. He would want to be
10 present at all of the depositions, wherever they are. And
11 if this case ever went to trial, then he would come out to
12 California to be present. So what's he looking at as far as
13 costs? Just don't know yet or do you have some ballpark?

14 MR. HOLMES: Well, I mean, there's typical airfare
15 that you can look at between New York and Los Angeles.

16 THE COURT: So we don't know yet?

17 MR. HOLMES: I haven't broken down the numbers.

18 THE COURT: Okay. You can move on. Anything else
19 that the SEC argued that you want to respond to?

20 MR. HOLMES: I think one of the other issues about
21 some of these foreign residents is that I don't think they
22 should be completely discounted because some of those
23 foreign residents who are in greater China --

24 THE COURT: And I didn't say they would be
25 discounted. What I really intended to say is if I'm

1 balancing and if I'm weighing it, I see it as they're going
2 to have to come to the United States. And that the cost
3 incurred for them probably is not going to be substantially
4 different if they're going to the East Coast or they're
5 coming to California.

6 MR. HOLMES: Well, I agree with that. The reasons
7 for the travel are potentially important because many of
8 these folks, even though they reside in China, do have
9 relatives in the New York area. So there's another reason
10 for them to come. So it's not just -- I think the argument
11 in the papers that the SEC filed were something along the
12 lines of, "Hey, you're flying over L.A. anyway. Why not
13 stop there." It's not quite that simple. There are other
14 reasons for them to go, so they may be able to combine it
15 with a trip to see relatives or family. So I don't think it
16 should be completely discounted.

17 THE COURT: I don't think that would be a factor
18 that I would consider. The fact that they may also make it
19 a pleasure trip to visit their family or for some other
20 reason just to come to the U.S.

21 MR. HOLMES: I thought I'd raise it because I
22 think it does have at least a tiny bit of relevance to this.

23 Let's move on, then. One of the things that we
24 also talked about was the different regional centers that
25 are at play here. The SEC's identified five.

1 THE COURT: But I think they've only identified
2 representatives from two who would be in this district. So
3 out of the five, the other three are in various other
4 places, and so I have that and would consider that.

5 MR. HOLMES: And even though one of the centers is
6 based in Florida, the witness that they're talking about is
7 in Illinois. So there are two in Illinois and one in DC.
8 Even though -- within the papers that the SEC submitted in
9 opposition, there's a declaration from Ms. Bergstrom. And
10 at Exhibit 2 of that declaration, there's a long list of all
11 of the investors that are, according to the SEC at least, at
12 issue here. And if you look at the totals on that, at least
13 50 percent of those investors invested through CMB, which is
14 in Illinois.

15 So, I'd say, half, if not more than half, of these
16 investors are outside of California who are potentially at
17 issue here and who could be witnesses. I think that's
18 relevant. Clearly, the Illinois regional centers are going
19 to be most impacted by this.

20 THE COURT: Did you want to address the agreement.
21 I asked some questions about these agreements: Where they
22 were negotiated? Where they were executed? Why they may be
23 relevant to the case? And where the defendant entered into
24 the agreements with the centers. Maybe you agree with the
25 SEC's response to that and don't want to address that. But

1 if you did, I'll give you that opportunity.

2 MR. HOLMES: Thank you. In large part, I do agree
3 with their take on it. I just, I think, want to clarify
4 that no agreements were negotiated through the L.A. -- the
5 short-term L.A. office. They were negotiated through the
6 New York office. That office was set up as a referral
7 center only. Any negotiations that actually occurred would
8 have been in New York and in China.

9 So those would be with the specific investors.
10 The agreements between the investors and the regional
11 centers, I'd have to look at the agreements themselves since
12 my client was not a party to those. I'd have to look at
13 those to see where they were. But I would assume it would
14 either be where the regional center was located or where the
15 client was at the time.

16 THE COURT: Did the defendants meet with clients
17 or regional centers within this district?

18 MR. HOLMES: I believe that there may have been a
19 couple of meetings here. I also know, as the papers address
20 on both side, there were some meetings in New York, there
21 were also some meetings in China. Because the regional
22 folks would also travel to China as well. So those meetings
23 occurred kind of all over the place, to be honest,
24 Your Honor.

25 So I don't know that that's a pivotal issue, but I

1 do think that it's important to note that at least the
2 agreement that my client entered into with the investors,
3 his clients, the EB-5 investors, I don't think any of them
4 actually were entered into in California.

5 The other issue -- and I know you said you're not
6 going to give this much, if any, weight -- is the counsel
7 issue. I was retained to try to get the case transferred to
8 the Eastern District because my client's counsel of choice
9 is in New York. He could have done a pro hac vice to get
10 it. We just didn't take that extra step.

11 THE COURT: But you have been designated as local
12 counsel?

13 MR. HOLMES: I have been. And to the extent this
14 case stays here, I anticipate I would stay in the case.
15 That's certainly not my client's preference. He would like
16 to go with his New York-based counsel. Again, I know you've
17 said that's not a very important issue in your estimation
18 for this transfer motion.

19 THE COURT: Well, I wouldn't say it's not
20 important, but it's a factor to be considered along with
21 other factors. But the most important, I think, in these
22 motions, there's reason that it's labeled for the
23 convenience of witnesses that we're actually usually looking
24 at the convenience of the witnesses.

25 MR. HOLMES: Of course. And I think turning back

1 to that for a minute. I know we just seemed to have
2 finished that. But turning back to that for a moment, I was
3 discussing this statute that allows the depositions to take
4 place, depositions or the trial, to take place anywhere
5 according to this long-arm statute under 78a- -- whatever it
6 was. It goes on from there.

7 THE COURT: Fifteen U.S.C. 78aa; is that the
8 one --

9 MR. HOLMES: That's the one I was thinking of.
10 The importance of that in this case is that wherever the
11 case is going to be -- New York, California -- we can call
12 the witnesses to that location for a deposition and for
13 trial. And I understand that and that's very useful, but
14 the cost considerations are very important when you think
15 about that. Because calling all the witnesses to
16 California, fine, you can do that, but then my client has to
17 travel out here for those depositions. And if my client
18 wants to call his own witnesses for deposition, he either
19 has to go to them or he has to come to California.

20 That's my understanding of the way the statute
21 works. And he has to pay to travel -- for anybody to travel
22 to California. But, of course, for trial, too, if he has
23 his own witnesses that the SEC is not paying to bring out,
24 then he has to pay for that. If, however, this all happens
25 in New York, he doesn't have to travel. He can bring the

1 witnesses there. It's a lot more convenient for him to have
2 these witnesses go there. And especially this group of
3 local witnesses, semi-local witnesses that he's intending to
4 call to have them go to New York. It's much more convenient
5 for that purpose, and it saves him a lot of money. Whatever
6 the actual amount is, there's clearly a savings for him to
7 have everybody brought to New York.

8 THE COURT: And 1404a, one of the factors to be
9 considered is the availability of compulsory process to
10 compel attendance of witnesses. So we don't have that
11 issue. But the difference in cost of litigation in the two
12 forums. So I think that's what you're focusing on.
13 Unfortunately, because neither side has cost figures that we
14 can -- that you can provide to the Court. I don't know what
15 the costs would be. It's going to cost the defendants if
16 the case stays here; it's going to cost the government or
17 the SEC if the case gets transferred. And I don't know how
18 to compare those costs, but it is one of the factors.

19 MR. HOLMES: Absolutely. If you look at it
20 strictly from a cost basis of: Hey, it's going to cost
21 somebody money to bring the witnesses somewhere, then that
22 would be an even factor. But if you look at the relative
23 burdens of the parties that are paying for it, I don't think
24 there's any doubt who comes out favorably on that. I think
25 if you look at who has ability to pay for these witnesses to

1 be moved, who has the ability to go to wherever they're
2 going to go and can pay for it more easily --

3 THE COURT: And, again, I don't think I have any
4 evidence on the ability to pay right now. I mean, actual
5 evidence. I think counsel is suggesting that the
6 defendant's a sole practitioner and the SEC is the
7 government and the suggestion is that the government could
8 better pay for it than the defendant, but I don't have any
9 real evidence of that. Sole practitioner, in some
10 instances, may be better able to bear costs than the
11 government. But I just don't know, so therefore the Court
12 can't evaluate that.

13 Anything else that you wish to place on the
14 record?

15 MR. HOLMES: The only issue on that, I know
16 there's no specific evidence on it, but Mr. Feng's
17 declaration in his final paragraph does identify that it
18 would be very costly and burdensome for him to have to
19 litigate the case in California. I know it's not the
20 specifics that you were just identifying but there's
21 something there.

22 THE COURT: Anything else?

23 MR. HOLMES: If you look in Ms. Bergstrom's
24 declaration, there's an Exhibit 3. It identifies a list of
25 the clients or, sorry, the witnesses -- quote-unquote

1 "victims" that the SEC is alleging are relevant to this
2 case. On that list, we've got -- and some of the problems
3 that I have also or the SEC has with the spellings of the
4 names and language issues, but we can identify at least the
5 Boston person Jianjun Peng --

6 THE COURT: And for that region, I said New
7 England. So if you want to just use that as a reference
8 when you're talking about where witnesses are located, you
9 may do that. Obviously, if it's within New England except
10 for maybe some of the smaller states and cities, the cost is
11 going to be less to get to the Eastern District of New York
12 than it's going to be to get to California. The convenience
13 for witnesses -- it's more convenient for them to go there
14 than it is for them to come here.

15 MR. HOLMES: Absolutely. Looking at their own
16 list, we've got this New England person who's actually in
17 Boston --

18 THE COURT: Why don't you just give me what those
19 numbers are. We don't need to go through each one of them.
20 Take a moment, you can add them up.

21 MR. HOLMES: I highlighted them, so 1, 2, 3 --
22 within the group that we have declarations for, that we
23 submitted, there are four on the list who are either in New
24 York or -- I'm sorry. Three on the list that are in New
25 York or New England. One of them is the Florida guy.

1 THE COURT: And you're talking about the list
2 prepared by the SEC --

3 MR. HOLMES: That's correct.

4 THE COURT: -- that's contained in counsel's
5 declaration.

6 MR. HOLMES: Right. And then also the California
7 person who has said it wouldn't be a problem to go to New
8 York. I'm sure there are others on here too that are within
9 the larger group of roughly 20 that are in Northeast.

10 Let me just check and make sure I've hit all the
11 points, Your Honor.

12 I actually think I've touched on all the areas
13 that -- one of the other things that we didn't talk about
14 and you didn't ask questions on perhaps because you're not
15 interested in this part of the argument --

16 THE COURT: Well, I wouldn't say not interested,
17 clearly interested, but go on.

18 MR. HOLMES: It's an interesting set of facts
19 anyway. And this goes to what this case is about in the
20 end, whether these contracts are securities. And if so,
21 whether my client acted as an unregistered broker with
22 regard to them. Obviously, if they're not securities, he
23 can't be an unregistered broker so you have to go through
24 them in that order, I think. And there is, as we look at
25 it, a slight difference in the law between the Second

1 Circuit and the Ninth Circuit, and that difference, I
2 think --

3 THE COURT: As it relates to the legal issues
4 securities and whether he's an unregistered broker?

5 MR. HOLMES: Well, specifically whether it's a
6 security issue --

7 THE COURT: As you know, there may be a difference
8 in the Second Circuit and the Ninth Circuit, but, you know,
9 a federal district court judge will look at both of those
10 circuit opinions. So I don't think that's a basis for
11 transferring a case. I mean, we do that all the time. So
12 we would be expected to read the law that's relevant to the
13 issue and try to do some analysis as to the Ninth versus the
14 Second.

15 MR. HOLMES: Okay. And then the only other issue
16 was the questions that you had asked about why the L.A.
17 office brought the case, as opposed to some other office?

18 THE COURT: You have some thoughts about that?

19 MR. HOLMES: While I certainly understand that the
20 counsel that have investigated the case certainly know the
21 case. The idea that --

22 THE COURT: But they can travel to New York as
23 well. We explored that already.

24 MR. HOLMES: I just wanted to touch on the idea
25 that the L.A. office has a particular expertise in EB-5,

1 that may be true but so do the other offices. I've done
2 EB-5 cases in San Francisco with the regional office up
3 there. I've done them in Philadelphia, and I've done them
4 in New York.

5 THE COURT: I'm sure that the lawyers that work
6 for the SEC anyplace in the country could become familiar
7 with this area of the law. So it may be that you have more
8 lawyers in L.A. that are familiar because maybe more of the
9 cases are in L.A., or something like that, but no question
10 in my mind, they are SEC lawyers --

11 MR. HOLMES: As was I, once upon a time.

12 THE COURT: They'll do the job that needs to be
13 done, wherever the case is.

14 All right. Thank you.

15 MR. HOLMES: Thank you, Your Honor.

16 THE COURT: The Court denies the motion to
17 transfer. So for the record, I just wanted to indicate, I
18 think it's much more difficult today to make a case
19 transferring for convenience of witnesses just because of
20 all the electronic materials that are available. It used to
21 be that we could talk about exhibits and voluminous and so
22 forth, but, generally, they're presented electronically
23 anyway. So it seems to me that that is not as strong an
24 item for balancing as it used to be.

25 For witnesses, not only are many of the witnesses

1 in cases like these -- and I don't mean just security cases,
2 just commercial cases -- testimony will be offered by the
3 deposition, and that is usually a video deposition, and so I
4 can understand the argument, but we wouldn't want all of our
5 witnesses to be on video. We want some to be there just to
6 keep the jury interested. But we have better than that
7 today. We actually have the video conferencing, and I know
8 we've used it in this courtroom where counsel actually are
9 conducting their examination of the witness. Counsel being
10 in one place, the witness being someplace else. The jurors
11 actually are able to judge credibility as if the person was
12 right here in the courtroom.

13 So I think that goes a long way today to suggest
14 that there may not be that many witnesses who are actually
15 going to be traveling across the country.

16 For the defendant, the defendant's employees, the
17 defendant, of course, doesn't have to be present at trial,
18 but we would expect would be present at trial. And
19 certainly if the case is tried here in Los Angeles, then the
20 defendant would travel here.

21 Those who work for the defendant, the Court
22 doesn't give as much weight to them as I would independent
23 witnesses who are not associated with either side. In this
24 case, a number of the witnesses traveling from another
25 country, as both sides have indicated, and so those

1 witnesses are going to be traveling to the United States
2 anyway. The fact that some may have another motive for
3 coming to the U.S., if the case were on the East Coast
4 rather than the West Coast. I don't think that's a factor
5 for the Court to consider. And I don't have any evidence on
6 that anyway.

7 The Court would find here, the burden of proof is
8 with the defendant. The defendant just hasn't carried the
9 burden because of all the things the Court has said.
10 Witnesses don't have to travel here. There is a way of
11 presenting their testimony effectively. Exhibits do not
12 have to physically be brought here because most are
13 electronic. Both sides agree that this is a proper forum
14 for the case, so there's no issue about the proper venue.
15 The law, it's in federal court, and so federal courts are
16 accustomed to applying federal law regardless of what
17 circuit it comes from. Counsel would cite those cases, and
18 the Court would review them as well. Where relevant
19 agreements were negotiated and executed, that is one of the
20 factors, that's why I asked the question. And so some
21 probably are executed and negotiated here because of the two
22 regional centers, but they're at least three others, if I'm
23 looking at a total of five, that may have been negotiated
24 elsewhere.

25 The plaintiffs choice of forum is a factor that

1 the Court considers and weighs in the balance.

2 Contacts with the forum. It's not like the
3 defendant has no contacts with the Central District. Might
4 have more contacts someplace else, but certainly has
5 contacts here.

6 And so one of the factors is the difference in
7 cost of litigation in the two forums.

8 So, generally, we are looking at the actual cost
9 of the litigation. Here, the Court doesn't really have any
10 evidence about the cost as we look at what would it cost the
11 defendant and his law firm if the case were tried here
12 rather than someplace else.

13 In commercial cases, securities cases not being
14 different, a lot of the testimony, if the case goes to
15 trial, that's an "if" -- usually these cases get resolved on
16 summary judgment so we don't even have these witnesses
17 traveling -- but if it goes to trial, counsel, of course,
18 have the ability to offer testimony by other means as the
19 Court has already addressed.

20 One of the factors is the availability of the
21 compulsory process to compel but, of course, we have the
22 *Dodd Frank* and so that becomes a non issue in these security
23 cases.

24 I don't think the parties have addressed this, but
25 I doubt that there is a big difference between the

1 administrative difficulties flowing from Court congestion.
2 I think regardless of where the case is, federal courts tend
3 to have a lot of cases but also would be trying to make sure
4 that those get resolved within a reasonable time period.

5 It's a federal question, so the local interest in
6 having localized controversies decided at home I think is
7 not -- certainly we don't have any evidence of that in this
8 case.

9 So on balance and considering the burden, the
10 Court denies the motion to transfer to the Eastern District
11 of New York.

12 All right. That's it. Thank you very much.

13 MR. BERRY: Your Honor, a ministerial point.

14 THE COURT: Sure.

15 MR. BERRY: In preparing for the hearing today, we
16 noticed that we might have to do further redactions in
17 accordance with Rule 5 of Civil Procedure for certain
18 information in two of our exhibits.

19 So the Court may -- might see a request to get
20 those two exhibits replaced with redacted versions. That's
21 it.

22 THE COURT: You're not asking that they be sealed?

23 MR. BERRY: No, Your Honor. We had redacted some
24 of the exhibits, and we noticed we might need to do some
25 further redactions.

1 THE COURT: Have you made the defendants aware of
2 it?

3 MR. BERRY: I was going to do that after this.

4 THE COURT: Okay. So it's something that you may
5 even stipulate to if you can, but if not, then, of course,
6 you know how to make that request, and you would make it.

7 MR. BERRY: Thank you, Your Honor.

8 MR. HOLMES: Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 *(Thereupon, proceedings adjourned)*

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript format is in conformance with the regulations of the Judicial Conference of the United States.

Date: March 31, 2016

Lisa M. Gonzalez
/s/ _____
Lisa M. Gonzalez, U.S. Court Reporter
CSR No. 5920

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