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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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

Defendants.

CASE NO. 2:15-CV-09420-CBM-SS

DEFENDANTS HUI FENG AND LAW OFFICES OF FENG & ASSOCIATES P.C.'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES

[Filed concurrently with Request for Judicial Notice and [Proposed] Order]

Date: July 26, 2016
Time: 10:00 a.m.
Crtrm.: 2

Assigned to Hon. Consuelo B. Marshall

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 26, 2016, at 10:00 a.m., or as soon thereafter as this matter may be heard in Courtroom 2 of the above-entitled Court, the Honorable Consuelo B. Marshall presiding, located at 312 North Spring Street, Los Angeles, California 90012, Defendants Hui Feng and Law Offices of Feng & Associates P.C. will, and hereby do, move for entry of an order granting judgment on the pleadings against Plaintiff Securities and Exchange Commission pursuant to Federal Rules of Civil Procedure 12(c) and 9(b).

This Motion is based on the grounds that (i) the Complaint fails to set forth the circumstances of the alleged fraud in the first and second claims with requisite particularity pursuant to Rule 9(b), and (ii) the third claim under Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a), is unconstitutionally vague as applied to this case.

This Motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice and attached exhibits, the reply papers, the pleadings on file, and such other evidence and argument as the Court may receive.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on May 18, 2016.

DATED: June 7, 2016

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By: /s/ Ariel A. Neuman
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I

INTRODUCTION

Each year the United States offers 10,000 green cards to immigrants who successfully apply for the employment-based fifth preference ("EB-5") visa. 8 U.S.C. § 1153(b)(5). The EB-5 program was created by Congress in 1990 to stimulate the economy by attracting foreign capital. To obtain an EB-5 visa, the foreign applicant must contribute a certain amount of money to a qualified project in the United States and show that that the project will create American jobs. Although termed an "investment" in the parlance of the EB-5 program, it has long been recognized that the overriding goal of EB-5 program participants' capital contributions is to obtain a green card. There are much easier ways to invest one's money and obtain a greater return.

Defendants Hui Feng and Law Offices of Feng & Associates P.C. (collectively, the "Feng Parties") provide legal services to foreign applicants seeking green cards under the EB-5 program. Like hundreds of immigration attorneys across the country, the Feng Parties strive to ensure that their clients' EB-5 capital contributions comply with regulatory criteria and that the clients complete the necessary petitions to file with the federal government.

For the first twenty-three years of the EB-5 program's existence, Plaintiff Securities & Exchange Commission ("SEC") took no interest in the immigration program. In fact, because it is really a job creation and immigration initiative, the program is administered by the United States Citizenship and Immigration Services ("USCIS"). The SEC issued no guidance or memoranda, undertook no related enforcement actions, and otherwise gave no indication that it believed any aspect of the program came within its jurisdiction. Then in 2013, the SEC, without any formal explanation or rulemaking, suggested that EB-5 capital contributions *may* be "securities" within the purview of the federal securities laws in certain instances.

Despite its equivocation, the SEC issued no guidance or clear statement on the issue, and it said nothing further for almost two years. Then, only six months ago, the SEC for the first time initiated a nationwide enforcement sweep targeting eight immigration attorneys, including Mr. Feng, for alleged securities law violations arising from the legal services they provided to EB-5 clients.

Now, in this case of first impression, the SEC has taken the unprecedented step of filing a complaint in federal court against an immigration attorney alleging that he acted as an unregistered broker and committed securities fraud in connection with the legal services he provided to EB-5 applicants. While this lawsuit is ill-conceived for many reasons that will be raised in due course, this Motion, pursuant to Federal Rule of Civil Procedure 12(c), seeks judgment on the pleadings on two grounds.

First, the unregistered broker dealer claim in the Complaint must be dismissed because the statutory term "broker" is unconstitutionally void for vagueness as applied to the Feng Parties, in violation of the Due Process Clause of the Fifth Amendment. The uncertainty in the statute was compounded by the SEC's twenty-three year silence, its subsequent equivocation, and by case law indicating both that EB-5 investments are not securities in the first place, and that regardless, immigration attorneys assisting EB-5 clients do not engage in the kind of tasks associated with brokers. Consequently, an ordinary person in the Feng Parties' position lacked fair notice, and could not fairly be presumed to know, that the statute required him to register as a broker before he could provide legal services to EB-5 clients.

Second, the two fraud claims in the Complaint must be dismissed because they fail to comply with Federal Rule of Civil Procedure ("FRCP") 9(b) in that they do not allege with particularity the circumstances of the allegedly fraudulent conduct at issue here. Despite conducting an investigation that lasted more than a year, the SEC's Complaint is chock full of vague references to EB-5 clients and

regional centers in the aggregate, and does not once identify with specificity the time, place, and parties involved in the alleged fraud.

Accordingly, the Feng Parties request that the Court dismiss the Complaint in its entirety and enter judgment on the unregistered broker claim in favor of the Feng Parties and against the SEC.

II

FACTUAL BACKGROUND

A. The EB-5 Program

In 1990, Congress created the EB-5 visa category as part of the Immigration Act of 1990. 21 Pub. L. No. 101-649, tit. I, subtit. B, pt. 2, § 121, 104 Stat. 4978, 4989-94 (codified as amended at 8 U.S.C. §§ 1153(b)(5), 1186b). The new category, the Senate Judiciary Committee explained, was "intended to create new employment for U.S. workers and to infuse new capital into the country." S. Rep. 101-55, 101st Cong., 1st Sess. (June 19, 1989) (*See* Request for Judicial Notice ("RJN"), Ex. A); *see also* RJN, Ex. B (135 Cong. Rec. S7748, S7770-7773, 1989 WL 192567 (daily ed. July 12, 1989)) (Senate debate affirming purpose to create American jobs); Ex. C (Statement By President George Bush Upon Signing S. 358, 1990 U.S.C.C.A.N. 6801-1 (Nov. 29, 1990)) (noting the law "will promote the initiation of new business in rural areas and the investment of foreign capital in our economy"). The statute is administered by the USCIS. 8 U.S.C. § 1103 (delegating authority to the Secretary of Homeland Security).

To obtain an EB-5 visa, a foreign applicant must complete a series of steps. First, the applicant must invest $1 million in a new commercial enterprise in the United States.[1] *See Chang v. United States*, 327 F.3d 911, 916 n.2 (9th Cir. 2003)

[1] The amount of the investment is reduced to $500,000 in "targeted employment areas," which are defined as "a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)." 8 U.S.C. § 1153.

(citing 8 U.S.C. § 1153(b)(5)(A)(i)-(iii), (C)). The term "invest" in this context, as defined by regulation, "means to contribute capital." 8 C.F.R. § 204.6(e). Next the applicant must file an "I-526 Petition by Alien Entrepreneur" "seeking approval of their submitted investment and business plans." *Chang*, 327 F.3d at 916. If approved, the applicant receives conditional permanent resident status in the United States for two years. 8 C.F.R. § 204.6(a). If the enterprise creates or sustains at least 10 full-time jobs during that time, the applicant may file an I-829 Petition to request removal of the conditions and obtain permanent legal status (i.e., a green card). 8 U.S.C. § 1186b(c); 8 C.F.R. § 216.6(a)(4); *Chang*, 327 F.3d at 916.

Congress has since amended the EB-5 program to permit foreign applicants to pool their capital in "regional centers." 8 C.F.R. § 204.6(e).[2] Only regional centers that meet strict USCIS regulations are eligible to participate in the program. *Id.* § 204.6(m)(4). To be approved, the regional center must (1) clearly describe how it will promote economic growth in the specific geographical region; (2) provide in verifiable detail how jobs will be created indirectly through increased exports; (3) provide the amount and source of capital committed to the regional center; (4) contain a detailed prediction regarding the manner in which the regional center will have a positive impact on the economy; and (5) base its metrics on economically or statistically valid forecasting tools. *Id.* § 204.6(m)(3). Foreign applicants who work with regional centers can fulfill the job creation requirement by showing the direct or indirect creation of 10 or more jobs per applicant. 8 C.F.R. § 204.6(j)(4)(iii), (m)(7); *see generally Carlsson v. U.S. Citizenship & Immigration Servs.*, No. CV 12-7893-CAS, 2012 WL 4758118, at *2 (C.D. Cal. Oct. 3, 2012).

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[2] A "regional center" is "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 C.F.R. § 204.6(e).

Recent government data show that the overwhelming majority of EB-5 visas are obtained through the regional center program. In 2014, for instance, 97 percent of conditional visas issued (10,376) were granted to foreign applicants through the regional centers, and only 3 percent (316) were granted through the original program.[3]

B. The SEC's Sudden and Unannounced Attempt to Classify EB-5 Attorneys as Brokers

For over 25 years, immigration attorneys in this country – and on the west coast in particular – have helped foreign applicants navigate the complex EB-5 program and secure permanent legal status in the United States. As far as defendants are aware, none of those lawyers registered as brokers because there was no suggestion by *anyone* – not the SEC, the USCIS, any other government agency, or any court – that they were in fact acting as brokers. In fact, for the vast majority of that time – more than 23 years – the SEC did not concern itself with the EB-5 program at all. This is likely because everyone knew that the EB-5 visa program is an *immigration* program and *not* a securities program.[4] The reality is that most if not all of the foreign "investors" are perfectly willing to lose their capital contributions if it means getting a visa and green card. As one immigration attorney told a Washington state legislative committee in 2013, "[m]ost of my clients want the green card above all else." The applicants' attitude was "if I lose my money, I lose my money, but I don't want to lose the green card."[5]

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[3] *See* RJN, Ex. E (U.S. State Department Report of the Visa Office, Table V (Part 3)).

[4] *See, e.g.*, RJN, Ex. S (Eric Posner, "Citizenship for Sale," *Slate* (May 13, 2015)); Ex. T (Editorial Board, "For sale: U.S. citizenship, $500,000 to $1 million," *Los Angeles Times* (Nov. 29, 2015)); Ex. U (Alana Samuels, "Should Congress Let Wealthy Foreigners Buy Green Cards?" *The Atlantic* (Sept. 21, 2015)).

[5] *See* RJN, Ex. V (Sanjay Bhatt, "Money from investor visas floods U.S., but

In late 2013, the SEC tepidly put a toe in the water toward its current attempt to expand its jurisdiction and reclassify the EB-5 visa program as a securities program. Without issuing any formal explanation or guidelines, the SEC *suggested* for the first time that certain (but not all) EB-5 investments "***may*** involve securities offerings."[6] But the SEC offered nothing more than this equivocal statement and the issue was left unresolved. It offered no warning to immigration lawyers or others involved in assisting EB-5 clients to navigate the program that the SEC might suddenly consider them brokers.

Then, less than a year ago, again without notice or rulemaking, the SEC launched a nationwide charge to pursue purported "brokers" in the EB-5 program. In *June 2015*, the SEC announced that it had brought its *first* unregistered broker-dealer claim against two business entities (not law firms) that allegedly introduced EB-5 projects to more than 150 immigrants.[7] A few months later, the SEC turned its attention for the first time to attorneys, instituting administrative proceedings against seven immigration attorneys arising from their legal services to EB-5 clients.[8] When Mr. Feng declined to accept the SEC's sudden and unjustified

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doesn't reach targeted poor areas," *The Seattle Times* (March 7, 2015)); *see also* RJN, Ex. W (Lornet Turnbull, "Wealthy immigrants can invest way to visas," *The Seattle Times* (December 10, 2011)).

[6] RJN, Ex. G (USCIS and SEC, "Investor Alert – Investment Scams Exploit Immigrant Investor Program" (Oct. 1, 2013)). The report vaguely states that some "regional centers offer investment opportunities in 'new commercial enterprises' that ***may*** involve securities offerings," providing no guidance as to which EB-5 investments - if any - constitute securities. *Id.* (emphasis added). It says nothing about immigration lawyers being considered brokers.

[7] *See* RJN, Ex. H (SEC, Press Release, "SEC Charges Unregistered Brokers in EB-5 Immigrant Investor Program," S.E.C. 15-127, 2015 WL 3857267 (June 23, 2015)). For the underlying order instituting administrative proceedings, see RJN, Ex. J (*In re Ireeco*, Release No. 75268, 2015 WL 3862865 (June 23, 2015)).

[8] *See* RJN, Exs. K-Q (*In re Bernstein*, Release No. 76570, 2015 WL 8001128 (Dec. 7, 2015); *In re Kaye*, Release No. 76571, 2015 WL 8001130 (Dec. 7, 2015);

attempt to categorize immigration attorneys as brokers, the SEC filed this action against the Feng Parties alleging failure to register as a "broker" and securities fraud in connection with the provision of EB-5 legal services. Dkt. No. 1 ("Compl.") at ¶ 4.

C. The SEC's Deficient Complaint Against the Feng Parties

The SEC's entire case against the Feng Parties is based on the faulty premise that EB-5 investments made by their clients constitute "securities." Compl. ¶¶ 30-48. Based on that purported jurisdictional hook, the SEC claims that the Feng Parties acted as "brokers" because they (i) engaged in ministerial tasks such as transmitting documents, signatures, and funds (*id.* ¶¶ 51, 54), (ii) communicated with regional centers on behalf of non-English speaking clients (*id.* ¶¶ 52-53); and (iii) received contingency fee payments from regional centers upon approval of client's I-526 petitions (*id.* ¶¶ 57-59). The SEC calls these contingency fees "commissions," and accuses the Feng Parties of being unregistered "brokers." *Id.* ¶¶ 57, 62-63.

The SEC next alleges in the vaguest possible terms that the Feng Parties committed securities fraud. *Id.* ¶ 8. Without identifying a single client or regional center by name, the SEC asserts that the Feng Parties failed to disclose to "the vast majority" of their legal clients that they received contingency fee payments from regional centers upon approval of the clients' I-526 petitions. *Id.* ¶¶ 65, 72. The SEC asserts in conclusory fashion that this "would have been significant information" to the clients, "as it would have affected their assessment of Feng's claimed objectivity and due diligence in recommending certain Promoters over

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In re Yoo, Release No. 77459, 2016 WL 1179271 (Mar. 28, 2016); *In re Khorrami*, Release No. 76572, 2015 WL 8001131 (Dec. 7, 2015); *In re Manesh*, Release No. 76573, 2015 WL 8001133 (Dec. 7, 2015); *In re Bander, PLLC*, Release No. 76569, 2015 WL 8001126 (Dec. 7, 2015); *In re Azarmehr*, Release No. 76568, 2015 WL 8001125 (Dec. 7, 2015)).

others." *Id.* ¶ 68. The SEC further asserts, again without any factual basis, that the contingency fee payments also "would have been significant to them in deciding whether to proceed with the EB-5 investments that Feng recommended." *Id.* ¶ 70. Conspicuously absent from the Complaint, however, is any factual allegation identifying a single client who believes he or she was the victim of fraud.[9]

Finally, the SEC alleges that the Feng Parties defrauded certain unidentified regional centers when, at the centers' instruction, they designated individuals overseas to receive contingency fee payments on the Feng Parties' behalf. *Id.* ¶¶ 76-77. The SEC claims that the Feng Parties committed fraud by telling the regional centers that the designees were "partners" or "agents," but not elaborating that they were also relatives or friends. *Id.* ¶¶ 78-79. The SEC also asserts that the Feng Parties falsely told the regional centers that the designees were soliciting EB-5 clients, "when, in fact, it was Feng or his employees." *Id.* ¶ 80. Despite the fact that the regional centers were the ones who directed defendants to designate the overseas proxies in the first place, the SEC incredulously asserts that the Feng Parties' omissions were "materially false and misleading" because the regional centers would not have continued paying defendants if they knew the recipients were relatives and friends. *Id.* ¶ 81. Notably absent from the Complaint is any allegation that any regional center has asked for its money back or otherwise considers itself the victim of fraud.[10]

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[9] In fact, as the evidence in this case will show, Feng's clients are uniformly happy with the services he performed as he has a 100% success rate of helping them toward the goal of a green card. None invested in a project that was later denied by the UCSIS. Indeed, the evidence will also show that Feng's clients were already aware that regional centers might make contingency payments. And even since this case was filed, none have filed suit or otherwise demanded that the Feng Parties (or anyone else) return the contingency fees, undermining the SEC's contention that any lack of disclosure was material.

[10] As with the situation with the Feng Parties' clients, the evidence in this case will

In sum, the SEC has hailed an immigration attorney and his entire law firm into federal court, jeopardizing his livelihood and reputation, without notice of the SEC's sudden change in rules, and for no reason other than his practice of providing essential legal services to satisfied clients and earning compensation in return from sophisticated and government-approved regional centers. For the reasons discussed below, the Complaint is facially deficient and must be dismissed.

III

ARGUMENT

The Complaint must be dismissed in its entirety because the unregistered broker statute is unconstitutionally vague as applied to this case, and the two fraud claims are not pled with particularity in compliance with FRCP 9(b).

A. The Unregistered Broker Statute Is Void for Vagueness

In the Ninth Circuit, a statute is void for vagueness, and thus unconstitutional under the Due Process Clause of the Fifth Amendment, if it fails one of two tests: (1) "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits;" or (2) "if it authorizes or even encourages arbitrary and discriminatory enforcement." *S.E.C. v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d 1031, 1048 (9th Cir. 2005). A statute "cannot be so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Hockings*, 129 F.3d 1069, 1072 (9th Cir. 1997). Where, as here, the alleged conduct does not involve First Amendment freedoms, the vagueness challenge "must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). In this case, section 15(a) of the Exchange Act fails both prongs of this test.

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show that not a single regional center has demanded that a contingency fee be refunded, and none have come forward to claim they were defrauded.

Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a), requires any "broker or dealer" who "make[s] 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" to be registered with the SEC, a process which in turn imposes numerous other obligations. 15 U.S.C. § 78o. The purpose 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) (quoting "Persons Deemed Not to Be Brokers," Exchange Act Release No. 20,943 (May 9, 1984), 49 Fed. Reg. 20,512, 20,515 (1984)).

The SEC's section 15(a) claim violates due process because the term "broker" is unconstitutionally vague as applied to the alleged conduct in this case. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Thus, "regulated parties should know what is required of them so they may act accordingly" and "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.*

As discussed below, the statute at issue here is so vague as applied to the Feng Parties that individuals of common intelligence must guess at its meaning and differ as to its application, as the SEC itself has done vis-à-vis the EB-5 program.

1. The Definition Of "Broker" Is So Vague That People Of Ordinary Intelligence Must Guess At Its Meaning

The term "broker" is broadly defined under Section 3(a)(4)(A) of the Exchange Act to include "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A).[11] But

[11] Not relevant here, the term "dealer" is separately defined as "any person engaged

this definition – which itself employs fuzzy phrases such as "engaged in the business" and "effecting transactions" – is far from conclusive as to who falls within this category. As a result, intelligent persons must guess at the definition of "broker" and "differ as to its application." *Hockings*, 129 F.3d at 1072. On the one hand, the SEC now asserts that an immigration attorney who receives compensation for introducing clients to regional centers and handles clerical tasks constitutes a "broker." On the other hand, federal courts in analogous cases involving mere finders have rejected this simplistic application of the term "broker."

In *S.E.C. v. M&A West, Inc.*, No. C-01-3376, 2005 WL 1514101 (N.D. Cal. June 20, 2005), *aff'd*, 538 F.3d 1043 (9th Cir. 2008), the district court granted summary judgment *sua sponte* in favor of the defendant on the SEC's section 15(a) claim. The SEC asserted the defendant businessman acted as a broker because he acted as a "middleman" to facilitate reverse mergers by helping a private company identify "suitable public shell companies," preparing documents for the reverse merger, obtaining the signatures for the documents, and ultimately receiving payment upon completion of the mergers. *Id.* at *3-4, 9. The court rejected that contention, concluding that the defendant was not a broker, reasoning as follows:

> This factual recitation capped with an ipse dixit sheds no light on why Medley's activities-commonly associated with paralegals (who draft documents), lawyers (who draft documents and orchestrate transactions), businessmen (who identify potential merger partners) and opportunists (who like to take a small cut of a big transaction), none of whom is commonly regarded as a broker-add up to Medley being a broker. In particular, no assets were entrusted to Medley, and the Commission identifies no evidence that he was authorized to transact "for the account of others" (aside from his fiduciary authority over Fordee's and Byzantine's accounts). Although Medley was in the business of *facilitating* securities transactions *among other persons*, the Commission cites no authority for the

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in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5)(A).

> proposition that this equates to "*effecting* transactions in securities *for the account of others*."

Id. at *9 (emphasis in original).

Similarly in *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011), the court held that despite the defendant's services as a "finder," he had not acted as a broker. *Id.* at 1340-41. As to the SEC's allegation that the defendant engaged in broker conduct insofar as he introduced one large investor to an issuer and received a payment based on the successful introduction, the court held that defendant's "conduct consisted of nothing more than bringing together the parties to a transaction," and such "minimal involvement in the . . . transaction is not susceptible to the description 'engaged in the business of effecting transactions in securities for the accounts of others.'" *Id.* at 1339. As to the SEC's allegation that the defendant was a broker in that he subsequently actively solicited his friends and family by distributing promotional materials and directing them to the issuer's website and press releases, told them that the issuer was "a good company" and "a good investment," used a "network" of associates to promote the issuer, and ultimately received some transaction-based compensation in both instances (*Id.* at 1337-1340), the court held that this alone did not rise to the level of "broker" activity where the SEC presented no additional indicia of broker conduct. *Id.* at 1340 (citing eight other factors that were absent).

Furthermore, numerous courts have held that even receiving a percentage finder's fee for introducing parties to a transaction is insufficient to show as a matter of law that a consultant has acted as a broker. Rather, to constitute broker activity, the evidence must demonstrate involvement at "key points in the chain of distribution," such as "analyzing the financial needs of an issuer, recommending or designing financing methods, involvement in negotiations, discussion of details of securities transactions, making investment recommendations, and prior involvement in the sale of securities." *Cornhusker Energy Lexington, LLC v. Prospect St.*

Ventures, No. 04–586, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006). For example, in *Corhnhusker*, even though it was undisputed that the consultant received a percentage finder's fee in return for soliciting investors, the court denied summary judgment due to triable issues of fact as to the "nature, extent, and timing of the activities" of the defendant. *Id.* at *10; *see also Salamon v. Teleplus Enterprises, Inc.*, No. CIV. 05-2058 (WHW), 2008 WL 2277094, at *8-9 (D.N.J. June 2, 2008) (denying summary judgment based on conflicting evidence of consultant's level of participation in negotiations and in structuring the deal, where consultant was paid ten percent finder's fee); *Salamon v. CirTran Corp.*, No. 2:03-CV-787, 2005 WL 3132343, at *3 (D. Utah Nov. 22, 2005) (finding material issue of fact as to whether consultant, who was paid finder's fee, acted as a finder or broker-dealer).

In short, the federal courts have uniformly rejected the SEC's view that receiving a finder's fee in exchange for introducing parties to a transaction is dispositive of the broker inquiry. That courts have so often rejected the SEC's determination on this point demonstrates that the statutory meaning of "broker" is difficult to ascertain, not only to persons of ordinary intelligence, but also to government agencies and federal judges alike who have expertise in statutory interpretation. As one federal judge has commented, "[t]he distinction between a finder and a broker . . . remains largely unexplored, and both the case law and the Commission's informal, 'no-action' letter advice is highly dependent upon the facts of a particular arrangement." *Kramer*, 778 F. Supp. 2d at 1336-37. If even lawyers and jurists differ on the proper application of the term "broker," there is no question that persons of common intelligence must necessarily guess at its meaning without specific and unambiguous guidance. *Hockings*, 129 F.3d at 1072.

2. Section 15(a) Is Unconstitutionally Vague As Applied To The Feng Parties

Due to the ambiguity of the statutory term "broker," an ordinary person in the Feng Parties' position would have to – at best – guess whether his or her legal services constituted broker conduct where the SEC issued no guidance on the matter. As a threshold matter, an immigration attorney assisting EB-5 clients would have no reason to know that his legal services were in connection with securities in the first place, and thus by definition would not have known he was acting as a broker. Instead, an ordinary immigration attorney could reasonably believe that EB-5 investments are *not* securities, and that even if they were, providing legal services to EB-5 clients is not broker conduct.

a. An Ordinary Immigration Attorney Would Not Reasonably Suspect EB-5 Investments Are Securities

A person in the Feng Parties' position would not assume that EB-5 investments constitute securities. As previously discussed, for twenty-five years the SEC did not seek to regulate the EB-5 program. This makes sense: since its inception in 1990, the EB-5 program was intended by Congress and the President to attract foreign capital to stimulate job creation, not to create a market for securities. It was not until 2013 that the SEC even suggested – without explanation, guidance or any clarity – that the EB-5 program *may* involve securities in certain instances, though even the SEC apparently was not sure. And it was only in 2015 – the year this case was filed – that the SEC took a real position on the issue. Given the historical absence of the SEC in the EB-5 arena, it would be unfair to presume that someone in the Feng Parties' position would understand his clients' EB-5 investments to be securities.

Furthermore, given extant case law, a person in the Feng Parties' position could reasonably have concluded the very opposite: that EB-5 investments do not in fact qualify as securities. In *United Housing Foundation, Inc. v. Forman*, 421 U.S.

837 (1975), the seminal case cited extensively in the SEC's papers on the prior motion to transfer venue in this case (Dkt. 19), the Supreme Court explained that a "security" exists only where the "investor 'is attracted solely by the prospects of a return' on his investment." *Id.* at 852 (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 300 (1946)). The Court specifically warned against elevating form over substance, but rather instructed that "the emphasis should be on economic reality." *Id.* at 848. Thus in *Forman*, because the investors who bought shares of a housing cooperative "were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments," the Supreme Court concluded the shares were not securities. *Id.* at 853-54. The Court reasoned that "when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply." *Id.* at 853.

Likewise in the context of EB-5, it is self-evident that applicants commit their capital not for the purpose of earning a financial return, but rather to obtain a green card. Tellingly, the American public has often criticized the EB-5 program precisely because it is viewed as a backdoor for immigrants to buy a visa.[12] Even the Ninth Circuit has recognized that the obvious goal of EB-5 investments is the immigration benefit. *See Chang*, 327 F.3d at 929 ("Appellants sought no guarantee of success, but a contingent promise that, if they held up their end of the bargain by fulfilling the terms of their approved I–526 petitions, they would obtain the LPR status promised by the EB–5 program."). Further, it defies common sense to say that an EB-5 applicant "is attracted solely by the prospects of return" on the investment, when he could simply buy stocks on an open market with a much better chance of a return on investment, rather than lock-up a million dollars with a

[12] *See, e.g.*, RJN, Exs. S-U (Eric Posner, "Citizenship for Sale," *Slate* (May 13, 2015); Editorial Board, "For sale: U.S. citizenship, $500,000 to $1 million," *Los Angeles Times* (Nov. 29, 2015), Alana Samuels, "Should Congress Let Wealthy Foreigners Buy Green Cards?" *The Atlantic* (Sept. 21, 2015)).

minimal rate of return and incur the time and expense necessary to complete the arduous EB-5 process. Because EB-5 applicants are clearly driven by the expectation of a green card, an immigration attorney in the Feng Parties' position had ample reason to think EB-5 investments are not securities. [13]

In summary, the vagueness of the term "broker" was perpetuated by the SEC's protracted silence in the EB-5 arena for almost two-and-a-half decades, its failure to take a position when it first spoke on the issue, and by the contrary legal authority indicating EB-5 investments are not securities. Under these circumstances, a person in the Feng Parties' position would not assume that he was working in connection with securities, and therefore lacked fair notice that his legal services could possibly constitute broker conduct.

b. An Ordinary Immigration Attorney Would Not Reasonably Suspect That He Was Acting As A Broker

In addition to having no cause to believe the EB-5 program involved securities, the Feng Parties had even less cause to believe they stood in the same company as Wall Street brokers. Until six months ago, the SEC had never – in the history of the EB-5 program – suggested that immigration attorneys assisting EB-5 clients were acting as brokers. But more fundamentally, as discussed below, the legal services provided by an attorney to his EB-5 client bear no resemblance to the profile of a securities broker.

An immigration attorney counseling an EB-5 client is concerned with compliance with the applicable regulatory standards. *See* 8 C.F.R. §§ 204.6, 216.6. While it would be too voluminous to recount them here, the USCIS has issued a memorandum delineating these requirements, which govern everything from the amount of capital that must be invested, to the characteristics of the commercial

[13] Indeed, as the Feng Parties have set forth in their Answer and will argue in greater detail at a later date, the EB-5 capital contributions are not in fact securities at all.

enterprise or regional center that receives the capital, to the contents of the business plan for the commercial enterprise, to amount of jobs created as a result.[14]

For example, every I-526 Petition filed by a foreign national seeking to participate in the EB-5 program must be accompanied by a business plan that "should reasonably demonstrate that the requisite number of jobs will be created by the end of [the] two-year period" following adjudication of the petition. RJN, Ex. F at 19. The Administrative Appeals Office ("AAO") has articulated the standards by which USCIS will review a business plan. RJN, Ex. D (*Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm'r 1998)). To survive review, the business plan should (i) contain a market analysis of competing businesses; (ii) list required permits and licenses obtained; (iii) describe the supply, materials and manufacturing process, if any; (iv) detail any contracts executed for supply or distribution; (v) discuss the marketing strategy; (vi) set forth the organizational structure; (vii) explain staffing requirements and personnel experience; and (viii) contain sales, cost, and income projections. *Id.* at 213.

Accordingly, an immigration attorney must provide indispensable *legal* – not financial – advice on complying with these elements and drafting the petitions to maximize the chances that the applicant will attain their legal objective: securing permanent legal status. Currently there are 834 approved regional centers in the United States.[15] Given the hundreds of options for foreign applicants to choose from, it is an intrinsic part of the immigration attorney's job to research and identify regional centers and their projects that meet the legal criteria mandated by EB-5

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[14] *See* RJN, Ex. F (USCIS, "EB-5 Adjudications Policy Memorandum," PM-602-0083 (May 30, 2013)).

[15] RJN, Ex. I (USCIS, Website, "Immigrant Investor Regional Centers," available at: https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers (last accessed on June 2, 2016)).

regulations. And while an immigration attorney might transmit documents, provide language translation, and obtain client signatures, these too are clerical tasks inherent to the provision of legal services.

None of the foregoing tasks – which have defined EB-5 attorneys' work for the past two decades – would cause a reasonable attorney to believe he or she was acting as a broker. As previously discussed, "[m]erely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough" to constitute broker activity. *Kramer*, 778 F. Supp. 2d at 1336 (internal quotation marks and citation omitted); *M&A West*, 2005 WL 1514101, at *9 (middleman, though paid finder's fee, was not broker). Rather, a broker engages at "key points in the chain of distribution," such as "analyzing the financial needs of an issuer, recommending or designing financing methods, involvement in negotiations, discussion of details of securities transactions, making investment recommendations, and prior involvement in the sale of securities." *Cornhusker*, 2006 WL 2620985, at *6. He also has assets entrusted to him and is authorized to transact "for the account of others." *M&A West, Inc.*, 2005 WL 1514101, at *9. An ordinary attorney could very well believe that his legal services do not fit these descriptions (as they do not in this context). For this independent reason, the broker registration statute is unconstitutionally vague as applied to the Feng Parties because they lacked adequate notice of whether their legal services constituted broker conduct.

3. The Statutory Vagueness Promotes Arbitrary Enforcement

Vague statutes are also unconstitutional if they fail to "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). "[P]recision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 132 S. Ct. at 2317. Otherwise, minimal guidelines "encourage arbitrary and discriminatory enforcement" and "may permit 'a standardless sweep [that] allows policemen,

prosecutors, and juries to pursue their personal predilections." *Id.* at 357-58.

Here, the malleability of the term "broker" invites the risk of arbitrary and uneven enforcement of the securities laws. Even in the short period since the SEC first decided to pursue alleged brokers in the EB-5 industry last year, it is conspicuous and telling that the overwhelming majority of persons being charged under section 15(a) are immigration attorneys working in small firms, as opposed to business persons engaged in finding EB-5 applicants – i.e., finders. *See supra* at p. 6 & nn.7-8. Such disparity is surprising, since the attorneys and businessmen were allegedly engaged in similar tasks of "recommending" regional centers, "acting as a liaison" between clients and regional centers, "facilitating the transfer and/or documentation of investment funds," and receiving compensation from the regional centers.[16] Given that thousands of EB-5 clients work with regional centers each year, *supra* at p.5 & n.3, it is both surprising and troubling that the SEC has hardly brought any cases against professional finders, and instead has devoted virtually all of its resources to target solo immigration attorneys. While only the SEC can explain this apparent disparate treatment, it nevertheless underscores the danger of discriminatory enforcement that the void-for-vagueness doctrine is meant to protect against. As the Supreme Court recently emphasized, the vagueness of a statute that fails to provide clear guidance for enforcement may "encourage seriously discriminatory enforcement." *Fox Television*, 132 S. Ct. at 2317.

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For all the foregoing reasons, the unregistered broker statute is unconstitutionally vague as applied to the Feng Parties. The term "broker" is so vague that, when combined with the SEC's twenty-three years of utter silence

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[16] Indeed, the SEC uses the same verbatim generic description to explain the activities of a professional finder charged, RJN Ex. R (*In the Matter of Kefei Wang*, Release No. 76574, 2015 WL 8001135 (Dec. 7, 2015)),as compared to the seven attorneys charged since, RJN Exs. K-Q.

together, its subsequent equivocation, and contrasting case law on the subject, an ordinary person in the Feng Parties' position would not have had fair notice that his legal services to EB-5 clients constituted broker conduct. Because of this ambiguity, the statute is also susceptible to arbitrary and possibly discriminatory enforcement. Because the application of section 15(a) in this case violates the Due Process Clause of the Fifth Amendment, the unregistered broker claim must be dismissed with prejudice and judgment entered in favor of the Feng Parties.

B. The SEC's Fraud Claims Fail to Satisfy Rule 9(b)

1. Rule 9(b) Legal Standard

Under Federal Rule of Civil Procedure 9(b), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Allegations of fraud "must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003). Accordingly, a plaintiff alleging fraud must set forth the circumstances indicating the falseness of the statements, including the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *See Schreiber Distrib. Co. v. Serv–Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). "Mere conclusory allegations of fraud are insufficient." *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989); *see also Vess*, 317 F.3d at 1106 (averments of fraud must be "specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong").

Rule 9(b) applies to actions brought under section 10(b) and Rule 10b-5. *Moore*, 885 F.2d at 540. In securities litigation, the requirement that the circumstances constituting fraud be pled with particularity serves three purposes: (1) it deters the use of complaints as a pretext for fishing expeditions of unknown wrongs to compel *in terrorem* settlements; (2) it protects against damage to

professional reputations resulting from allegations of moral turpitude; and (3) it ensures that a defendant is given sufficient notice of the allegations against him to permit the preparation of an effective defense. *Parnes v. Gateway 2000*, 122 F.3d 539, 549 (8th Cir. 1997).[17]

2. The Complaint Fails To Specify Time, Place, and Parties With Particularity

Despite taking more than a year to investigate this matter, the SEC fails to articulate the most basic circumstances of the allegedly fraudulent conduct. For example, the Complaint does not identify (i) a single client or regional center that was allegedly the victim of fraud, or (ii) when and where such alleged misrepresentation was made.[18] Instead the Complaint vaguely refers to the Feng Parties' "clients" in the aggregate, Compl. ¶¶ 65-74, and alleges in non-specific fashion that the Feng Parties "did not inform the vast majority of their clients that they received commissions" from the regional centers. *Id.* ¶ 72. Similarly, the

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[17] After a party has answered the Complaint, a Rule 9(b) motion can later be brought under FRCP 12(c) as a motion for judgment on the pleadings as the Feng Parties do here. *See F.T.C. v. ELH Consulting, LLC*, No. CV 12-02246-PHX-FJM, 2013 WL 4759267, at *1 (D. Ariz. Sept. 4, 2013) (allowing defendant to file Rule 12(c) motion attacking pleadings pursuant to Rule 9(b)); *Hayes v. AMCO Ins. Co.*, No. CV 11-137-M-DWM, 2012 WL 5354553, at *9 (D. Mont. Oct. 29, 2012) (granting Rule 12(c) motion against fraud claim on the basis of Rule 9(b)); *Apache Oxy-Med, Inc. v. Humana Health Plan, Inc.*, No. CV 06-0428-PHX-MHM, 2006 WL 3742169, at *4 (D. Ariz. Nov. 30, 2006) (same); *State of Cal. ex rel. Mueller v. Walgreen Corp.*, 175 F.R.D. 631, 633 (N.D. Cal. 1997) (same). A party may move for judgment on the pleadings at any time after the pleadings are closed, so long as the motion is filed in sufficient time that it will not delay trial. Fed. R. Civ. Proc. 12(c).

[18] The Complaint also fails to allege in what sense the alleged non-disclosure was material to the Feng Parties' EB-5 clients. Would it have affected the client's choice of which EB-5 project to enter into or which attorney to engage? The Complaint is silent on this point, and thus fails to state facts that plausibly explain how the alleged non-disclosure would have affected the clients' investment decisions.

Complaint refers to regional centers in the aggregate, *id.* ¶¶ 75-92, and then pulls back to allege that only "some of the [regional centers]" engaged in the transactions giving rise to the alleged fraud (without identifying which those were). *Id.* ¶ 76. Indeed, not a single client or regional center is identified in the Complaint.

Compounding the SEC's failure to specify which clients or regional centers were involved, the Complaint also fails to identify which communications between the Feng Parties and any given regional center were allegedly fraudulent. Rather, the Complaint alleges in the vaguest possible terms that omissions were made "[i]n communications with *some* of the [regional centers]." *Id.* ¶¶ 78-81 (emphasis added). The resulting uncertainty is exacerbated by the Complaint's vague and passing reference to interactions between unspecified regional centers and a Hong Kong entity called Atlantic Business Consulting Limited ("ABCL"), even though the Complaint notably does not assert that those interactions were materially misleading or part of the alleged fraud. *Id.* ¶¶ 86-87.

The SEC's broadly worded and non-committal assertions plainly violate the Ninth Circuit's command to describe the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Schreiber Distrib.*, 806 F.2d at 1401. The Ninth Circuit has consistently required a plaintiff to describe what misrepresentations are at issue and which parties were involved in the alleged fraud. *See Moore*, 885 F.2d at 540 (holding complaint for violation of section 10(b) and rule 10b-5 failed to satisfy Rule 9(b) where it "d[id] not specify which plaintiff received which prospectus, or which plaintiff(s) made purchases through the stockbroker defendants, or which securities the investors allegedly purchased"); *see also Fed. Nat. Mortgage Ass'n v. Olympia Mortgage Corp.*, No. 04-CV-4971, 2006 WL 2802092, at *9 (E.D.N.Y. Sept. 28, 2006) (dismissing complaint under Rule 9(b) where it did "not identify how many transfers plaintiff is challenging or the specific dates and amounts of those transfers," but only "aggregates the transfers into lump sums over three to five year time periods").

Indeed, the Complaint's failure to allege the timing of the Feng Parties' alleged omissions to the regional centers concerning overseas payees not only violates Rule 9(b), but also highlights the fact that such omissions could not possibly have been material to the regional centers. According to the Complaint, the alleged contingency payments were sent only after the capital contributions were made and after the I-526 petitions were approved – i.e., *after* the (unspecified) regional center had decided to work with the Feng Parties and a given EB-5 applicant. Compl. ¶ 61. Because the alleged discussions between the Feng Parties and the regional centers concerning overseas payments inevitably occurred ***long after*** the alleged "securities" offerings, those discussions could not have been material to those investment decisions.[19] *See, e.g., Marksman Partners, L.P. v. Chantal Pharm. Corp.*, 927 F. Supp. 1297, 1305 (C.D. Cal. 1996) (materiality depends on whether information was important to investment decision). Accordingly, the fraud claims involving the regional centers should be dismissed on the independent ground that the claims fail to allege plausible facts showing the alleged omissions were even material.

Unless the SEC complies with Rule 9(b), the defense will be significantly impaired because it can only guess at the amorphous scope of the SEC's case-in-chief. In order for the Feng Parties to mount an effective defense, they are entitled to know, at a minimum, who the SEC claims were victims of the alleged fraud and what communications with which regional centers are at issue.

[19] Further, given how far removed the contingency payments were from the investment decisions, it is similarly implausible that the identity of an overseas payee would have been remotely material to the regional centers. In fact, as the evidence will show, none of the regional centers bothered to scrutinize to whom specifically they were sending the contingency fee so long as it was an overseas entity.

3. The Complaint Fails to Allege Defendants' Conduct With Particularity

The Complaint also violates Rule 9(b) in that it fails to specify which defendant made the alleged fraudulent statements or omissions. "Rule 9(b) requires identification of the source of the fraud and specification of the role of each defendant in the fraud." *Comwest, Inc. v. Am. Operator Servs., Inc.*, 765 F. Supp. 1467, 1471 (C.D. Cal. 1991) (internal quotation marks omitted). "Each defendant is entitled to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with." *In re Worlds of Wonder Securities Litigation*, 694 F. Supp. 1427, 1433 (N.D. Cal. 1988). To satisfy Rule 9(b), fraud claims "must allege the roles of defendants in sufficient detail to permit each to assess and answer the various claims of . . . liability asserted in the complaint." *Hokama v. E.F. Hutton & Co., Inc.*, 566 F. Supp. 636, 646 (C.D. Cal. 1983).

Here, although the SEC has chosen to prosecute this action against Mr. Feng in his individual capacity *and* against his law office, it has utterly failed to explain which alleged misrepresentations are attributable to him personally and which are attributable to his law office. The distinction matters since the Complaint recognizes that the law office employed persons other than Mr. Feng. Compl. ¶ 25. Nonetheless, in some places, the Complaint vaguely alleges in the aggregate that "Defendants" made omissions, *id.* ¶¶ 6, 7, 65, while in other places, the Complaint equivocates that either Feng, or his law office, were responsible for omissions, *id.* ¶¶ 78-80. Such imprecise allegations, without specifying the speaker, are insufficient to satisfy Rule 9(b). *See Comwest*, 765 F. Supp. at 1471; *see also Arnold & Associates, Inc., v. Misys Healthcare*, 275 F. Supp. 2d 1013, 1028–29 (D. Ariz. 2003) (finding that plaintiff's general allegations that the healthcare provider made fraudulent statements were insufficient under Rule (9)(b) where plaintiff failed to identify the individual speakers). Accordingly, the Complaint cannot withstand Rule 9(b) scrutiny for this independent reason.

In light of the deficient Complaint, the Feng Parties cannot meaningfully defend against the fraud charges at trial. The Feng Parties' myriad communications involving multiple clients and regional centers necessarily involved unique circumstances in each instance, and the Complaint fails to give adequate notice of what the SEC believes constitutes the factual basis for its serious charges. The two fraud claims should therefore be dismissed.

IV

CONCLUSION

The Feng Parties respectfully request that the Court dismiss the Complaint in its entirety, and enter judgment as to the section 15(a) claim in favor of the Feng Parties and against the SEC.

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